A

SYSTEM

OF THE

PRINCIPLES

OF THE

LAW of SCOTLAND.

By GEORGE WALLACE, Advocate.

VOL. I.

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MDCCLX.

MVSEVM
BRITAN
NICVM

TO

His ROYAL HIGHNESS

THE

PRINCE OF WALES.

SIR,

IT has been uſual for authors to ſolicit by dedications the patronage of perſons diſtinguiſhed by birth, poſſeſſions, or honours; hoping thereby to ſecure to their works the favour of the public. But they deceive themſelves; the public judgment cannot be controlled; and every work muſt depend ultimately for its ſucceſs on its own merit alone.

I have not therefore preſumed to do myſelf the honour of addreſſing your ROYAL HIGHNESS on this occaſion, expecting to conceal under your protection the defects which may be found in the following work. But men, connected together in their aſſociated ſtate, have invented various ways of marking reſpect for one another. Among theſe, Dedications have been introduced, and have become eſtabliſhed forms of expreſſing regard. Being prefixed to literary performances, it has ever been thought that propriety ought to be obſerved in making them, and that every work ought not to be dedicated to every man. Legiſlation is intended for rendering ſociety happy, and deſcends for this purpoſe into a detail concerning all the important intereſts of mankind. Hence it has been uſual to inſcribe to Princes books, which trace juriſprudence from its original principles, explain with preciſion the powers of magiſtrates, or define the rights of private men; and a Syſtem of the principles of the Law of Scotland ſeemed not improper to be preſented to a young PRINCE, born the Guardian of the laws and the Protector of the liberties of his country. I reſolved therefore to embrace this opportunity of expreſſing, in the moſt public manner, the attachment which I have to His MAJESTY, to your ROYAL HIGHNESS, and to the Proteſtant ſucceſſion.

HUMAN

DEDICATION.

HUMAN affairs cannot well be brought to ideal perfection; and every political form muſt be defective. But every one, who is impartial and attends to the multiplicity of intereſts which muſt be managed, as well as to the fury of thoſe paſſions which actuate the human heart, muſt confeſs that the ends of government have been fully anſwered during the reign of our preſent moſt gracious Sovereign, your Royal Grandfather. The people have lived in peace, trade has been extended, the arts have flouriſhed, property has been ſecure; and it is impoſſible to cite, in the annals of his reign, one attempt made by the King to extend the prerogative of the Crown. The glory therefore and the victory, which have attended his arms, muſt make his faithful ſubjects feel the moſt grateful joy; and they are bound to pray for the preſervation of his precious life.

BUT ſubjects, ſenſible of the happineſs of their preſent condition, are much intereſted in futurity; they cannot therefore avoid looking forwards to ſucceeding generations; and it muſt afford ſatisfaction to the people of Britain to find they can caſt their eyes on your ROYAL HIGHNESS. Your dutiful deportment towards the King, your reſpectful behaviour towards the Princeſs your mother, your zealous attachment to the intereſt of your country, the decency remarkable in all your conduct, mark the virtuous diſpoſition of your mind, and with the various accompliſhments of which you are poſſeſſed, give the people reaſon to congratulate themſelves on the proſpect they have of the continuance of their felicity.

I have the honour to be,

SIR,

Your ROYAL HIGHNESS's

moſt devoted,

moſt obedient and

moſt humble ſervant,

GEORGE WALLACE.

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An

An explanation of the ABBREVIATIONS uſed in the following work.

R. M. *for* the treatiſe known by the name of Regiam Majeſtatem.
Q. A. *for* the Quoniam Attachiamenta.
L. B. *for* Leges Burgorum.
A. D. I. *for* Aſſiſæ de ponderibus et menſuris Regis Davidis.
ſt. W. *for* Statuta Wilhelmi.
l. f. *for* Leges Foreſtarum.
ſt. A. II. *for* Statuta Alexandri Secundi.
p. ſt. R. I. *for* prima ſtatuta Roberti Primi.
ſ. ſt. R. I. *for* ſecunda ſtatuta Roberti Primi.
ſt. D. II. *for* ſtatuta Davidis Secundi.
ſt. R. II. *for* ſtatuta Roberti Secundi.
a. R. III. *for* acta parliamenti Roberti Tertii.
c. b. *for* Curia quatuor burgorum.
ſt. G. *for* ſtatuta Gildæ.
I. C. *for* Iter Camerarii.
I. J. *for* Iter Juſtitiarii.
m. t. b. *for* Modus tenendi curias baronum.

The acts of the Scotch parliaments are quoted by the year in which they were enacted, and the number aſſigned in the printed copies to each of them:

Thus the twenty-firſt act paſſed in the third parliament of Charles the Second, intituled, *Act concerning the election of commiſſioners for ſhires*, is quoted 1681, *c.* 21.

The acts, enacted by the Parliaments of Great Britain held ſince the Union of the kingdoms, are quoted by the year of the reign of the King during which they were paſſed, and the number of the chapter aſſigned to each of them in the printed collections of the Britiſh ſtatutes:

Thus the act paſſed in the ſeſſion of parliament, held during the ſeventh year of the reign of her late Majeſty Queen Anne, intituled, *An act for improving the union of the two kingdoms*, is quoted *7mo A. c.* 20.

That paſſed in the Seſſion of parliament, held during the firſt year of the reign of his late Majeſty King George the Firſt, intituled, *An act for preventing tumults and riotous aſſemblies, and for the more ſpeedy and effectual puniſhing the rioters*, is quoted 1*mo* G. I. *c.* 4.

That paſſed in the ſeſſion of parliament, held during the fourth year of the reign of his preſent Majeſty King George the Second, intituled, *An act to explain a clauſe in an act made in the ſeventh year of the reign of her late Majeſty Queen Anne (for naturalizing foreign Proteſtants) which relates to the children of the natural-born ſubjects of the Crown of England or of Great Britain*, is quoted 4*to* G. II. *c.* 21.

The ACTS of SEDERUNT made by the Court of ſeſſion are quoted by the date aſſigned to each of them, with the letters *A. S.* or *Aſ.* prefixed:

Thus that one, intituled, *Act anent ſolicitations*, paſſed in the year one thouſand ſix hundred and thirty-two, is quoted *Aſ.* 12th *June* 1632.

The DECISIONS *or* reports of the caſes adjudged by the Court of ſeſſion are quoted ſome of them by the number aſſigned to each of them in the printed collections, with an abbreviation to ſhew the author among whoſe reports they are found; others of them by the date of the judgment with the name of one of

of the parties concerned in the ſuit after, and an abbreviation of that of the author before it; others, being arranged under different titles after the manner of a dictionary, by an abbreviation of the name of the author, the title under which they are found, the date of the judgment, and the name of one of the parties.

Thoſe quoted by the number aſſigned to each of them have always an abbreviation prefixed to the number to ſhew the author, among whoſe reports they may be found; and they are theſe following:

B. *for* The collection of deciſions *or* reports made by *Alexander Bruce, Eſquire, Advocate.*

Da. *for* that made by *The Right Honourable Sir Hew Dalrymple, Lord Preſident of the Court of Seſſion in Scotland.*

Di. *for* that made by *the Right Honourable Sir John Niſbet of Dirleton, Advocate-general* for his Majeſty King Charles II.

C. F. for that made by *the Committees appointed by the Faculty of Advocates*, beginning 4th Feb. 1752.

Fa. I. *for* the firſt volume of the collection made by *David Falconer, Eſquire, Advocate.*

Fa. II. *for* the ſecond volume of the ſame collection.

G. *for* The collection made by *the Right Honourable Sir John Gilmour of Craigmillar, Lord Preſident of the Court of Seſſion in Scotland.*

H. *for* that made by *the Honourable Sir Roger Hog of Harcarſe, one of the Lords of the Seſſion in Scotland.*

K. *for* that made by *the Honourable Henry Home of Kaims, Eſquire, one of the Lords of the Seſſion in Scotland.*

N. *for* that made by *the Right Honourable Sir David Falconer of Newton, Lord Preſident of the Court of Seſſion in Scotland.*

n. *for* a collection publiſhed at Edinburgh in 1757, beginning from the month of November 1735.

All theſe have the number aſſigned to the deciſion, ſubjoined to them.

Thoſe, quoted by the date of the deciſion and the name of one of the parties, are to be found in collections made by the authors, whoſe names are marked by the following abbreviations:

B. mſ. *or* B. Mſ. *for* a manuſcript by *Alexander Bruce, Eſquire, Advocate.*

C. *for Alexander Colvil*, commendator of Culroſs, and one of the Lords of the Seſſion in Scotland.

Du. *for* the Honourable *Sir Alexander Gibſon of Durie*, one of the Lords of the Seſſion in Scotland.

E. *for John Edgar, Eſquire*, Advocate.

Æ. *for Sir George Ærſkine of Inverteil.*

Fa. *for David Falconer, Eſquire*, Advocate.

F. *for William Forbes, Eſquire*, Advocate.

F. Mſ. *for* a manuſcript collection made by the ſame author.

Fo. *for the Honourable Sir John Lauder of Fountainhall*, one of the Lords of the Seſſion in Scotland.

Go. *for the Honourable Sir Peter Wedderburn of Gosford*, one of the Lords of the Seſſion in Scotland.

Ha. *for the Right Honourable Thomas Earl of Haddington.*

Hume, *for the Right Honourable Sir Patrick Hume.*

M. *for the Honourable Sir Richard Maitland of Lethingtoun*, one of the Lords of the Seſſion in Scotland.

N. *for the Honourable Sir John Baird of Newbyth*, one of the Lords of the Seſſion in Scotland.

S. *for* *Sinclair*. The author of the collection, uſually called by the name of *Sinclair's Practicks*, is not certainly known.

St. *for the Right Honourable James Lord Viſcount of Stair*, and Lord Preſident of the Court of Seſſion in Scotland.

All theſe are quoted by ſubjoining to the foregoing abbreviations the date of the deciſion, and the name of one of the parties concerned in the ſuit.

Thoſe, arranged under different titles after the manner of a Dictionary, are quoted by ſubjoining to an abbrevation of the name of the author, the word or title under which the deciſion is to be found, with the date of it, and the name of one of the parties. Thus *Sp. arbiter*, 30*th June* 1625, *Halkerton*, denotes a caſe reported by *the Right Honourable Sir Robert Spottiſwood of Pentland*, under the word *arbiter*, to have been adjudged on the 30*th* of *June* 1625, one *Halkerton* being party to the ſuit. In quotations made after this manner,

A. denotes *the Honourable Sir George Auchinleck of Balmanno*, one of the Lords of the Seſſion in Scotland.

Ba. *the Right Honourable Sir James Balfour of Pittendreich*, Lord Preſident of the Court of Seſſion in Scotland.

Ho. *the Right Honourable Sir Thomas Hope of Kerſe*, Lord Juſtice-General, and one of the Lords of the Seſſion in Scotland.

Ni. *the Honourable Sir Thomas Nicolſon of Carnock*, one of the Lords of the Seſſion in Scotland.

Sp. the Right Honourable Sir Robert Spottiſwood of Pentland, Lord Preſident of the Court of ſeſſion in Scotland.

The Dictionary of Deciſions, compiled by *the Honourable Henry Home of Kaims, Eſquire*, one of the Lords of the Seſſion in Scotland, is quoted by ſubjoining to the letter *D.* the mark I. for the firſt, and II. for the ſecond volume, with an Arabic number to denote the page of the volume, the date of the deciſion, and the name of the party. Thus *D.* I. 14. 3*d Feb.* 1738. *Ramſay*, denotes a caſe reported on the fourteenth page of the firſt volume of the Dictionary to have been adjudged on the 3*d* of *February* 1738, one *Ramſay* being party to the ſuit.

Sometimes it is quoted by the word or title under which the caſe is arranged.

ERRATA.

Page.	*line.*	
13.	ult.	of the note, *for* act ? *read* act.
28.	6.	*dele* the
29.	5.	from the bottom, *for* rage *read* age
51.	penult.	*for* exacted *read* enacted
71.		in the note, *l.* 3. *dele* and
96.	15.	from the bottom, *for* nigers *read* negroes.
97.	3.	of the note *for* dering *read* during
122.	17.	from the foot, *for* days *read* day
136.	17.	*for* leſs *read* more
188.	penult.	*for* her power *read* his power
191.	31.	*for* as are *read* are as
199.	3.	from the bottom, *for* perſonal *read* perſonable.
200.	11.	*for* recovered *read* have recovered
203.	22.	*for* Fo. *read* St.
255.	ult.	*for* mothers *read* mother
272.	3.	in the note from the bottom, *for* oppoſite *read* appoſite
336.	22.	*for* to himſelf *read* himſelf to
344.	17.	*for* obligee *read* obligor
377.	3.	*dele* either: *for* if *read* of: *l.* 4. *for* age, is not a leap-year, or on the twenty ninth, if it happens to be one, *read*; for that one can never be a leap-year
422.	antep.	*for* get aſide *read* get ſet aſide
430.	31.	*dele* ſo
464.	3.	of the note, *for* is the *read* is not the
466.	20.	*for* accountable *read* unaccountable
474.	21.	from the bottom, *for* to every *read* to do every
484.	11.	*for* makes *read* make
495.	18.	from the bottom, *for* they *read* theſe: *l.* 3. from the bottom *for*; particularly, *read*: partially
526.	19.	*for* it plain *read* it is plain
528.	14.	from the bottom, *for* an *read* on
567.	9.	*for* Trotter *read* Sinclair

THE

A

SYSTEM

OF THE

PRINCIPLES

OF THE

LAW of *SCOTLAND.*

THE accounts, which we have concerning the primæval ſtate of human kind, are dark and imperfect. It was not the intention of the ſacred hiſtorian to inform us of every fact, which curioſity might make us deſirous of knowing; and we have been left to form conjectures concerning the condition, in which the firſt mortals appeared upon this globe.

The ſuppoſition of a number, which is actually infinite, ſeems to involve manifold abſurdities; and we cannot believe, that human race exiſted from all eternity, continuing itſelf by propagation, in perpetual ſucceſſion to the preſent time. There was therefore an inſtant, in which man was created, and got this terraqueous globe aſſigned him for the place of his abode.

An infant formed, and abandoned immediately by his Creator, muſt have inſtantly periſhed; and it ſuits not with the exalted conceptions we entertain concerning the Moſt High, to ſuppoſe the Deity to have employed himſelf in attending continually his new creature. The firſt man therefore muſt have proceeded out of the hand that made him, in a ſtate more perfect than that in which infants are at preſent born. Human race could not otherwiſe have exiſted at this day.

But the capabilities, of which his nature is poſſeſſed, could not alone have ſecured the exiſtence of the kind. The eye, opticians tell us, is not a judge of diſtance; becauſe external objects are ſeen through pictures drawn all of them on the ſame tablature, the bottom of this organ. Hence the firſt ſpectator, taking every thing to be at an equal diſtance from him, or perhaps to exiſt within himſelf,

ſelf, could not avoid, in moving from place to place, to knock his head againſt every tree, or fall from the firſt precipice that came in his way. Beſides, ignorant of the nature of every thing with which he was ſurrounded, he might either have ſwallowed ſome noxious food; or fallen a prey to the venom, ferocity, or carnivorous diſpoſition of the beaſts of the field; or been drowned in the firſt ſtream which preſented itſelf to his view. Amidſt theſe accidents to which he was at every turn expoſed, it is probable that a few hours would have put a period to his exiſtence. The number therefore of human kind, which exiſt at preſent, proves that the Creator muſt either have himſelf tended the firſt man, or endowed him by his immediate agency with ſomething analogous to that knowledge which we find can be acquired only by experience.

The greateſt goodneſs as well as wiſdom are every-where conſpicuous in the univerſe; and it is abſurd to ſuppoſe the Divinity to have been actuated by caprice in any part of his government of the world. 'Tis impoſſible therefore to believe, that the firſt cauſe of all things, having created at once a number of individuals, placed them at great diſtances, in habitations in which they had no chance of meeting with one another. The affections, which man has for his kind, would not have been made conſtituent parts of his nature, had the Deity intended to leave it to accident to determine concerning the ſtate in which he ſhould live.

'Tis impoſſible for one to be afraid of an object, which he knows not to be terrible, fear implying in all caſes an antecedent opinion formed concerning the object of it. A man therefore, who had never ſeen any of his own kind, would not, as has been ſuppoſed by ſome philoſophers *, fly from another whom he ſaw making towards him; becauſe he could not know that he had any thing to fear from him.

Man is not like the brutes, a wild animal, born to eat, to ſleep, and to ſtare about him; he has paſſions, affections, and rational powers; and we are not to imagine that the conſtitution of the firſt mortals was eſſentially different from ours. Society, 'tis true, has produced a prodigious alteration on the wants, and of courſe on the paſſions of human kind; it has enlarged the circle of their ideas, extended their knowledge, and increaſed their powers. But the materials, of which man was made, were in all ages the ſame; and the firſt one contained, the ſchool-men would ſay *in potentia*, all the paſſions affections and powers which have ſince developed themſelves by degrees. Marking therefore the affections of his heart, he would feel a longing after ſomething which he had never beheld; and on the firſt approach of one of his own kind would immediately recognize this to be the object, which could alone ſatisfy his deſires. Hence the two firſt of human kind, who happened to meet, would not out of fear run away from one another; and ſocial life began at that inſtant, at which they caſt their eyes on one another.

Having once become acquainted, a thouſand cauſes would conſpire to make them continue to live together. Each of them would have more ſatisfaction in aſſociating with his own kind than in the company of the beaſts of the field, or in brooding alone over his own ideas; they would feel in indulging their mutual affection a joy, which they never knew before; and would be charmed with the various novelties, which they found they could invent for the entertainment of each other. Beſides, they would obſerve that they could live more ſecure in their united than in their ſeparate ſtate. They could not have much occaſion of variance; the earth was all before them; each of them could purchaſe food in abundance for himſelf, and they could not well fall together by the ears about the places of their abode. The caves, the trees, the thickets abounded, and would afford ſhelter to both; the methods, by which the vain diſtinguiſh themſelves from others, were unknown; and they were not tortured by thoſe paſſions, which ſociety has diſcovered to lodge in the breaſt of man. Thus every thing would

* *De l'Eſprit des loix, liv. 1. ch. 2.*

would conſpire to make them continue to live near and to maintain intercourſe with one another.

The ſame principles, which decide concerning the wiſdom of the firſt cauſe, entitle us to conclude that the Deity, intending to maintain the ſucceſſion of human kind, would form a male and a female rather than two males or two females; becauſe he appears plainly to have intended that the ſpecies ſhould continue itſelf by propagation, and hath therefore diſtinguiſhed individuals by ſex. He would not give to one creature the proportions of the male, and neglect to form a female for him. Beſides, could we ſuppoſe that animal kinds were produced at firſt either by chance or by equivocal generation, and that ſeveral individuals made their appearance all at once and of a ſudden, on remote corners of this globe, it is almoſt demonſtrably more probable, and it is therefore more natural to ſuppoſe both that theſe individuals, and that the two firſt of them who met, were, than that they were not, diſtinguiſhed from one another by ſex. Hence to thoſe other motives, which can be ſuppoſed to lead men to aſſociate, the paſſion of love would lend its aid; and it is proved by various arguments that human kind entered, as ſoon as the two firſt mortals were produced, into ſociety with one another. The accounts therefore, which the ſacred hiſtorians give concerning the primæval ſtate of man, appear upon an attentive conſideration of the matter to be agreeable to thoſe ideas, which are ſuggeſted to us by every phænomenon in nature concerning the plans of the conduct of the Divinity.

But ſociety and government are different things; and we are not to imagine that the latter was inſtituted eſtabliſhed or perfected, as ſoon as man entered into the former. Social life implies that men live converſing in friendſhip, and maintaining intercourſe with one another. But the inſtitution of government ſuppoſes, beſides, a diſtinction introduced between the governors and the governed, powers conferred on the former, and the obligation of ſubmiſſion impoſed on the latter: it implies therefore various diſtinctions, ſubordinations and powers; territories to be limited, magiſtrates appointed, departments aſſigned them, and a regular plan of adminiſtration eſtabliſhed.

But men could not live long in the ſocial ſtate, before ſomething like government would be introduced among them. For they would immediately acquire ideas of property; differences would thence ariſe among them; and parents remarking the ſuperiority which nature gave them over their children, would retain during life ſome portion of that authority which they had once acquired.

Man would immediately be ſtimulated by hunger; and living in company with others, every one would begin to think of providing food for *himſelf*. Thus he would immediately have the intention of *acquiring* it to *himſelf;* he had natural reaſon as well as we; and having the ſame data which we have to found his concluſion, he would think the pains which he took in purchaſing as well as in preparing it, gave him the beſt and an *excluſive* title to it. The ſeaſons he would ſoon remark to be changeable; the winds would blow, the rains deſcend, and the colds come; and it would be neceſſary for him to ſhelter himſelf from their violence. He would diſcover *one place* more convenient for this purpoſe than another; would *occupy* it; and having firſt *taken poſſeſſion* of it, would think it hard to be driven from it by another. His natural powers would exert themſelves; he would imagine he had thereby *acquired* a *right* to *maintain* his poſſeſſion, and would hold the *place occupied* by him to be *his*. Finding by experience the inclination to reſt ſteal upon him at regular returns, he would ſeek for a convenient place for taking his repoſe, and would form the deſign of fitting it up for his own reception. He could not continually and in every inſtant hold his poſſeſſion; he would be obliged to leave it at ſome times, to go about his affairs; but during his abſence he would retain in his mind the thought of returning to *uſe* it, and would not imagine that his right was loſt by a ſhort temporary abſence. Thus he would acquire the idea of *retaining* it, and would immediately ſee that the continual and uninterrupted retention of the natural poſſeſſion of a thing

could by no means be neceſſary for *retaining* the property of it. But men are indolent, ſelfiſh and perverſe; their ideas of juſtice could not in all caſes regulate their conduct; ſome of them would mark their own ſuperior ſtrength; and the ſtronger would frequently deprive the weaker of thoſe things, to which they had acquired an excluſive title. In this manner diſputes would ariſe between them; and it would immediately be remarked that all would go into diſorder, were every thing allowed to be decided by force. Man is a compound of very oppoſite and heterogeneous principles, and is naturally a generous as well as a capricious animal; he regards injuſtice with abhorrence, and cannot endure to allow the ſtronger to oppreſs the weaker. All the noble affections of his nature would rouſe his indignation againſt the oppreſſor; every one, who was not immediately intereſted in the matter, would take part with the injured, and would oblige both to ſubmit to their deciſion. Thus the method of terminating differences by the judgments of others would be introduced; men would accuſtom themſelves to acquieſce in deciſions founded on abſtract principles; and ſome individual having diſcovered on repeated occaſions his ſuperiority, would by degrees acquire an *authority* to which others would find it difficult for them not to have the greateſt reſpect. Hence the neceſſity of inſtituting government would appear, imperfect ideas of it would be acquired, ſome rude form would be eſtabliſhed; and it is not improbable that it derived its original from the œconomical aſſociation. Children are born in an indigent and helpleſs condition, and are unable to take care of themſelves. But nature hath provided in the moſt effectual manner for them; and having implanted in the breaſts of their parents the ſtrongeſt affection for them, hath thereby obliged theſe to take care of the infants to whom they have given being. Parents have abſolute power over their children, and regardleſs of their caprices, would find themſelves obliged to exerciſe it, during their nonage, in an arbitrary manner. The children uſed to the ſight of them, accuſtomed to obey, and feeling every inſtant the effects of their love, would ſoon mark the ſuperiority of their benefactors, and would be impreſſed by degrees with an awe, a veneration, and an affection for them. The parents would thus acquire authority over their children, would iſſue their commands, and would take care to ſee them obeyed. But children are ſometimes peeviſh and ſtubborn; and refuſe to obey the orders given them. Paſſionate, they injure others; ſelfiſh, they arrogate too much to themſelves; ignorant, they fall into miſtakes about their good. Their parents would therefore be neceſſitated to correct them for their tranſgreſſions, in order to bring them to act in a reaſonable manner, and to induce them by the fear of puniſhment to reſolve to tranſgreſs no more. Thus the firſt family made the firſt ſtate; and the father, mother, and children the members of which it conſiſted. The parents were at once poſſeſſed of the legiſlative, judicative, and executive power; they iſſued their orders, and theſe were *the laws*; they *judged* of the actions of their children, and appointed puniſhments to be inflicted upon them; they executed the reſolutions which they had taken, and thus carried their own *decrees* into execution.

The authority, which the firſt parents of human race had acquired over their children, they would retain during their lives over all their deſcendents. For every individual would remark the veneration with which they were regarded by his own immediate aſcendents, would be brought up with a veneration for them, would be taught from his infancy to acknowledge their ſuperiority, and would learn the habit as well as his obligation to obey them.

But men would multiply; the firſt common parent would die; his children might be numerous, and poſſeſſed of various talents, might each of them form pretenſions to the ſucceſſion. Beſides, they would ſoon loſe ſight of their mutual relations; the attachment, which each individual had to his own immediate parents, would connect him more ſtrongly with them, and would abſorb that which he had to thoſe more remote. Thus diſſenſions would ariſe; aſſociations would

would be formed; ſeceſſions would be made; family would ſeparate from family; men would divide into various kindreds, tribes, and nations; and a number of independant ſtates would in this manner be erected.

Acquainted with thoſe fields on which they had been educated, and ignorant of the condition of other lands, they would not move immediately to a diſtance from their accuſtomed abodes; much leſs would they think of defining each of them the limits of their reſpective territories; and the ſubjects of every ſtate would continue to have intercourſe with one another. Hence differences would ariſe between individuals; every one of theſe would be made a national quarrel; wars would be waged between thoſe little ſtates, as they are now between great ones; and theſe would extend by conqueſt the dominions as well as the number of the ſubjects of the victors. In the mean time the mind of man would expand itſelf; he would begin to think; his genius would exert itſelf; diſcoveries would be made; commerce would be extended; the wants of men would be multiplied; their intereſts would more and more interfere; and government would become continually a more and more complicated matter.

Men are not, in ſimple times, ſuſpicious of one another; the fury of human paſſions and the wildneſs of ambition diſcover themſelves by degrees; and it would not enter into the heads of the firſt mortals, that thoſe veſted with authority would ever abuſe their power. Beſides, they had not heard of the preeminence it beſtows on thoſe poſſeſſed of it, and ambition could not have much influence over an ignorant people. Every one would take it for granted that he was equal to every other; and would not dream of the authority which men acquire by the mere poſſeſſion of power, of the prejudices which it creates in their favour, or of the difficulty which ever attends the execution of deſigns laid for ſtripping them of it. Hence an original contract would not be made at the firſt inſtitution of government between the governors and the governed; ideas of a conſtitution would not be formed; the reins would be put raſhly into the hands of the magiſtrate; and they would not define either the limits of his power, or the rules which he ſhould obſerve in the exerciſe of it, or the meaſures of ſubmiſſion due by the people. The power therefore of the firſt magiſtrates muſt have been arbitrary; and the political conſtitution of the moſt antient ſtates was fixed either by chance or by force.

But thoſe veſted with this arbitrary power were men; they would immediately diſcover themſelves to be ſubject to all the frailties, paſſions, and partialities of humanity; and thoſe ſubjected to their authority would ſoon find it neceſſary to hinder them from regulating the affairs of mankind by their caprices alone. They would therefore think of eſtabliſhing general abſtract rules, by which every caſe might be decided; and theſe rules, which are the laws, could be no other than expreſſions of their original notions of right and wrong.

Man is endowed with reaſon; his natural powers were in all ages the ſame; and he would in moſt caſes form the ſame concluſions from the ſame *data*. But his firſt views are uſually narrow and imperfect, becauſe his experience is confined. The laws therefore enacted by the firſt men, would be both few and ſimple; they would relate to thoſe particular wrongs alone, which they wanted immediately to redreſs by them. The remote conſequences of cuſtoms and of inſtitutions diſcover themſelves by degrees alone; and new evils would be continually ariſing in ſociety. Thus new regulations would be wanted from time to time; ſtatutes would be multiplied; abuſes would be corrected; and legiſlation would grow without end, becauſe it would at laſt be diſcovered to be neceſſary, that the law ſhould extend to every contingency in human life.

I know that thoſe, who attend not to the multiplicity of human affairs, are apt to be ſurpriſed at the intricacy of juriſprudence; and ſome have been found even among the learned, who being themſelves ignorant of the reaſons which make forms definitions and rules neceſſary, have ſuſpected all to have proceeded from the craft of lawyers, who have rendered the law of every country both

obſcure

obſcure and perplexed, in order to add to their own importance, and to enable them to create to themſelves immenſe eſtates out of the ſpoils of others. The truth is, that ſtatutes have ſometimes been drawn careleſsly; but a little attention will ſerve to ſhew that the complicateneſs of juriſprudence hath ariſen chiefly from neceſſity, and from the nature of the thing.

The immediate end of law is the ſecuring of property; it would therefore be neceſſary firſt of all to define certain *criteria*, by which a thing might be aſcertained to be the property of an individual. Hence diviſions and ſubdiviſions of things would be made; titles would be diſtinguiſhed: definitions would be formed concerning the methods of acquiring, of retaining, and of loſing property; and rules would be eſtabliſhed concerning the manner of transferring it from one to another.

Every right, which one has, is his property; the law would therefore be obliged in the next place to aſcertain the *rights* of men, as well as the infringements which might be made of them. Thus long diſquiſitions would be made concerning the actions which men are and thoſe which they are not entitled to do; and occaſion would be given to the doctrine concerning their conventions, concerning their crimes, and concerning the conſequences which they ought to be ordained to have.

But experience, as has been ſuppoſed, had diſcovered already the numberleſs inconveniencies, which flow from allowing every man to decide concerning his own right, and with his own hand to do juſtice to himſelf. Hence it would be neceſſary to eſtabliſh formal methods of aſcertaining right and of redreſſing wrong; and *courts of judicature* would be erected, to whoſe deciſion men might make their appeal. But every one is partial in his own favour; men might miſrepreſent their own cauſes; and it would be unjuſt to decide concerning one's right upon the repreſentation of his adverſary alone. Hence it would be neceſſary to fix a preciſe manner in which the one ſhould certify the other that he had made his appeal to the judge, and to eſtabliſh the ſolemnities which parties ſhould be obliged to obſerve in bringing their differences before him, as well as the formalities which he ſhould obſerve in proceeding to decide them.

But the deciſion of a judge is no more than his opinion, and could not alone make a right effectual to the perſon in whoſe favour it was pronounced: the next ſtep therefore would be to carry his decree into execution. Thus a new point ariſes concerning the officers who ſhould execute the decrees of judges, and the formalities which ſhould be obſerved in the execution of them.

Commerce would increaſe; differences would grow more and more frequent; and one court would not be able to overtake all the buſineſs brought before it. Hence juriſdictions would be diſtinguiſhed, magiſtrates would be multiplied, proper departments would be aſſigned to each of them; and it would be neceſſary to determine with preciſion the powers, the rights, and the diſabilities of theſe.

The ſecurity of property is, perhaps, the immediate view of legiſlation; but it would be neceſſary for it to aim at other ends. The preſervation of the morals of men, the improvement of their minds, and the diſcharge of the duties which they owe to the Divinity would make important objects of the attention of legiſlators. Hence religion would be eſtabliſhed, prieſts conſecrated, and ſchools erected; and various matters would fall to be defined relating to theſe. In this manner the law would find itſelf obliged to attend minutely to *all* the intereſts of human kind; and the points, which it would have occaſion to determine, would be as numerous as human life is various.

A Syſtem therefore of law is a treatiſe concerning every poſſible contingency in human life. *Quicquid agunt homines noſtri eſt farrago libelli.* But the infinitude of the ſubjects, of which juriſprudence treats, is not the only cauſe of its intricacy. Others have conſpired with thoſe which have been mentioned, to render it perplexed. 'Tis ſeldom that men, who have taken extenſive views of human life, have attended to the effects of different inſtitutions, and have marked

ed the conſequences of every paſſion, have been employed to compile complete ſyſtems for the government of their country; legiſlation has in all nations been gradual; and legiſlators attending to preſent objects alone, have been both ignorant and regardleſs of futurity. Hence juriſprudence muſt be both infinite, and, which is worſe, imperfect. 'Tis difficult to bring men to abandon their antient cuſtoms; the force of ſtatutes is often feeble; and the ingenuity of vice hath eluded the ſubtility of lawyers.

Legiſlation muſt in all countries, in which laws are made, be intricate: but it muſt be particularly ſo in free ones, becauſe the law muſt in theſe be much involved by ſtatutes. Every nation conſiſting originally of individuals, who have each their own poſſeſſions, and have by education or otherwiſe contracted prejudices peculiar to themſelves, muſt have its own peculiar views, and muſt hold a certain ſyſtem to be fundamental to its conſtitution. Hence every ſtate hath its *common* law, which is the ſum of all thoſe maxims that have not been eſtabliſhed by ſtatute, but having been coeval with the ſtate itſelf, are the firſt principles of its conſtitution, are held to be eſſential to it, and have been confirmed by perpetual or immemorial cuſtom. Their authority therefore is not allowed to be called in queſtion. But every principle may be puſhed to various concluſions, which are implied in it; and the variety of contingencies, which happen in life, would make it neceſſary for judges to draw them. Man diſcovers himſelf on many occaſions to have whimſical views; and the ſingular manner, in which ſome individuals conceive every thing, would make them draw the moſt eccentric concluſions from the moſt juſt principles. Individuals are not every one poſſeſſed of equal abilities; and the concluſions, drawn by different men from the ſame principles, would differ widely from one another. Beſides, men have particular attachments; they are moved by caprice, by friendſhip, by reſentment, by ambition, by intereſt to be partial to thoſe they love and to do injuſtice to thoſe they hate; and ſometimes both become themſelves and make others the ſports of their paſſions. But laws are inflexible; and have not either eyes, or ears, or paſſions, or reſpect of perſons. Hence every free ſtate, jealous of its liberty, hath not choſen to truſt its ſecurity to common law; but hath been itſelf obliged to *expreſs* by ſtatutes, which might be both read and underſtood by every one, the concluſions which it thought ought to be drawn from its original principles; and having thereby defined with preciſion the rights and the obligations of individuals, hath converted judges into the mouths which ſhould pronounce the preciſe words of the law, and apply them to particular caſes. In *Turkey* the law is a very ſimple matter, becauſe every order iſſued, every decree made is formed by the opinion, that is, by the caprice of him who iſſues or makes it. In *England* every man is independent of every other, and liberty is real as well as the ſenſe of it ſtrong among the people. Hence every thing is in this country determined by law; preciſe rules are eſtabliſhed, by which the judges are bound to make their deciſion of every caſe; and the ſpirit of the people having continually increaſed, ſtatutes have been multiplied prodigiouſly.

But *Scotland* ſeems not in the moſt antient times to have been in the ſame condition. 'Tis true the power of the crown was not abſolute, and the barons had a high ſenſe of maintaining their independence on it. But the liberty of a conſtitution muſt always be meaſured by the number of thoſe, whom it makes free; and the feudal law, which prevailed with all its rigour among us, kept the people in ſlavery, becauſe it made every landlord the *abſolute maſter* of thoſe who lived within his domains. The ſame perſons, who conſtituted the legiſlative body, were all of them poſſeſſed of extenſive territorial juriſdictions; their own importance depended on the number of their clan; and they had not the humanity to think the meaneſt of their kind had a natural right to live independent of them. They would not therefore in their legiſlative preſcribe rules to be obſerved by themſelves in their judicative capacity; they would thereby have limited their own juriſdiction, and have deprived themſelves of the power

of oppreſſing thoſe whom they wanted to keep dependent on their caprices. Beſides, the human mind is ever obſerved to be late of arriving in cold climates at its maturity; becauſe the attention of thoſe, who inhabit them, is almoſt at all times fixed on preventing themſelves from being ſtarved. *Scotland* is ſituated in a high northern latitude, and it had for many ages little correſpondence with foreign nations. Hence the progreſs, which it made from the ſavage to the civilized ſtate, was ſlow; and a regular manner of diſtributing juſtice was late of being eſtabliſhed in it. By conſequence its ſtatutory law was for many reigns penurious; it determined not the rights of private men, but related to a few matters of police alone. Thus, the people were warlike; and ſtatutory orders were made almoſt by every parliament concerning the arms which they ſhould poſſeſs, and the manner in which they ſhould take the field. They had not commerce, were ignorant of arts, and had not much mathematical knowledge: hence they ſeem to have been mightily puzzled to fix in a proper manner the proportions, which the different coins ſhould bear to one another; and we find two or three acts, intituled *anent the cuinzie*, paſſed almoſt every year before the reign of *James* VI. and the time when Sir *Archibald Napier*, the father of the famous baron whoſe memory is rendered illuſtrious by his invention of the logarithms, was made maſter of the Mint in this kingdom. But a college was in 1537 inſtituted by King *James* V. and was veſted by the legiſlature with ſupreme power for diſtributing juſtice among the people; its juriſdiction was ſuperior to that of the barons, and extended over all the kingdom; the art of printing happened to be imported early into this country; and thoſe few ſtatutes, which had been enacted before, were ordered to be printed in the year one thouſand five hundred and forty. The people had frequent occaſions to obſerve the impotence of the crown; they knew the legiſlative authority was veſted in a numerous aſſembly; and they beheld every day a venerable court diſtributing juſtice. Beſides, the reformation was accompanied with the introduction of knowledge among us, and, which is an important point, propagated it among many. Thus the people began to think; their ideas were extended; bold geniuſes made their appearance; and ſpirit was diffuſed over the nation. The effects, which truth and good ſenſe have, are ſurprizing; a ſingle man, who has firmneſs of mind, and maintains uniformly his integrity, can ſave a ſtate; and a nation, which is allowed to recollect itſelf, and in which the power of the crown is not abſolute, will bring its affairs by degrees into a proper ſituation. The civil wars, waged during the reign of *Mary*, introduced the notions of liberty into *Scotland;* and the changes attempted to be made in the eſtabliſhed religion, having been continual, kept alive the ſpark which had been once kindled among us. One would have thought that theſe cauſes, conſpiring together, would have much enlarged the volume of the *Scotch* ſtatutes; and that the people having diſcovered their own importance and learned an independent ſpirit, would have inſiſted that their rights ſhould be aſcertained in a preciſe manner by theſe. But the civil law had been early introduced into this country; few acts had been made by parliament at the time, at which the College of juſtice was inſtituted; the judges had no other rules for regulating their deciſions than thoſe few general maxims, which were held to be fundamental in the conſtitution, and compoſed the common law. The *Roman* ſyſtem contains deciſions of almoſt every queſtion which can occur in life; and its deciſions are uſually founded on equitable principles. The judges therefore were neceſſitated to have recourſe to it on every occaſion; its authority increaſed; and we had in this manner leſs uſe for a multitude of ſtatutes concerning the common occurrences of life than other nations. Beſides, we wanted commerce; we had not merchants, who had acquired princely eſtates; and the proprietors of land were alone poſſeſſed of the riches of the country. The territorial juriſdictions, veſted in theſe, were not aboliſhed; the labourers were poor, their farms were ſmall, their leaſes were either annual or ſhort, and they were oppreſſed by their maſters. Hence they were hindered, either by poverty

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or by the fear they had of being ruined by thoſe on whom they depended, from ſeeking redreſs of the wrongs done them. Beſides, *Scotland* was much involved in confuſion during the reigns of the ſucceſſors of *James* V. the minds of men were kept in one continual ferment on account of religion; and their attention was chiefly directed towards it. The progreſs therefore, which we made towards improvement during this tumultuous period, could not but be ſlow. The revolution authenticated the principles of the conſtitution; but the period, which intervened between it and the union, was ſhort. Hence that, which is properly called the ſtatutory law of *Scotland*, is not ſo voluminous as that of *England*; and few of thoſe ſtatutes enacted by its parliaments are uſeful in aſſiſting one to a deciſion concerning the rights of private men. For the bulk of them relate immediately to the unſettled ſtate of the nation, and were therefore temporary only. The crowns of both kingdoms had been worn by one Sovereign; the nations occupied the ſame iſland; the kingdoms, after having continued long ſeparate ſtates, were at laſt united in 1707; and by the celebrated treaty made at that time it was expreſsly ſtipulated, that the law of *Scotland* ſhould in many reſpects continue the ſame which it had been before. The union therefore rendered the law of *Scotland*, in ſome ſort, like that of the *Medes* and *Perſians*, immutable; and the parliaments of *Great Britain*, diſtinguiſhed by the fidelity with which they obſerve treaties, have been delicate in making alterations upon it. 'Tis true the volume of thoſe, which are called *the Britiſh Statutes*, hath increaſed to a prodigious ſize: but few of theſe have had much effect upon the law of *Scotland*; and the alterations, which have been made upon it, are ſuch as ſeemed to be neceſſary for rendering the union more complete. They relate therefore almoſt all of them to the public law. But the union, though it has not expreſsly made many alterations on the law of *Scotland*, hath been attended with the happieſt conſequences in other reſpects. It laid open our communication with *England*; acquired to us a right of trading with the colonies of that nation; and gave us opportunities of obſerving and of acquiring the ſpirit of the *Engliſh*. A people, among whom the feudal notions prevail, cannot eaſily be reconciled to commerce; and the attempts, which were made for ſeveral years to introduce induſtry among us, were not attended by remarkable ſucceſs. But misfortunes are ſometimes productive of happy conſequences on the affairs of nations as well as on thoſe of individuals; and the rebellion which was raiſed in the year one thouſand ſeven hundred and forty five, having proved the uncertainty of the events of war, drew the attention of the legiſlature to this part of the united kingdom. At that time a nobleman, diſtinguiſhed by his abilities, ſat at the helm of juſtice; the integrity which he had maintained, as well as the applauſe with which he diſcharged the duties of the high office he held, acquired him an influence and a reſpect due to his ſuperior merit; and under his patronage excellent acts were paſſed for reſcuing the commons of *Scotland* from that ſlavery, under which they had ſuffered themſelves to groan. By theſe, conſiderable alterations were made in the law of this country; oppreſſive juriſdictions, which ſubjects had poſſeſſed, were reſumed to the crown; ſervile tenures were aboliſhed; and tyrannical principles were baniſhed from the law. Thus men were brought more generally to attend to the rights they had; the way was cleared, by which every one might arrive at the fountains of juſtice; and ſome change has been, in a few years, wrought both on the manners, and, which is more, on the ſentiments of the people.

The law therefore of *Scotland* appears from the account which hath been given of it, to be a compound made up of many heterogeneous parts. It conſiſts in the firſt place of thoſe original principles, which have been mentioned, and make that part of it, called *the common law*. Next come a number of acts which were paſſed by parliaments during many ſucceſſive reigns, but have moſt of them little authority at preſent. To theſe muſt be added thoſe *Britiſh* ſtatutes which are authoritative in this country, and muſt be ſelected out of more than twenty

large volumes. Beſides all theſe, the deciſions of the law have been explained in works written by private lawyers; and voluminous reports of the caſes adjudged by the court of ſeſſion have been publiſhed, which prove the opinions held by the ſenators of this college concerning various points that were either doubtful or moot. To one therefore, who takes a view of its ſeveral parts in their detached incoherent condition, and is not well acquainted with the principles on which it is founded, the law of *Scotland* muſt appear to be a very rude confuſed indigeſted heap; and one muſt often be puzzled to diſcover the preciſe deciſion, which it makes of caſes propoſed. Hence it ſeems to need more than that of any other country to be cleared of its rubbiſh; and attention will ſhew, that it is not impoſſible to reduce into order parts which appear not at firſt to have any connexion with one another.

The end at which the law of every country either does or pretends to aim, is to promote the happineſs of the members of ſociety, and for this purpoſe to ſecure the enjoyment of his right to every man. *Finis enim et ſcopus*, ſays Lord *Verulam*, *quem leges intueri, atque ad quem juſſiones et ſanctiones ſuas dirigere debent, non alius eſt quam ut cives feliciter degant.* But the happineſs of ſociety depends on every individual's diſcharging the duties incumbent on him. The conſequence is, that the baſis on which the municipal law of every country muſt be founded, can be no other than the law of nature. But every ſtate hath its own ideas or views of things, and hath therefore, as has been remarked, adopted certain general maxims which it hath made fundamental principles of its ſyſtem. Hence every deciſion, contained either in the ſtatutory or in the cuſtomary law of any country, muſt be connected with one or other of theſe ſources, and be deducible from them; and the ſum of all theſe deciſions muſt be a regular ſyſtem, connected every part of it with every other.

The law of *Scotland* muſt therefore, like that of every other nation, own the authority of certain general principles; and owning theſe, it cannot avoid admitting alſo the truth of every concluſion depending upon them. Hence I was led to conclude that it could not be incapable of being treated in a ſcientific manner; that a connected ſyſtem might be compoſed of theſe principles, and of the concluſions flowing from them, ſomething like that made by HEINECCIUS of thoſe of the *Roman* law; and that it was poſſible to erect on the moſt ſimple foundation a ſuperſtructure different from any which had been hitherto raiſed, aſcending ſtep by ſtep from the firſt maxims of juriſprudence to all the deciſions given by the law of *Scotland*. I reſolved therefore to make an attempt towards realizing my ideas; and the volume, which I now offer to the public, will give ſome notion of my deſign.

I remember Lord *Verulam*, in his third book *de augmentis ſcientiarum*, a work which will perhaps upon an attentive examination of it be found entitled to be called the nobleſt that human genius ever produced, compares the ſciences to pyramids erected on the baſis of hiſtory and of experience, and aſcending from theſe by various ſtages to the ſummit of all. Thus the baſis of that one, which repreſents natural philoſophy, is the hiſtory of nature; the phyſical part, which treats of the efficient and material cauſes that operate in the univerſe, he makes the ſecond floor; the third conſiſts of metaphyſics, or that which enquires into the formal and final cauſes of things; and it is by theſe three, he ſays, that we can alone expect to arrive at the ſummit, the ſcience of the ſupreme law of nature. Juriſprudence is a ſcience, and reſembles a pyramid in ſome reſpects: but it ſeems to be more natural, and it is more agreeable to the plan of the following ſyſtem, to compare it to a lofty oak or ſome other tree. Theſe make their firſt appearance under a diminutive form, that of a ſeed or ſmall quantity of matter. But this puny embryo developes itſelf by degrees; and branches out with an irregular wildneſs into a great variety of luxuriant parts, which though different both from it and from one another are found, on being viewed attentively, to be all intimately connected with it, and to depend for their exiſtence upon it. In

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the ſame manner juriſprudence recognizes a few original principles; theſe are the ſeeds out of which the ſyſtem grows, and contain in embryo all the concluſions deducible from them; and it ſeems that one by beginning from the moſt ſimple definition may develope it into all that variety of heterogeneous parts, of which the law of every country muſt neceſſarily conſiſt.

But an attempt to treat municipal law in this manner muſt, it is plain, be attended with great difficulty; and it is neceſſary to aſcend with the utmoſt caution from the root to the ſummit of all, proceeding regularly from branch to branch, and taking care in the progreſs not to overlook any part of the tree. Propoſing from principles to deduce concluſions, two things muſt therefore be neceſſary to be done in order to explain the law of *Scotland* in a preciſe ſcientific manner. The firſt is to inveſtigate the principles, which are to be made the foundation of the ſuperſtructnre to be raiſed, that is, of the concluſions deducible from them. The other is from theſe principles, after they have been inveſtigated, to deduce the concluſions, or to apply them to the deciſion of all the caſes which can be ſuppoſed to happen in real life. Hence I have had occaſion to make uſe both of the analytical and of the ſynthetical method. The analytical is that which proceeding from phænomena to hypotheſes, from effects to cauſes, from concluſions to principles, and from particulars to generals, converts the former into media for diſcovering the latter. It is employed therefore, from viſible and known effects to inveſtigate the cauſes of them; from phænomena found by experience to be real, to diſcover hypotheſes which will account for them; from concluſions admitted to be juſt, to diſcover the principles from which they flow; and from particular propoſitions to arrive at others more general. The ſynthetical is directly contrary to the former, and is that which proceeds from hypotheſes to phænomena, from cauſes to effects, from principles to concluſions, and from generals to particulars. Hence it is uſed to account by hypotheſes which are made, for phænomena obſerved to exiſt; to explain from cauſes which are known to operate, effects produced by them; to puſh principles eſtabliſhed or aſſumed, to the conſequences deducible from them; and to reſolve general propoſitions into thoſe particular ones implied in them.

The uſe made of theſe different methods in the following work, muſt already be obvious from the account given of them. The principles and the concluſions, neceſſary to form a complete ſyſtem of juriſprudence, are connected together; and it is neceſſary to trace them both. But the former are the baſis on which the latter muſt be raiſed: hence the firſt point at which I found it neceſſary to aim on every occaſion was, to inveſtigate a general rule or definition which might be the foundation of the ſuperſtructure intended to be erected upon it; and the analytical method has been employed for this purpoſe. This definition is the general principle, from which all the concluſions muſt be deducible: it ought therefore to invelope all theſe within itſelf, and to be capable of being, in its turn, developed into them. Hence the utmoſt preciſion of thought as well as the greateſt accuracy of expreſſion is, on every occaſion, neceſſary in forming it; and it can hardly be expected that no improprieties or inaccuracies will be diſcovered in any of the definitions uſed in the following work. A general rule, principle or definition having been thus inveſtigated in the analytical manner, the next and the moſt important point is to deduce from it by juſt ſteps, ſynthetically, all the corrollaries which flow from it and are neceſſary for explaining the different titles of the law. In order to do this in the moſt rational manner, every definition is firſt reſolved into its conſtituent parts, that is, *propoſitions which*, it is evident, *are either expreſſed or implied in it:* theſe I call axioms; and aſſuming them for principles, I endeavour to deduce from them, in a logical manner, all the concluſions neceſſary to be explained on every ſubject.

The advantages of the method, which has been deſcribed, are various. It gives one occaſion to trace the cauſes of every inſtitution, conducts him with the greateſt certainty to his concluſions, and renders the ſtudy of law an agreeable as well as a rational one.

The knowledge of cauſes is more valuable than that of facts. It has however been reproached to lawyers, that overlooking the ſublimer part of their ſcience, they have ſeldom extended their views beyond the words of the law of their country. But the proſecution of the plan, which hath been propoſed, affords an opportunity of enquiring into cauſes, and may thereby help to remove, in ſome ſort, the complaints which have been made upon this matter. Hence I have as well in deducing concluſions as in inveſtigating principles taken incidental views of human affairs; and have attempted, on every occaſion, to point out, in a rational manner, the evils meant to be prevented as well as the utilities intended to be promoted by every regulation, and the propriety of the means employed by the legiſlature for theſe purpoſes. 'Tis in this manner that philoſophy can beſt be mixed with juriſprudence. Abſtract metaphyſical conſiderations have little effect in real life; and one, who perſuaded that theſe made any conſiderable part of the views of legiſlature, ſhould ſet about forming his opinions on this ſuppoſition, would at laſt find that they could be of little utility to him, and would, beſides, be led into innumerable errors or conceits. But the intereſts of ſociety are different from theſe, and either have made or ought to make the principal object of the attention of legiſlators; and a ſyſtem, which deſcends into a detail concerning theſe, and marks the connexion ſubſiſting between them and municipal laws, becomes in effect a complete ſyſtem of political knowledge.

The method, which has been propoſed, is valuable on other accounts; but it is moſt uſeful, becauſe it conducts one with the greateſt certainty to his concluſions. For it makes all depend on three things: on the truth of the definition which is the firſt, the original and the fundamental principle; on the accuracy with which it is reſolved into axioms; and on the juſtneſs of the reaſoning made from theſe. Every concluſion drawn by the rules of right reaſon from juſt principles, muſt be true. Hence one is enabled, by following the method which hath been propoſed, to form his opinions with the greateſt facility, by arguing from principles *a priori;* and having by habit acquired the faculty of pronouncing readily what *muſt be* the deciſion of the law, is not neceſſitated to have recourſe, on every occaſion, to *authorities* in order to diſcover from them what it *is*. At the ſame time it would be highly preſumptuous for one to put his own opinions on the world for the dictates of the law of his country. Hence after having finiſhed the firſt draught of the following ſyſtem, I thought it my duty to conſult ſtatutes, precedents, and the works of others; applied theſe, as they occurred, to the propoſitions maintained in every title; and proved their truth by *the beſt authorities which I could* find. For one would fall into many errors, who ſhould form his opinions upon theſe alone; and it is vain to expect that indiſputable authorities can be cited for every deciſion of the law of *Scotland*.

Intenſe thought is ever agreeable. Hence cheſs is of all games the moſt amuſing; becauſe it fills the mind, and at the ſame time that it intereſts the player, it fixes his attention in the cloſeſt manner. One, who ſtudies ſome of thoſe theorems recorded by EUCLID in his elements, cannot help being charmed with the elegance of the method, the progreſs which the demonſtration makes from ſtep to ſtep, the connexion every one of theſe has with the concluſion, and the conviction afforded of the truth of it. A ſtudy therefore, which fixes the attention, is ever found to yield the ſtudent his reward; and juriſprudence treated in the manner which has been deſcribed, muſt become an agreeable as well as rational one. In other caſes the mind is in ſome ſort paſſive altogether, being chiefly employed in admitting ideas ſuggeſted by others. But the ſtudy of law gives

gives it activity, affords one ample room for exerting his powers, or rather is itſelf an actual exertion of them. The inveſtigation of principles, the deduction of concluſions, and the tracing the connexion between them make one ſuggeſt to himſelf a number of new ideas. Beſides, the matters conſidered, the proofs brought, the analogies marked enamel the ſcene, and yield by their variety an agreeable proſpect. The moſt common occurrences of life are converted into ſubjects of the niceſt diſquiſition.

The *method*, which ought to be followed in treating of every ſubject, is a thing very different from the *order*, in which the books or titles that treat of theſe are arranged; and one is not, by altering the former, laid under an abſolute neceſſity of making a total alteration of the latter. There is, I know, in all caſes, an order which is beſt, and which one ought on every occaſion to obſerve in developing his ideas to others. That is the order which is moſt natural, and which will ſerve beſt to make that underſtood which he intends to explain. He ought therefore to go from one thing to another, beginning with thoſe which are ſimple, and proceeding from them to thoſe which are complex, explaining always that firſt which preſents itſelf firſt to be underſtood. But every thing is connected in juriſprudence; and it is impoſſible to avoid uſing on every occaſion terms, which have not been explained. Beſides, this ſcience, as has been remarked, reſembles in ſome ſort a tree, whoſe trunk divides itſelf at a ſmall diſtance from the root into different branches. The order therefore, which ſhould be obſerved in climbing theſe, or in treating of the parts of which the ſyſtem conſiſts, appeared not to be of much importance. For they are different every one from another; it would at any rate be neceſſary to ſtep aſide at every turn to purſue each of them to its extremity, through all the little twigs into which it divided itſelf; and after having traced them in this manner, to return to the original ſtock and to aſcend from thence another branch. The important matter therefore ſeemed to be to connect them all with one another and with the trunk from which they ſprang, and to deſcribe minutely the branches which proceeded from it. A natural order had been pointed out by Lord Viſcount *Stair*, and it had been followed by Lord *Bankton*. Their inſtitutes are much reſpected in this country, and are in the hands of every lawyer. I reſolved therefore to follow as exactly, as the *method* I had propoſed to myſelf would permit, the *order* which their Lordſhips have thought proper to be obſerved in arranging their titles. They divide their inſtitutes into four books, and each of theſe into ſeveral titles. But juriſprudence is the moſt complex as well as various of all the ſciences; it muſt therefore be of the laſt importance in it to keep every ſubject as diſtinct as poſſible, and to treat ſeparately of points which ought not to be confounded. Hence inſtead of dividing the following work into four books, I thought it better to divide it into four parts, making each of theſe correſpond with the books into which thoſe learned authors have divided their ſyſtems; and to multiply the number of books and titles as much as could conveniently be done, dividing every part into a number of books and every book into a number of titles. By this means every title becomes a ſeparate treatiſe; the mind of the reader is relieved by the ſeeming variety with which he meets; his apprehenſion is much aſſiſted by keeping ſeparate ſubjects which are totally diſtinct; and the frequent opportunities, which he finds of reſting himſelf, render his entertainment more eaſy of digeſtion and more agreeable.

'Tis impoſſible for one to preſerve his attention equally fixed on all occaſions; and one learns by experience a variety of things, which would otherwiſe eſcape his obſervation. A theoretical lawyer can hardly avoid falling into errors; and it is well known to moſt of thoſe, for whoſe peruſal this ſyſtem is chiefly intended, that I have been only a few years at the bar. Miſtakes are ſometimes diſcovered

vered even in ſmall treatiſes; and it cannot be expected that amidſt the multiplicity of propoſitions contained in this volume, none ſhould be found. But I would fain hope, that the plan which I have formed, and the method which I have propoſed to follow, will be ſome apology for having preſumed at ſo early an age to offer ſo large a volume to the public. Every man ought to endeavour to be uſeful in ſociety; and I thought this was the way in which I could be moſt ſo to my country, to my friends, and to myſelf.

Thus much I thought it neceſſary to ſay by way of introduction to the following work; and ſhall now proceed to the proſecution of my deſign.

A

SYSTEM

OF THE

PRINCIPLES

OF THE

LAW OF *SCOTLAND.*

PART I.

A SYSTEM OF THE PRINCIPLES of the LAW of *SCOTLAND.*

PART I.

BOOK I.

TITLE I.

Of the Word LAW.

§ 1. THOSE, who attend not to the matter, uſe to ridicule the minuteneſs of lawyers. But a ſyſtem, which deſcends not into particulars and leaves one to ſeek on every occaſion, is little valuable. The word *law* is a general term, is fundamental in the following argument, and occurs almoſt in every page of the works of the learned. Beſides, it is, as it were, the ſeed, which is in the following treatiſe to be developed into a multitude of branches; it ought therefore in ſome ſort to invelope all theſe within itſelf; and it is neceſſary to begin by inveſtigating and by defining the preciſe meaning of it.

§ 2. I doubt not every one imagines, that he fully underſtands a word, which he both uſes himſelf and finds uſed by others every day. But the moſt common terms are not always either *preciſely* underſtood or eaſily defined. PLATO is ſaid by Lord VERULAM to have obſerved, that one, who is able to form a good definition, is equal to a God; and you will upon trial find it difficult, if not impoſſible, to light on ſuch *general* expreſſions as will define with preciſion the meaning of this word, when taken in its moſt extenſive ſenſe, and will be applicable to it in all caſes. There is not to be found any-where that I know a good *general* definition of it. Indeed the only *general* one, with which I have ever met, is that given by M. DE MONTESQUIEU, *l.* 1. *ch.* 1. *De l' Eſprit des Loix.* He calls laws 'les rapports néceſſaires qui derivent de la nature des choſes,' *the neceſſary relations which ariſe from the nature of things;* a definition which ſeems not to be accurate: for laws are not the relations themſelves; they are rather the cauſes and the effects of theſe relations.

§ 3. The analytical is the beſt method of inveſtigation; and it is not improper to apply it on this occaſion.

I. Every one, who revolves within himſelf the ideas ſuggeſted to him by the word *law*, muſt immediately obſerve that it is, in all caſes, applied to effects which either are actually or are intended *to be produced*, to *ends* which either are

actually or are intended *to be accompliſhed*, to actions which either are or ought to be done. Thus the laws of nature imply, that certain events are obſerved to happen, or that certain effects are produced in nature: the moral law ſuppoſes, that men ought to do certain actions, or that they ought to intend the accompliſhment of certain ends.

II. But the mere exiſtence of the events, the production of the effects, the accompliſhment of the ends is not the firſt idea ſuggeſted by this word: the characteriſtical one is the *conſtancy* which either is or ought to be obſerved in the accompliſhment of them. For a law implies, that ſeveral events either do or may exiſt in one uniform manner. But conſtancy and uniformity imply *regularity*; therefore every law ſuppoſes an *eſtabliſhed rule* or method, by which theſe ends either are or may be accompliſhed. Thus the laws of nature mean eſtabliſhed rules which *are* obſerved by nature in her operations, and by which certain effects are found conſtantly to be produced: civil laws are rules which *ought to be* obſerved conſtantly by men, and by which they *ought to* produce certain effects.

III. Hence the word *law* is not applied to thoſe rules alone, which are always obſerved; 'tis in many caſes applied to ſuch, as are not conſtantly obſerved. Thus we ſay *human laws*; yet every one knows that theſe may be tranſgreſſed. But all laws fall under one or other of theſe alternatives, and agree in being rules which either are or ought to be conſtantly obſerved.

A law therefore may be defined to be *a rule, which either is or ought to be conſtantly obſerved.*

§ 4. The obſervance of a rule implies the exiſtence of ſome being which obſerves it. But the beings, by which rules may be obſerved, are ſome of them material, others of them intelligent; and ſome laws are, others are not obſerved conſtantly. 'Tis therefore neceſſary to diſtinguiſh theſe different caſes: for we ſhall ſee, that the firſt alternative of the definition applies to material, and the other to intelligent beings alone.

The intelligent beings, which are the immediate objects of juriſprudence, are men; theſe are endowed with liberty, and being imperfect, are therefore inconſtant in the obſervance of the laws impoſed upon them. They are not however allowed to govern themſelves by caprice alone; laws are preſcribed to them to be the rules of their conduct; and theſe they are bound to obey.

Man has natural reaſon, and he has entered into ſociety with others; therefore the powers, by which the laws he is bound to obſerve are enacted, are two, either nature or the ſupreme power of that ſtate to which he is ſubject. The former is the law of nature, the latter the civil law.

In ſociety every man is bound to obſerve the laws eſtabliſhed in it: but the end which theſe mean to accompliſh and for which they are enacted, is, as we ſhall ſhew, to bring man to do his duty, or to obſerve in his conduct the law of nature. The civil law therefore of every country ought to be no other than a developement of the law of nature; it ought to be the law of nature branched out, as it were, into all the particulars of which it conſiſts, and applied to the deciſion of all thoſe caſes which either do or may happen in ſociety; and all the ſtatutes of the one ought to be 'expreſſions of the preciſe dictates of the other.' *La loi, en général, eſt la raiſon humaine, en tant qu'elle gouverne tous le peuples de la terre: et les loix politiques et civiles de chaque nation ne doivent être que les cas particuliers, où s'applique cette raiſon humaine* *.

§ 5. The law of nature therefore is the baſis, on which civil law ought to be founded; and it is neceſſary to begin by explaining it. It is applied to material as well as to intelligent beings; but it has, when applied to the former, a ſenſe very different from that which it has, when it is applied to the latter. The explanation of the meaning it has in the one caſe will lead to diſquiſitions, which may perhaps appear to be foreign to juriſprudence; but theſe will throw much light on that which it has in the other. Let us therefore conſider it in both caſes, and begin by applying it *firſt* to matter, then to man.

TITLE

* De l'Eſprit des Loix, liv. 1. ch. 3.

TITLE II.

Of the Law of nature-material.

§ 6. EVERY one who contemplates the univerſe, will immediately perceive an uniformity, a regularity, a conſtancy in all the operations of nature. Certain events are obſerved conſtantly to follow other events, and are from thence concluded to be dependent upon them, and to be connected with them. The exiſtence of the one is a certain prognoſtic of that of the other. On ſeeing the one we predict with the moſt confident aſſurance, that it will be followed by the other. No matter whether we have or have not any better reaſon for doing it, than the mere force of habit alone; whether there is or is not any neceſſary connexion between the events; whether our predictions are or are not infallible. The *fact* is certain, that ſome events are, by uniform experience, found to be conſtantly attended by others. Thus, conſtant experience informs us, that bodies, which are ſpecifically heavier than the air, fall downwards towards the Earth, if nothing ſupports them, or hinders them from falling. The ſame experience teaches us, that a body, which is at reſt, continues at reſt, in caſe no power acts upon it, and puts it into motion. We learn from the ſame inſtructreſs, that a ſolid body does not ſink, but ſwims in a fluid which is ſpecifically heavier than it; but that it ſinks, in caſe it is immerſed into one, which is ſpecifically lighter than it. Thus, a piece of cork, put into a veſſel full of water, does not ſink to the bottom of the veſſel, but ſwims at the ſurface of the fluid. But a piece of lead is found to ſink to the bottom, as ſoon as it is thrown into the water. If in place of the water, we ſubſtitute quick-ſilver, which is a fluid ſpecifically heavier even than lead, we find, that not only the cork, but the lead ſwims in it. But in place of lead, take a piece of pure gold, and you ſhall find, that there is no fluid ſo heavy, in which it will not ſink; becauſe there is no fluid, which is not ſpecifically lighter than gold. Again, experience teaches us, that motion is, in ſome caſes, communicated by impulſe, and that one body, impinging upon another which is at reſt, puts, in ſome caſes, that other, which was at reſt, into motion; that at ſome times, inſtead of putting the other into motion, it is itſelf reſiſted, ſtopped, and driven backwards in a direction oppoſite to that, in which it moved before; that, at other times, inſtead of being driven backwards in a direction contrary to that, in which it advanced, it is driven off from the body, on which it impinged, ſo that the angle of its incidence is equal to that, in which it is reflected; and that at others, a body in motion, impinging on another at reſt, does not move it, but that, after the ſtroke, both bodies remain at reſt. All theſe facts are obſerved by experience, and happen conſtantly in all caſes, according to the different degrees of hardneſs, ſoftneſs, elaſticity, velocity, and force of the bodies, and according to the different directions of their motions. Fire is found conſtantly to burn ſome ſubſtances, and to be itſelf extinguiſhed by others. Seed, caſt into a proper ſoil, and nouriſhed by heat, by moiſture, and by ſuitable weather, grows out of the Earth, and becomes a ſubſtance different according to the different kinds of the ſeed, which was ſown. Food of certain ſorts is found to undergo certain ſucceſſive mutations, and at laſt to be aſſimilated in ſuch manner, as to become fit nouriſhment for animal bodies. Other things are found to produce oppoſite effects, and, inſtead of contributing to the preſervation of animal life, to put, in a ſhort time, an end to it.

'Tis needleſs to be more particular; for every one's own obſervation muſt convince him of the reality of this uniformity in the operations of nature. Now,

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it is this uniformity, which leads us to an Idea of what is called the Law of nature-material. For in all caſes, in which we obſerve events to happen conſtantly after one uniform manner, we conclude, that there is ſomething in the conſtitution of things, to which this uniformity is owing; that the connexion, which is conſtantly obſerved to ſubſiſt between events, is not arbitrary and alterable, but neceſſary and unalterable; and that there is ſomething in the conſtitution of nature, which makes it impoſſible for matter either to exiſt or to act after a manner, different from that, in which it is found by conſtant experience to exiſt and to act. Hence we acquire the Idea of a Law of nature, and are able to define it: for, from the uniformity of natural operations, we conclude, that nature obſerves certain fixed rules in all her operations, and that ſhe acts agreeably to them. Now, thoſe rules, which are conſtantly obſerved by her, are called the Laws of nature. So that a Law of nature may be defined to be 'a 'Rule of exiſtence, which is conſtantly obſerved in the material univerſe, and according to which matter muſt perform its different operations.' Or it may be defined to be 'a way of exiſtence, which conſtantly takes place in the material univerſe, and according to which matter muſt perform its various operations.' For it is true, I. That every law of nature is *a rule*. II. That it is a rule of *exiſtence*. III. That it is a rule which is *conſtantly* obſerved. IV. That it is a rule, according to which matter *muſt* perform its operations.

7. Firſt. Every Law of nature is a rule. (§ 6. *ax.* 1.) That is, it is 'a method of operation, by which an end is accompliſhed.' (§ 3.) If nature intends to produce an effect, in order to accompliſh its end and to produce the effect, it uſes a certain determinate method. It operates in a determinate way. That is, it makes matter *exiſt after a certain manner*. For inſtance, if it wants that a body ſhould remain at reſt, it hinders every other body, all external influence from acting upon it. If it wants to make a body continue in motion, it hinders every obſtacle from oppoſing its courſe. If it wants to make it move either in a ſtrait line or in a curve, it gives a certain impulſe to it, and a certain direction to its motion. Now, thoſe methods, which it takes in order to accompliſh its ends, are the rules of its operations. And in this ſenſe all the Laws of nature may be called Rules.

8. Secondly. The Laws of nature are rules of exiſtence. (§ 6. *ax.* 2.). That is, they are the rules, by which nature operates, and according to which matter exiſts. For inſtance, matter may exiſt either at reſt or in motion. If it is in motion, it may move either in one direction or in another; in one ſort of line, or in another; according to one rule, or according to another. Now, in all thoſe different caſes, matter does, in truth, no more than *exiſt* in different ways. So all the ways of its exiſtence are no other than rules of exiſtence.

9. Thirdly. The Laws of nature are rules of exiſtence, which are *conſtantly* obſerved. (§ 6. *ax.* 3.) For it is the conſtancy, with which matter exiſts in a certain way, that makes the way of its exiſtence entitled to be called a rule or a Law of nature. It is from this conſtancy, with which the rule is obſerved, that the Idea of a Law of nature is originally derived. (§ 6.) Unleſs it were diſcovered by experience to be conſtantly obſerved, we could not pretend to ſay poſitively, that it was a Law of nature, or a rule which nature had reſolved to obſerve in its operations. Therefore, if an event happens no more than once, it is impoſſible from thence to infer, that it exiſts according to an eſtabliſhed Law of nature, or rather it is impoſſible to diſcover the preciſe Law, according to which it exiſts. No doubt, every ordinary event happens according to certain Laws eſtabliſhed by the Author of nature. But it is impoſſible for mankind to diſcover thoſe laws without experience. Experience, as it has been very properly defined by Mr. HARRIS, is nothing elſe than 'the reſult of 'many repeated experiments.' Therefore, in all caſes, in which the events or experiments are not repeated, mankind can have no experience. Of courſe, it muſt be impoſſible for them to diſcover a Law of nature from one ſingle event,

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from one experiment. So, in order to entitle any way of exiſtence to be denominated a Law of nature, it is neceſſary, that it has, on repeated occaſions, taken place, and that conſtantly, after one and the ſame manner, according to an eſtabliſhed, certain, and unvaried rule.

§ 10. Laſtly. Every Law of nature is ſaid to be a rule, according to which matter *muſt* perform its operations. (§ 6. *ax.* 4.) This is the moſt doubtful and the moſt exceptionable part of the definition. Perhaps, ſome people may think, it ought not to be inſerted; becauſe, they may ſay, it does not appear to be anywiſe neceſſary, that matter ſhould perform all its operations according to thoſe rules, which are found by experience to be conſtantly obſerved in nature. And no doubt, their opinion is, in ſome reſpects, agreeable to truth. For it is incontrovertible, that all the Laws of nature, ariſing from the conſtitution of it, are entirely dependent on the Author of nature, the firſt cauſe of things, and are alterable by him: ſince that power, which, it is acknowledged, *created* the univerſe, muſt, *a fortiori*, have had power to impoſe upon it the obſervance of any Laws, which ſeemed good to it; a creative power implying an uncontrollable power over that, which is created, and, of courſe, a power of aſſigning to the creature the Laws of its exiſtence, of its operations, and of its duration. This power the Creator may exert, either by eſtabliſhing general rules to be obſerved by his creatures, or by immediate interpoſitions. It is ſeldom, that he has choſen to act in the laſt way. Revelation informs us of the occaſions, on which, in his infinite wiſdom, he has thought fit to do it. But the ordinary method of his government is, by aſſigning a certain *conſtitution* to his creatures, to ſubject them to the Laws reſulting from it. Thoſe Laws, therefore, matter muſt obſerve, as long as its conſtitution is the ſame. It has it not in its power to neglect the obſervance of them. It lies under an abſolute and an irreſiſtible neceſſity of acting agreeably to them. For natural philoſophy, indeed, common ſenſe teaches, that *inertia*, inertneſs, inactivity, or an abſolute indifference to any one ſtate, are qualities eſſential to matter. It cannot act ſpontaneouſly. It has no power of moving itſelf, of altering its ſtate, or of hindering itſelf from being affected by the general Laws of nature. Therefore, if it is at reſt, it muſt continue at it, till ſome external influence is uſed upon it. If it is in motion, it muſt continue in motion, till it meet with reſiſtance from ſomething without it: for it has not power to ſtop itſelf. It has no inclination to a ſtate of reſt more than to that of motion; to a ſtate of corruption than to that of incorruption; to a ſtate of exiſtence than to that of annihilation. It has no affections, no ſelf-moving principle, no power of action. It is entirely paſſive. 'Tis true, terreſtrial bodies, put into motion, are always obſerved to come to reſt at laſt, and no body, which is at reſt, is ever obſerved to move itſelf. But it does not from thence follow, that body has, in truth, a greater tendency to remain at reſt than to continue in motion. For every body, which is upon Earth, is ſurrounded with other bodies. Motion is reſiſted by the ambient air. The reſiſtance acts continually and in every inſtant. Conſequently, it retards continually, and in every inſtant, the motion of the body. Thus, its motion is gradually diminiſhed, till, at laſt, it is ſtopped altogether. So bodies, which have been once put into motion, come into a ſtate of reſt, not becauſe they have naturally a greater inclination to reſt than to motion, but becauſe they are acted upon, and their motion is continually reſiſted by external cauſes. For experience demonſtrates, that the duration of the motion of any given body, moving with a given velocity, is proportionable to the reſiſtance made to its motion; that a great reſiſtance makes it come ſoon to an end; that a ſmall reſiſtance makes it late of coming to an end; that the motion is, in all caſes, ſooner or later ſtopped in proportion to the greatneſs or ſmallneſs of the reſiſtance; and that it never ſtops, in caſe it meets with no reſiſtance. Thus, a bowl, rolled along rough ground, is ſoon ſtopped. Roll it along ice, and the ſame force will make it continue much longer in motion. The motions of the heavenly bodies are perpetual.

Their velocities are never diminiſhed, becauſe they move in free ſpaces, in which they meet with nothing, that retards or obſtructs their motion.

This *inertia* or inactivity, which ariſes from the inanimate nature of matter, is ſo conſtant an attribute of it, that it is impoſſible for matter, which is moving, to alter either the velocity or the direction of its motion, or to deviate into a direction different from that given it by the Power which put it originally into motion. It muſt continue to move uniformly, always with the ſame velocity, which was given it in the firſt inſtant of its motion, deſcribing equal ſpaces in equal times. It muſt proceed in a right line, always moving towards the ſame point, unleſs ſome external cauſe acts upon it, and makes it change either the velocity or the direction of its motion. For its lifeleſsneſs, its want of ſpontaneity, of a faculty of volition, and of a power of moving itſelf, makes it abſolutely impoſſible for it to act upon itſelf, and to determine whether it ſhall accelerate or retard its velocity, whether it ſhall go out of the direction given it, towards the right or towards the left. But it would be abſolutely neceſſary for it to make this determination, before it could change either the one or the other, either the velocity or the direction of its motion, without the influence of an external cauſe acting upon it. For, if no external cauſe acts upon it, and forces it to change its ſtate, that change muſt proceed from itſelf, and from its own influence exerted upon itſelf. But its *inertia*, its inactivity, its inanimateneſs, makes it impoſſible for it to act upon itſelf. Therefore, it cannot, in caſe no external influence is uſed upon it, change either the velocity or the direction of its motion. Of courſe, it muſt continue to move with the velocity and in the direction, originally given it by that power, which put it into motion. But the original direction, which can alone be given to any body, muſt, in all caſes, be rectilinear. Therefore, a body, put into motion, muſt continue to move uniformly forwards in a right line, till the direction of its motion is changed by ſome external cauſe.

It is true, that moſt of the motions, with which we are acquainted, are curvilinear. All projectiles, for inſtance, move in curve lines, and, after being gradually bent towards the earth, fall down to it at laſt. But the reaſon of their curvilenear motion is the inceſſant action of external cauſes, to wit, of gravity, and of the reſiſtance of the air: for gravity, by acting inceſſantly and in every inſtant upon them, continually diminiſhes the tendency, which they have to recede from the Earth, at laſt overcomes it, forces them to change their direction, and makes them fall to the ground. From the continual and inceſſant action of this centripetal force, the courſe of the moving body is, perpetually and in every inſtant, bent from the tangent or right line towards the Earth, and is, upon the whole, curvilinear. So that this *Phænomenon*, far from affording an objection to the truth of the general doctrine, is, in reality, a proof and a confirmation of it. The ſame thing may be ſaid of the curvilinear motions of the Earth, and of the other bodies of the ſolar Syſtem. For the continuation of their motions is a ſtrong proof, that body has not a greater tendency to reſt than to motion; and that a body, which is once put into motion, never ceaſes to move, till ſome external cauſe acts upon it. The *Curvilinear* figure of their orbs is, in truth, a proof, that a body continues to move uniformly in a *right* line, unleſs ſomething external makes it change the direction of its motion. Be not ſurpriſed. For, in fact, gravity is that external cauſe, which acts inceſſantly upon them, bends them, in every inſtant, out of their rectilinear courſes, and makes them deſcribe curvilinear orbits. Therefore, if this cauſe did not act upon them, their courſes would be continually progreſſive in one direction and rectilinear.

The *inertia* of matter is further demonſtrated from that reſiſtance which body makes to changes attempted to be produced in its ſtate. For that reſiſtance ariſes from the inertneſs of it, from the impoſſibility, under which it lies, of changing its ſtate, and from the *niſus*, with which it endeavours to perſevere in

in it: and the argument proceeds after the following manner. All matter, which falls under our obſervation, is acted upon immediately by other matter; therefore that which is acted upon, ſince it is itſelf inert, muſt *cæteris paribus* have as great a power of preſerving its ſtate, as that which acts upon it has of altering it. If their mutual powers of action are equal, neither can prevail over the other; they muſt balance each other, and remain *in æquilibrio*. Hence in order to change the ſtate of a body which is, for inſtance, at reſt, a power ſuperior to its natural *vis inertiæ* is neceſſary. Therefore let two bodies, containing equal quantities of matter, be laid ſoftly into contact with one another, and neither of them will change its ſtate, or be put into motion, becauſe the *vis inertiæ* of the one is equal to that of the other. But let a body move with a certain velocity, and impinge upon another, which is at reſt and contains an equal quantity of matter, and you will find that the former will either put the latter into motion, or produce ſome other change in its ſtate, becauſe the power, which acts upon the body at reſt, and tends to put it into motion, is ſuperior to the *vis inertiæ* of it. For the quantities of matter contained in both bodies are *ex hypotheſi* equal; and the force of the one is rendered ſuperior to that of the other, by the motion or velocity given to it, the forces or *momenta* of bodies being, in all caſes, in the compounded *ratio* of the quantities of matter contained in them, and of the velocities with which they move *. Therefore, as the quantity of matter, which meaſures in all caſes the *vis inertiæ* of body, is *ex hypotheſi* equal in both, the force of the one in motion muſt be greater than that of the other, which is at reſt, in proportion to the velocity of the moving body; for the force of that at reſt is really no more than its *vis inertiæ*, which, it has been ſaid, is in all caſes proportionable to the quantity of matter contained in the body †.

The ſame principles are applicable to the colliſions of bodies in motion; for the effects produced by theſe depend on the forces, with which the bodies act upon one another. A greater force muſt, in all caſes, overcome a leſſer; both bodies are endowed with the *vis inertiæ*; therefore both of them reſiſt; they act mutually upon one another, and the effects of their mutual actions muſt depend upon the manner in which they act on one another.

From hence it is plain that the reſiſtance or *vis inertiæ*, experienced in matter, is a confirmation of the reality of its abſolute inertneſs. For matter is, in all caſes which we ſee, immediately acted upon by matter like itſelf; the *vis inertiæ* is common to all of it, produces effects on all of it, and makes it neceſſary for all of it to reſiſt.

Thus the *inertia* of matter is eſtabliſhed upon the cleareſt principles ‡; and it follows that matter lies under an abſolute and irreſiſtible neceſſity of obſerving thoſe rules, which it is found by experience conſtantly to obſerve. For it has no power of determining itſelf; the rules therefore of its operations muſt neceſſarily ariſe from its own nature and conſtitution. Of courſe as long as its conſtitution and nature remain the ſame, ſimilar effects muſt be produced by ſimilar cauſes; but ſimilar effects or ſimilar events are indicative of laws eſtabliſhed in nature; therefore matter muſt obſerve theſe laws.

§ 11. Mr. HUME, who has puſhed the principles of the ingenious, the virtuous, the pious Biſhop of CLOYNE || to their moſt diſtant conſequences, hath employed

* NEWTONI princ. def. 2. 3. KEIL's lect.

† KEIL. lect. 9. theor. 1.

‡ The diſquiſition concerning the nature and the *inertia* of matter may perhaps appear to be foreign to the ſubject of this work. But it muſt be remembered, that I am at preſent explaining the definition given of the law of nature; and I ſhould not have thought ſo much neceſſary to be ſaid upon this point, had not a late author, whoſe ingenuity, learning and abilities create reſpect to his opinions as well as to himſelf, endeavoured in art. 1. of *eſſays and obſervations phyſical and literary* to ſhew the abſurdity of the doctrine, which has been maintained by the greateſt natural philoſophers. See art. 2. of the ſame collection.

|| 'Tis ſurprizing that men of diſtinguiſhed acuteneſs as well as abilities have endeavoured to refute this fanciful

ployed all the ingenuity of which he is maſter to prove, that there is no neceſſary connexion between one event and another; that no one ought to be ſaid to be the neceſſary cauſe of any other event; that there is nothing in cauſe and effect more than priority and poſteriority; that events happen only *to exiſt after* one another; and that our imagination of their mutual neceſſary connexion ariſes from that *habit*, merely, which, from obſerving them conſtantly accompany one another, we acquire, of anticipating the future exiſtence of the one, as ſoon as we ſee the other exiſt. Every thing which is perceived is, according to the wild ſyſtem of this great philoſopher, for aught we either do or can know, no more than a perception; and nothing has a real exiſtence, external to the mind of the percipient being: mankind therefore might have had perceptions entirely different from thoſe which they have, and might have been formed to conceive things after a manner different from that in which they perceive them at preſent. It would have been as eaſy for them to have conceived a billiard-ball, after being ſtruck by another, to move upwards towards the ceiling, as to conceive it to move along the table into one of the pockets. It would have been as eaſy to have conceived that a ſword, on being plunged into the bowels of a man, changed him into a church like St Peter's, as to conceive that it made him drop down dead. Beſides, if time is itſelf no more than a perception; if it has no real ſucceſſion of inſtant after inſtant; if it is no more than a way, in which ideas are conceived to be related to one another; the reality of priority and of poſteriority is deſtroyed, and along with it that of cauſe and effect; for our idea of cauſe implies priority to its effect.

It would not perhaps be difficult to ſhew that this way of reaſoning, from the poſſibility of our having conceptions different from thoſe which we have at preſent, is liable to objections even upon its own principles. But it would be improper to enter into this metaphyſical diſpute: for whether Mr Hume's concluſions are or are not repugnant to the principles of his philoſophy, this particular tenet, which puts an end to the ſtability of nature, ſeems to be indefenſible upon the vulgar ſyſtem, which aſcribes a *real* external exiſtence to thoſe things that are *perceived as external*. A real external material thing muſt have a *certain conſtitution*; muſt therefore be capable of producing certain effects, and no others; and muſt of courſe obſerve, in all its operations, fixed and eſtabliſhed and invariable rules.

ſyſtem by arguments, which would make one ſuſpect they did not fully comprehend it. A late author, whoſe memory the ſciences, his friends and the learned ought to revere, in his *account of Sir Iſaac Newton's philoſophical diſcoveries*, (b. 2. ch. 1. § 1). ſays, that "as we are certain of our own exiſtence, and of that of our ideas, by "*internal conſciouſneſs*; ſo we are ſatisfied by *the ſame conſciouſneſs*, that there are objects, powers, or cauſes "*without* us, and that act upon us:" and in § 9. of the ſame chapter he proves the reality of ſpace from the reality of motion. Both arguments muſt appear inconcluſive to a Berkleian: he would ſay that it is impoſſible for a man to be ſatisfied, by *internal conſciouſneſs*, of the exiſtence of any thing *without* him, and that it is a mere *petitio principii* to infer the reality of ſpace from that of motion. For he holds motion to be no more than *a perception*; it is *a conſtituent part* of that complex idea which he calls the *moving body*. It cannot therefore prove to him, that ſpace is a real external being.

The celebrated author of *eſſays on the principles of morality and natural religion* hath alſo in an eſſay, *on the authority of our ſenſes*, undertaken to refute the principles of Dr Berkley. But one cannot avoid obſerving, that he ſeems indeed, from the manner in which he refutes them, to miſapprehend the Biſhop's doctrine: for in every argument which he brings he appears evidently to *take it for granted*, that the things, which are *perceived*, are *really external* to the mind of the percipient being. In order to be convinced of this, one has no more to do than to look into any page of his eſſay. Thus he ſays, p. 204. 'Every ſort of experience confirms the truth 'of our perceptions. I ſee a tree *at a diſtance*, of a certain ſhape and ſize. *Walking forward*, I *find* it in *its* 'place, by the *reſiſtance* it makes to *my body*; and ſo far as I can diſcover by *touch*, it is of the ſame *ſhape* and *ſize* 'which *my eye* repreſents it to be. I *return* day after day, year after year, and find the ſame object, with no other 'variation but what the ſeaſons and time produce. The *tree* is at laſt *cut down*. It is no longer to be *ſeen* or *felt*.' Again, ſays he, p. 211. 'In the ſenſes of taſting and touching, we are *conſcious* not only of an impreſſion made 'at *the organ*, but alſo of *a body* which makes the impreſſion. When I *lay my hand* upon *this table*, the impreſ-'ſion is of *a hard ſmooth body*, which *reſiſts* the motion of my hand.' Is it not plain from theſe words, the author takes it for granted, that the table and the tree are real material objects external to his mind; and that he abſtracts not from the materiality of his body, but takes his body, its organs, and its parts to be all of them real material objects, ſuch as the vulgar think they are?

rules. In truth, the neceſſary connexion, which ſubſiſts between a cauſe and its effect, ſeems to be demonſtrable *a priori*. For it is implied in the very Idea and definition of body; at leaſt, it follows from it. For inſtance, every body is moveable. Mobility, therefore, is a part of the Idea of body. But mobility implies, that the moveable body is capable of being put into motion by the impulſe of ſome other body. For motion is communicated by one body, to another which is at reſt, by impulſe alone. Therefore, it is a part of the Idea of matter, that motion is communicable by impulſe. In the ſame manner, it may be proved, from the very definition of body, that there is a neceſſary connexion between any other cauſe and its effect; and that, if a body, endowed with ſuch qualities, as are *ſuppoſed* to be inherent in matter, is once allowed to exiſt, the effect might *a priori* be demonſtrated and be foretold from the cauſe. Thus, it appears, that there is ſome more intimate connexion between a cauſe and its effect than that of priority and poſteriority alone. Indeed, it is impoſſible for man to believe, that the connexion between them is not neceſſary. And were it for no other reaſon than this, it would entitle him to pronounce, that there is actually a neceſſary connexion between them *.

§ 12. But ſuch, as attend to vulgar opinions more than to the truth of things, may, perhaps, think the definition, which has been given (§ 6.), imperfect, becauſe no mention is made in it of the Legiſlator, by whom the Laws of nature are enacted. Every Law, it is commonly ſaid by Lawyers, neceſſarily implies the exiſtence of a Lawgiver, on whoſe legiſlative power it depends, and from whoſe will it derives its force. Hence, Law is ſometimes, indeed, is uſually defined by them, to be 'the will of a ſuperior, who has power to make his will 'obligatory.' But if we reflect on the manner, in which, it has been demonſtrated, the Idea of the Law of nature is *acquired*, we will eaſily ſee, that there is no neceſſity, indeed that it would be improper, to make mention, in the definition, of the firſt legiſlative cauſe of theſe laws: Becauſe that cauſe is no *original and primary part* of the Idea. For the Idea, annexed to the word Law, is acquired from the *obſervation* of *facts*, which are obvious, and from them alone. We *obſerve* certain *phænomena* in nature. Theſe *phænomena* are no more than facts, and thoſe, facts which happen always after one uniform manner. The notion of a cauſe, to which the eſtabliſhment and the obſervance of the rules are owing, is not neceſſarily a part of the Idea. For we have the Idea without it. We acquire it from the facts alone. Therefore, all which needs enter into the definition, is no more than that which the facts ſuggeſt. For the Idea is as complete without, as it is with mention of the cauſe, which eſtabliſhes the rules.

No doubt, nature, matter, the univerſe, all things owe their exiſtence to a firſt cauſe, and depend upon it. Therefore, this cauſe muſt not only have had power to enact, but have alſo enacted laws to be obſerved by its Creatures. Of courſe, the Idea of a ſupreme Legiſlator may, in ſome ſort, be ſaid to enter into that of Law. For the very nature and conſtitution of things, on which the Laws, eſtabliſhed in the material world, depend, are themſelves dependent on the firſt cauſe, and owe their eſtabliſhment to it. Of courſe, the Laws, obſerved by matter, when conſidered as eſtabliſhed by the legiſlative will of the firſt cauſe, may be defined to be 'Rules of exiſtence, eſtabliſhed by the firſt 'Cauſe of the univerſe, according to which matter both does and muſt perform 'its operations.'

* See an ingenious treatiſe *ſur les Premieres Verités, par M. le Pere Buffier.*

TITLE III.

Of the Law of nature-intelligent.

§ 13. FROM what has been ſaid, it is plain, that the firſt alternative of the general definition, which has been explained (§ 2, 3.), refers to matter. For a law of nature, when referred to material beings, is 'a rule, 'which matter not only does, but is neceſſitated conſtantly to obſerve.' We ſhall now ſhew, that it is referable to matter alone. For man, tho he ought, is not neceſſitated conſtantly to obſerve any law. In order to prove it, it will be neceſſary to trace our Idea of the Law of nature-intelligent to its origin, and to ſhew what is meant by it, when it is applied to human kind.

§ 14. The actions of mankind are, ſome of them, involuntary, others of them voluntary. The involuntary are all thoſe, which depend on the material part of the human conſtitution. For the bodies of mankind are material. Therefore, they muſt be ſubject to laws, ſimilar to thoſe which matter is neceſſitated to obſerve; becauſe thoſe laws depend on their material conſtitution. All matter muſt be equally ſubject to them. Hence, they muſt perform their internal animal functions, they muſt hunger, muſt thirſt, muſt digeſt, muſt ſecrete, muſt have the deſires which are the neceſſary conſequences of thoſe functions, and muſt be affected by the actions of other bodies upon them, whether they will or will not. Becauſe not only thoſe animal functions, which are performed internally, but the effects of the actions of matter upon them, are truly mechanical involuntary operations, and are independent of the choice of the animals themſelves. Thus, a man cannot, by mere volition, hinder his blood from performing its circulations, his food from being digeſted, ſecreted, or aſſimilated, or his body from being affected by the actions of other bodies upon it. A ſuperior force muſt overcome his reſiſtence, and muſt put him into motion. A mortal wound muſt kill him, whether he will or will not. All theſe, therefore, are neceſſary effects, actions, paſſions, or ways of exiſtence, which muſt take place, and muſt continue the ſame, as long as the material frame and conſtitution of man, on which alone they depend, continue the ſame. Therefore, the expreſſions, 'the law,' and 'the law of nature,' when they are referred to man as he is matter, and to his involuntary actions depending upon it, have the ſame ſignification which, it has been ſaid, they have, when they are applied to any ſpecies of material exiſtence.

§ 15. But man is an intelligent, rational being, and is not, like matter, deprived of thought, volition, and ſpontaneity. Endowed with liberty, actuated by paſſions, and moved by ſprings ſo many, ſo various, and ſo oppoſite to one another; he muſt be inconſtant in his conduct, becauſe he is imperfect. Poſſeſſed of a power of chuſing between one action and another, it is impoſſible he can, in all caſes, lie under an abſolute, a phyſical, and an irreſiſtible neceſſity of obſerving any rules of conduct. His liberty implies, that ſome of his actions muſt be free and voluntary. For a phyſical neceſſity is inconſiſtent with liberty. No agent, who, in all caſes, lies under it, can be called free.

From hence, it is plain, that it would be abſurd, as well as repugnant to experience, to maintain, that there are any Laws, which men either do or are neceſſitated conſtantly to obſerve in regulating thoſe their voluntary actions. Of courſe, Law cannot, when it is applied to them, be defined 'a rule, which 'men either do or are neceſſitated conſtantly to obſerve.' It muſt, as was obſerved already, (§ 5.), have ſome other ſignification, and muſt, therefore, be otherwiſe defined.

§ 16.

§ 16. Every man, who attends to his own thoughts, reflections, determinations, opinions, reſolutions, approbations, and diſapprobations, concerning his duty and his conduct, muſt be ſenſible, that there is within him a principle, call it nature, call it reaſon, or call it conſcience, which convinces him, that there are certain maxims, certain rules, which he *ought* to obſerve in life. Theſe thoughts, opinions, reflections, he cannot hinder himſelf from having: becauſe he cannot alter his moral any more than his material conſtitution. The conviction, which ariſes from them, is more certain, and more authoritative, than that, which ariſes from the proof of other facts. The teſtimony of two witneſſes, whoſe credibility is known to me, muſt convince me of the truth of a fact, to which they depoſe. *A fortiori*, a teſtimony, which is given me by myſelf, even the teſtimony of my own conſcience, muſt convince me. Indeed, it is, *ex hypotheſi*, impoſſible for it not to convince me. For the evidence, ariſing from it, is internal. It ariſes from myſelf. I am conſcious of it as well as of the conviction conſequent upon it.

Thoſe rules, therefore, which one *ought to* obſerve in regulating his conduct, are what are called Laws, when the word is referred to the voluntary actions of mankind. So that, when referred to them, a Law may be defined to be 'a rule, 'which men ought conſtantly to obſerve in regulating their *voluntary* actions.' A definition, which is itſelf perſpicuous enough, and will be eaſily underſtood from the explanation of the former one. I. A Law is ſaid to be a *rule*. II. It is a rule, which men *ought conſtantly to* obſerve. III. It is a rule, by which they ought to regulate their *voluntary* actions.

§ 17. Firſt. It is a rule; for all Laws are rules. (§ 3.) A rule has been defined to be 'a method of operation, by which an end may be accompliſhed.' Therefore, it ſuppoſes, that an end is intended to be accompliſhed, and points the method, in which it is neceſſary for one to act, in order to accompliſh that end.

Secondly. It is a rule, which men *ought to* obſerve. (§ 16. *ax.* 2.) It is not defined to be a rule, which they either do or are neceſſitated conſtantly to obſerve.

For, Thirdly. We are, in this place, ſpeaking of free intelligent agents, and defining the meaning, which the word 'Law' has, when it is applied, not to the neceſſary and involuntary, but to the free and voluntary actions of mankind. (§ 16. *ax.* 3). The meaning, which it has, when it is applied to the neceſſary and involuntary actions either of matter or of percipient beings, has been explained already (§ 3. *ſqq.*)

§ 18. From hence it is eaſy to ſee, that *a Law of nature*, when it is referred to the voluntary actions of men, may be defined, 'a rule, which, it is evident 'immediately from the light of nature, men ought conſtantly to obſerve in regu-'lating their voluntary actions.' And *the* Law of nature is 'the ſum of thoſe 'rules, which, it is evident immediately from the light of nature, men ought con-'ſtantly to obſerve in regulating their voluntary actions.'

The propriety of this definition will appear, if you ſhall analyze it into its conſtituent parts. It is ſaid, I. That every Law of nature is *a rule*. II. It is a rule, which men *ought* to obſerve. III. It is a rule, which they ought to obſerve in *regulating* their *voluntary actions*. IV. It is a rule, which, it is *evident immediately from the light of nature*, they ought to obſerve.

§ 19. The three firſt of theſe axioms have been explained already. (§ 17). The laſt remains yet to be explained. In it a Law of nature is ſaid to be a rule, which, it is *evident immediately from the light of nature*, ought to be obſerved by mankind.

For it is an eſſential and diſtinguiſhing characteriſtic of every Law of nature, that the evidence of the obligation, under which men lie to obſerve it, ariſes immediately from the light of nature. That is, man muſt be able, by the exerciſe of thoſe rational faculties, with which he is endowed by nature, without the aſſiſtance of divine revelation, to diſcover both the rule and his obligation to

obſerve

obſerve it. For, if he cannot make the diſcovery by the exerciſe of his natural faculties alone, without the aſſiſtance of divine revelation, the rule cannot be ſaid to be a law of nature. It is a poſitive Law. Thus, whether one ſhould ſet every ſixth or every ſeventh day apart to the worſhip of God, is a point, which it would have been impoſſible for man to have determined by his natural reaſon alone. Therefore, it cannot be counted among the Laws of nature, properly ſo called, that man ought to ſet every ſeventh day apart to it. It is a divine Law, and derives its force from an immediate revelation of the will of the Almighty. But, that one ought not wantonly or *unneceſſarily* to kill his neighbour, is a rule, which man may, by the exerciſe of his natural faculties, diſcover he ought conſtantly to obſerve. In the ſame manner, that one ought not to rob another of his property, that he ought not to break a lawful promiſe, that he ought not to refuſe to give charity to the poor, that he ought not to do any thing, which will give any creature unneceſſary pain; theſe are rules, which the light of nature alone dictates to every man, he ought to obſerve.

In caſe the evidence of the obligation ariſes immediately from the light of nature alone, it is no matter, whether it be intuitive or demonſtrative. For one either may have a conviction of his duty ariſing immediately from evidence, which is intuitive and irreſiſtible, or may diſcover it by the exerciſe of his rational faculties, by deducing it from principles, which are themſelves intuitively evident. In ſome caſes, it is ſo clear, that one ought to obſerve ſuch or ſuch a rule, that no more is neceſſary to convince him he ought to obſerve it, than that he underſtand the meaning of it. For no ſooner does he underſtand it, than he is inſtantly convinced; the evidence ariſing from the propoſition and from the Ideas themſelves. In order to be convinced that *one* and *one* make *two*, no more is neceſſary, than to have a clear Idea of the number *one* *, and to underſtand what is meant by the ſum of two numbers. For, as ſoon as one underſtands the meaning of the propoſition, or has clear Ideas of the number 'one,' and of the ſum of two numbers, he inſtantly ſees it to be true, that one and one make two, without any rational or logical deduction whatever. In the ſame manner, every one, who attends to his own convictions, muſt be conſcious to himſelf, that there are certain rules, which, as ſoon as he underſtands them, he cannot hinder himſelf from thinking he *ought* to obſerve in his conduct. A conviction, which ariſes from his own intimate conſtitution, and from the nature of things. Therefore, it is no more in his power to hinder himſelf from having it, than it is for one to hinder himſelf from believing, that the ſum of 2 and 2 is 4. The truth of the propoſition is intuitive. One is conſcious of it. The conviction is irreſiſtible. For inſtance, every one muſt be conſcious, that he ought to point out the road to a traveller, who is ignorant of it; and, in general, that he ought, in all caſes, to do to others every good office, which it will not be hurtful to himſelf to do them.

There are other caſes, in which the evidence of the obligation is not intuitive, but demonſtrative. It ariſes not inſtantly upon the perception of the Ideas, but is got by a rational deduction of one truth from another. But the conviction is, in this caſe, as authoritative, as in the other. 'Tis true, in all moral inquiries, it is difficult for men to agree, either with others, or with themſelves, in annexing always the ſame preciſe Ideas to the ſame words. Therefore, the concluſions may happen, in the one caſe, not to be ſo certain and ſo indiſputable, as the immediate perception is in the other. It may ſometimes be denied, that the concluſion follows from the principles, on which it is founded. A man may, in ſome caſes, be incapable of ſeeing it. And in others, he may doubt of it.

But this hinders not the definition from being juſt. For, if there are *any* rules, which, it can be proved by a rational deduction, ought conſtantly to be obſerved by

* The number 'one' is, I own, an improper expreſſion; for one is not a number. A number is *ex unitatibus compoſita multitudo*. See Euclid book 7. But it is impoſſible to avoid every improper expreſſion.

by men, it is enough to ſupport the truth of it; ſince all thoſe rules fall under the expreſs terms of it. No matter, whether they be few or many.

§ 20. But man, it has been ſaid, (§ 15.) endowed with liberty, obſerves not always, in his conduct, thoſe rules, which he is convinced he ought to obſerve. Actuated by paſſions, he endeavours to eradicate his natural convictions; and, tho' it is impoſſible for him not to have them, he neglects to regulate his conduct by them. Hence, philoſophers have been led to enquire into the original foundation of moral obligation, or into the reaſons which ought to induce mankind to obſerve the Law, or to do their duty *. An enquiry, which is important in itſelf. For it will not be pretended, that one ought to do any action without a reaſon or motive ſufficient to prevail on him to do it. Therefore, it muſt be important to ſociety to aſſign the reaſons, which ought to prevail on mankind to regulate their conduct conſtantly by the maxims of the Law of nature. And it is capital in juriſprudence. For the end, which all the Laws, enacted by men, mean to accompliſh, is to bring them to do their duty. But it would be abſurd to want them to do it, if all actions were naturally indifferent. Therefore, it is a *poſtulatum* in legiſlation, that men are bound to do it. Of courſe, it muſt be eſſential in juriſprudence to eſtabliſh morality on a firm foundation. For this reaſon, it may not be improper to beſtow ſome pages on explaining each of the arguments, on which it is founded.

§ 21. The queſtion, then, is, whether are there, in fact, any reaſons ſtrong enough to induce men to obſerve conſtantly the Law of nature, or to be good men? Are there, in fact, any reaſons, which ought to make them prefer certain rules, certain actions to others? Is there any eſſential difference between one action, between one ſyſtem of conduct and another? Is it of no importance to man, whether he acts in one way or in another? Is every action indifferent to him? May he act capriciouſly without obſerving any rule? Or are there rules, which ſufficient reaſons prove ought to be conſtantly obſerved by him?

§ 22. I anſwer, there are: And thoſe, both internal and external, both abſolute and relative. The internal and abſolute are thoſe, which ariſe from the internal conſtitution of man, and are independent of every thing external to him.

To this claſs are referable 1) That antecedent conviction, which every man has of his duty: 2) That approbation, which is conſequent upon the diſcharge of it: 3) The internal joy, which attends it.

The external and relative proceed either from the connexion, which man has with his kind, or from that knowledge, which he has of the will, of the intentions, and of the plans of the Deity.

To the firſt of theſe are referable 1) The conſequences, which dutiful conduct has in procuring the eſteem, the love, and the favour of the world: 2) The patrimonial advantages, which naturally flow from it.

To the ſecond are referable 1) The evidence, which we have that it is agreeable to the will of GOD, we ſhould obſerve the Law of nature; and 2) The aſſurance, which we have of exiſting in a future ſtate, in which every one will be rewarded according to his deeds.

* I ſay, 'the *reaſons*, which ought to *induce* mankind to do their duty.' For it cannot be pretended, that man, who is a free agent, lies under a *phyſical* neceſſity to do it. (§ 15.) Moral obligation is 'the connexion, 'tie, or *nexus* of *motives* with a *free* action.' Thus, it is defined by HEINNECCIUS, *Element. jur. nat. l.* 1. *c.* 1. § 67. *Obligatio eſt nexus motivorum cum actione libera.* Therefore, one is ſaid then to be *obliged*, 'when there 'are good reaſons to *induce* him, or to *determine* him to act?

TITLE IV.

Of the internal and abſolute Reaſons, on which moral Obligation is founded.

§ 23. AMONG thoſe, which I called internal, the firſt ariſes from the definition, which has been explained, (§ 16, 17, 18, 19.). For it is ſuppoſed in it to be evident immediately from the light of nature, that every Law of nature ought to be obſerved by mankind. (§ 19.) This evidence, therefore, and the *antecedent* conviction which every man has of his duty, *before* he acts, are alone ſufficient reaſons to induce him to do it; for it would be abſurd to ſay, that one has not good reaſon to obſerve a rule, which he is conſcious to himſelf, and which it is *evident*, he ought to obſerve. One has, ſurely, good reaſon to do that, which he not only is convinced but cannot hinder himſelf from thinking he ought to do. If one has the conviction, he muſt, ſurely, hold himſelf to be *obliged*, that is, to have ſufficient reaſon for doing that, which he is convinced he ought to do. (§ 20.)

§ 24. The ſecond is ſimilar to the firſt. The firſt is that *antecedent* conviction, which every one has of his duty, *before* he acts. The ſecond is that reflexion, which is *conſequent* upon his conduct; that approbation, which every man has of virtuous conduct, and diſapprobation which he has of conduct that is vicious. For every one, who has done a virtuous action, is conſcious, that he approves of himſelf for having done it. He thinks it was right to do it. He eſteems himſelf, he feels a certain complacency and ſelf-ſatisfaction within himſelf for having done it. This inward approbation is a conſtant attendant on every virtuous action; and is always more lively and more ſtrongly felt according to the degree of the generoſity, goodneſs, or diſintereſtedneſs of the action. Thus, one, who ſupplies the wants of the needy, and makes the heart of him, who was ready to periſh, ſing for joy; who refuſes to take an undue advantage of his neighbour, tho' he has an opportunity of doing it; who ſhews the generoſity of his ſoul by doing ſome extraordinary act of diſintereſted friendſhip; who acts a noble part in defence of his country, of liberty, or of virtue; every one, who acts after this manner, approves of his own conduct, and feels an exquiſite joy on reflecting upon it. 'Tis otherwiſe with one, who has done a vicious action. He diſapproves of himſelf for having done it. He thinks it was wrong to do it. He therefore thinks ill of himſelf on account of it. And he feels this diſapprobation every time he does a vicious action. The diſagreeable feeling is an inſeparable attendant of the unworthy deed. Thus, one, who, amidſt the abundance and affluence of his own good things, ſhuts his ears to the cries of the poor; who ſympathiſes not with the diſtreſſed; who betrays the ſecret of his friend; who is ungrateful to his benefactor; who abandons the cauſe of his country; who exerciſes cruelty to ſuch, as lie at his mercy, or have never done him any harm; who ſcruples not to uſe any means, however flagitious, to accompliſh his wicked ends; a man, who acts after this manner, cannot help diſapproving of himſelf for acting ſo. He thinks ill of himſelf, and cannot hinder himſelf from thinking ſo. Indeed, ſuch is the conſtitution of man, that it is abſolutely impoſſible for any, even the moſt flagitious, of the human kind, in their hearts and in ſincerity, to approve of bad and vicious, and to diſapprove of good and virtuous conduct. For theſe approbations and diſapprobations are intimately interwoven with the human frame; they reſult neceſſarily from it and from the nature of things; and, let men pretend as they pleaſe, they have dominion over the human heart. If, therefore, we would approve ourſelves to ourſelves, it is neceſſary, that we obſerve conſtantly the Laws of nature, and make them the conſtant

ſtant meaſures of our conduct ; for every one, who does a bad action, or is guilty of a tranſgreſſion of the Law of nature, falls into the abſurdity of doing ſomething, which he cannot approve of himſelf for having done. This is, ſurely, a ſtrong reaſon for inducing men not to tranſgreſs it. For one, it muſt be owned, has good reaſon to do that, which he he cannot help approving, eſteeming, and thinking well of himſelf for doing; and to abſtain from doing that, which he cannot avoid diſapproving, contemning, and thinking ill of himſelf for doing.

§ 25. This antecedent conſciouſneſs, which every man has, that he ought to obſerve the Laws of nature, and the internal approbation, which is conſequent upon the obſervance of them, are *ſtrong* motives to induce men to obſerve them. But it muſt be confeſſed, that they cannot be ſaid to be alone of abſolute irreſiſtible authority ; ſince it is eaſy to imagine caſes, in which they ought not to prevail. For inſtance, if mankind had been, or rather, if it had been poſſible for them to have been ſo conſtituted, as to have been firmly convinced, that they ought to do that, which would render them wretched, miſerable, and unhappy, to have approved of themſelves for having done it, and to have diſapproved of themſelves for abſtaining from doing it; if it had been poſſible for them to have been ſo conſtituted, as to have been firmly perſuaded, that they ought not to do that, which would promote their happineſs, peace, and felicity, to have approved of themſelves for having done it, and to have diſapproved of themſelves for neglecting to do it; if men were conſtituted after this manner, it would, ſurely, be abſurd to maintain, that they ought blindly and implicitly to obey the dictates of ſuch a conſciouſneſs, approbation, or diſapprobation; ſince it is, plainly, erroneous. For common ſenſe teaches every man, that his principal aim ought, in all caſes, to be the acquiſition of happineſs, and that he ought to do thoſe things, which are the neceſſary means, in order to conduct him to that end. Every thing, therefore, which not only is not conducive to his felicity, but is even the cauſe of ill, ought to be avoided by him. For no propoſition can be clearer than this, that a being, which is capable of feeling pleaſure and pain, and to whoſe nature deſire of happineſs and averſion to pain muſt, therefore, be eſſential, ought to uſe the means neceſſary for making him happy, and to do thoſe things, and thoſe things alone, which will contribute to it. Therefore, he ought not to follow blindly and implicitly his own conſciouſneſſes, approbations, diſapprobations, or imaginations. In caſe he learns by experience, that they would perſuade him to do things, which will be prejudicial to his felicity, he ought not to give obedience to their dictates, but ought to endeavour to counteract them, and to hinder himſelf from being miſled by them.

But happily for human kind, the natural ſenſe, which they have of their duty, and the approbations, which are neceſſarily conſequent upon the diſcharge of it, are connected with their intereſt. Their natural feelings, notions, biaſſes, inclinations, Ideas of their own conduct, lead them to that point, to which the Law of nature directs their courſe, and at which their felicity is to be found. For they are themſelves ſo framed, ſuch is the conſtitution of things, that thoſe actions, which they have an antecedent conviction they ought to do, and which they approve themſelves for doing, are thoſe very actions, which lead them in the direct and unerring road to true happineſs. A truth, ſo important, deſerves particular attention. It is capable of being proved in ſeveral different ways. But I ſhall content myſelf with one of them, and ſhall endeavour to ſet it in that light, which appears to be the cleareſt and the ſtrongeſt, in which it is poſſible to ſet it.

§ 26. If we attend to the *phænomena* of the material univerſe, we ſhall ſoon remark the conſtancy, with which they exiſt. The ſame effects are obſerved to follow conſtantly from the ſame cauſes; ſimilar effects from ſimilar cauſes; different effects from different cauſes; and oppoſite effects from oppoſite cauſes.

Hence,

Hence, we are led to conclude, that there is a neceſſary connexion between the cauſe and the effect; that the exiſtence, the actions, and the paſſions of matter are the reſult of its conſtitution; that they depend upon it alone; and that they are, therefore, neceſſary; and are independent on the will of any created being. This principle it ſeems reaſonable to extend over the whole creation, to the effects, which ariſe from the actions of free and intelligent agents, as well as to thoſe, which ariſe from the actions of matter on itſelf, and that, not only to thoſe effects, which ſuch actions have on other external beings, but alſo to thoſe, which they have on the free and intelligent agents themſelves. The nature of things ſeems to be ſtubborn, conſtant, and inflexible. It admits not of any other than *one determinate* effect of *one determinate* cauſe. Every cauſe produces one, and *only* one effect, relative and adequate to it. No other than this *preciſe* effect can poſſibly be produced by it. Thus, a billiard-ball of a given ſhape, of a given kind, of a given quantity of matter, lying at reſt on a given ſurface, if it is ſtruck by another ball, which is alſo of a given ſhape, of a given kind, of a given quantity of matter, and moves in a given direction with a given velocity, muſt, after receiving the ſtroke, move or exiſt in one certain, preciſe, determinate way, and in no other. This way, in which it muſt exiſt, may eaſily, from the *hypotheſis*, be determined by the laws of motion and of mechaniſm. For on theſe laws it depends; and they muſt continue the ſame, as long as the nature of matter and of things continues the ſame. Two numbers, multiplied by one another, produce a third number, which is called their product, and is as certain, preciſe, and determinate, as the factors are themſelves. After the ſame manner, every action of a free and intelligent agent produces a certain effect, and no other, both on the agent himſelf and on other beings. Of courſe, the effects of good, and thoſe of bad actions are certain, determinate, and neceſſary. In order, therefore, to diſcover them, we have no more to do, than to conſult experience. For, if it informs us, that certain effects reſult from them, we may pronounce with the greateſt aſſurance, that thoſe effects are neceſſary. Now, the effect of good actions is to promote the happineſs of mankind, both internally and externally, both as they are individuals, and as they are connected with other men. Bad actions produce effects directly oppoſite. The conſtant effect of them is miſery and wretchedneſs within, and the being expoſed to them from the world. Thus, intemperance naturally and neceſſarily produces diſeaſes and bodily pain. It impairs the underſtanding, weakens the rational faculties, and ſhortens the days of the intemperate man. Every imprudent, every unjuſt, every mean, every cowardly, every ungenerous, every cruel action is followed with ſorrow, with regret, with anguiſh, with pain, with remorſe. The man who does it, feels within him the puniſhment of his guilt. A puniſhment, which is, in all caſes, proportionable to the turpitude, the demerit, the immorality of the action. One does ſomething, which is imprudent. He reflects upon it, is aſhamed of himſelf, and feels great uneaſineſs for his folly. Time and more prudent behaviour make him believe, it is both forgotten and forgiven by others. Thus, he becomes gradually eaſier than he was. But every time, at which he reflects upon it, he is uneaſy. A cruel, a diſhoneſt, a treacherous action produces anguiſh and a dreadful remorſe. It is attended with the moſt conſtant and the moſt gauling reflexions. The tormenting remembrance of it never fails to recur continually, with redoubled fury, and, like a fiend, to haunt the guilty wretch. In ſhort, nature has annexed to every vicious, wrong, or unnatural action a certain ſting, as its neceſſary and conſtant effect.

From hence it follows, that the miſery of life muſt be proportionable to the number of vicious actions, which are done during it. For every vicious action has its own ſting, its peculiar portion of miſery annexed to it. Of courſe, the more vicious actions are done by one, the more frequent muſt be thoſe ſtings, which are the neceſſary conſequences of them. A ſmall number of vicious actions

ons muſt be productive of a quantity of pain proportionably ſmall. A great number of vicious actions muſt be productive of a quantity of pain proportionably great. If life is no more than a ſeries of vicious actions, if it is *a courſe* of vicious conduct, it muſt be wholly wretched and miſerable. So that vice is the natural and neceſſary cauſe of miſery, and is attended by rack and torture both of body and of mind.

Virtue, on the contrary, is the conſtant and the neceſſary cauſe of happineſs and peace of mind. Every virtuous action is productive of a pleaſant ſenſation. A man is *happy* for having done it. Not only is he free from the miſery conſequent on vice, but he feels a ſtrong poſitive enjoyment, proportionable to the degree of the virtue of the action. Thus, one, who does not exceed thoſe bounds which nature, reaſon, and temperance preſcribe, not only uſes not to be tormented with thoſe pains and diſeaſes, which flow from intemperance and debauchery; but he enjoys an uninterrupted ſerenity and a ſincere joy, which the intemperate never know. By never over-doing, he taſtes thoſe pleaſures, which ſenſual things are capable of affording, in the higheſt degree. One, who relieves an object of diſtreſs, does generouſly by his friend, or acts a worthy part in the cauſe of his country, feels an extaſy ſuperior to that of every ſenſual enjoyment. In ſhort, every good, every natural, every virtuous action is the cauſe of a certain portion of felicity to him, who does it. Of courſe, the felicity of life muſt be proportionable to the number of virtuous actions done during its continuance. The more virtuous actions one does, the more joys muſt he feel. A ſmall and infrequent number of virtuous actions muſt be productive of a quantity of happineſs proportionably ſmall. A great number of virtuous actions muſt be productive of a quantity of happineſs proportionably great. And an infinite, pure, and unmixed number of virtuous actions muſt be productive of a quantity of happineſs infinitely great. Therefore, a life, which is no other than one *ſeries* of virtuous actions, which is a *courſe* of virtuous conduct, muſt be *perfectly* happy. So that, a life of virtue may be ſaid to be a life of pleaſure. A pleaſure, which, the more frequently it is taſted, the more keenly it invites the appetite. A pleaſure, which never cloys, never ſates the palate, and the more it is indulged, inſtead of palling on the mind, becomes continually more and more agreeable. 'Tell 'me, my friend,' ſays THEOCLES in the *Rhapſody*, 'if ever you were weary of 'doing good to thoſe you loved? Say when you ever found it unpleaſing to ſerve 'a friend? Or whether, when you firſt proved this generous pleaſure, you did not 'feel it leſs than at this preſent, after ſo long experience? Believe me, PHILOCLES, 'this pleaſure is more debauching than any other. Never did any ſoul do good, 'but came readier to do the ſame again, with more enjoyment. Never was love, 'or gratitude, or bounty practiſed but with increaſing joy, which made the practiſer ſtill more in love with the fair act. Anſwer me, PHILOCLES, you who are 'ſuch a judge of beauty, and have ſo good a taſte of pleaſure; is there any thing 'you admire, ſo fair as friendſhip? or any thing ſo charming as a generous 'action? What would it be, therefore, if all life were in reality but one continued friendſhip, and could be made one ſuch entire act? Here ſurely would be 'that fixed and conſtant good you ſought, or would you look for any thing be'yond *.'

If more were neceſſary to prove the happineſs which attends on virtue, I might ſay, it is ſtrongly marked in that, which ſeems to be the true ſolution of the celebrated queſtion, concerning the cauſe of the pleaſure ariſing from *tragical repreſentations* of human woe. I know, curioſity, vanity, faſhion, idleneſs, ſociality, love, and many other things conſpire to make men take delight in going to the theatre, as they do in making them go to other public places. But the high pleaſure, which the attentive are conſcious they feel from the entertainment itſelf, is a different thing, and proceeds from another ſource. It ariſes from

* See Lord SHAFTESBURY's Enquiry concerning virtue or merit, in which his Lordſhip demonſtrates, virtue to be that, by which alone man can be happy, and without which he muſt be miſerable.

hence, that their affections are brought, by the art of the Poet and that of the Actor, into a ſtate highly virtuous. The ſentiments expreſſed, the actions done, the characters marked, the dignity maintained by the perſonages introduced into the piece; theſe, aſſiſted by the charms of eloquence, by energy of action, and by propriety of decoration, work up the mind into the moſt powerful as well as the moſt agreeable enthuſiaſm. We pity the diſtreſſed; we love our country; we admire heroiſm; we hate vice; we are enamored of virtue. The ſofteſt and moſt tender emotions take poſſeſſion of our hearts. And, thus, we are made to feel the ſincereſt joy *.

§ 27. Since, then, vice is the neceſſary cauſe of miſery, and virtue is the neceſſary cauſe of happineſs, it is plain, that men have the beſt reaſons to obſerve the laws of nature, and to lead virtuous lives; for, happineſs being both deſirable in itſelf, and actually deſired by all mankind, every thing, which tends to promote it, ought to be done, and every thing, which will be cauſe of unhappineſs, ought to be avoided. One has, ſurely, good reaſon to do that, which will make him happy.

§ 28. I ſay, vice is the *neceſſary* cauſe of ill, and virtue is the *neceſſary* cauſe of good; for the connexion, which ſubſiſts between them, is neceſſary. It ariſes from the nature and the eternal relations of things. Therefore, it is independent on the will even of the Deity, the firſt cauſe and Author of the world. For thoſe relations were coeval with himſelf. They exiſted in the divine mind from all eternity. Therefore, they were coexiſtent, coeternal, and coindependent with himſelf; for they were no more than modes of his exiſtence. Of courſe, he was neceſſitated, from the moral perfection of his nature, to act according to them. It was, therefore, neceſſary, that every creature, made by him, ſhould participate of theſe relations, and ſhould be created according to them. Of courſe, it was impoſſible for him to conſtitute a being ſo, that vice ſhould be its happineſs and virtue its miſery; for it was morally impoſſible for him to do an ill action, or to diſregard, in any part of his conduct, thoſe eternal relations, which were coexiſtent modes of his own eſſence. Of courſe, it is vain for men to imagine, that the nature of things, and their own conſtitution might have, at firſt, been created other than they are; or that they may ſtill be altered by the firſt and ſupreme cauſe, the Author of the world.

But, ſuppoſe they could, this capricious power of creation would not avail them in this argument; for it turns not upon what *was poſſible*, but upon what *is*, not upon what God *might have done*, but upon what he *has done*. Therefore, ſince he has made nature ſuch as it is, it muſt, ſuch as it is, have effect upon us; for we know well, that the nature, the eternal relations, the conſtitution of things cannot be altered by the caprices, whims, and paſſions of mankind.

TITLE V.

Of the Conſequences, which dutiful Conduct has in procuring the Eſteem, the Love, and the Favour of the World; and of the patrimonial Advantages, which naturally flow from it.

§ 29. THE reaſons, which have been brought to prove, that men are bound to obſerve the laws of nature, may be called *abſolute* (§ 22); becauſe they would have authority over every individual, tho there was not upon earth any

* The cauſe aſſigned above for this *phænomenon*, is different from that given of it by L'Abbe Dubos, in his *Reflections Critiques ſur la Poeſie & ſur la Peinture*, by Mr. de Fontenelle in his *Reflections ſur la Poetique*, by Mr. Hume in his diſſertation 'of Tragedy,' and by the Author of 'Eſſays on morality and natural religion.'

any other man than himſelf. 'Tis true, he would not, in this caſe, have it in his power to obſerve *every* law of nature; becauſe the relations, which are neceſſary in order to make it poſſible for one to obſerve them, do not, in this ſuppoſition, ſubſiſt. Suppoſe, for inſtance, a man to be left alone on a deſert Iſland, where he had no companions but the brutes, he could not, in that caſe, have an opportunity of doing juſtice to others; of behaving honeſtly in his dealings with them; of acting a worthy part in duty to his country; or of doing any other thing, which *implies* intercourſe with other men. But he would have it in his power to obſerve the Laws of nature, ſo far as his opportunities extended. He would, indeed, every man muſt always have occaſion to do thoſe things, which are conducive to his own private happineſs. He would have it in his power to be either temperate or intemperate, to employ his time either in uſeful and ſublime contemplations, or in trifling amuſements, or in eating, drinking, and ſleeping alone. Beſides, he would have it in his power to diſcover the goodneſs of his temper by doing kind offices to the *brute* creation. In ſuch circumſtances, therefore, he would have reaſon to obſerve the laws of virtue and of nature, ſo far as his opportunities extended: becauſe he would be ſenſible, that he ought to obſerve them, becauſe he would approve himſelf for having obſerved them, and becauſe the obſervance of them would contribute to his happineſs.

But there are other reaſons, which I called external and relative, (§ 22.), and which may have great force in prevailing on mankind to be conſtant in the obſervance of the Law of nature. Theſe remain all of them to be explained in their order. I ſhall treat, in this Title, of the advantages, which are conſequent on virtue in the world.

§ 30. Man is not a ſolitary being. He is formed by nature to live in ſociety, to extend his connexions in it, and to have intercourſe with his kind. Of courſe, his actions muſt have an effect upon them as well as on himſelf. They muſt make certain impreſſions upon them, raiſe certain Ideas in their minds, and lead them to form certain opinions concerning him.

But he is not unconcerned about the opinions which others may have of his character. One of the ſtrongeſt deſires, paſſions, or inclinations, which make a part of the human conſtitution, is the deſire of eſteem. Every man muſt be conſcious to himſelf, that he wiſhes to be eſteemed by his kind. He is anxious, that others think well of him; and he is uneaſy, if he diſcovers, that they think ill of him. A mark of contempt, by which he is made underſtand, that they have a mean, a contemptible, or a bad opinion of him, ſtrikes him to the heart. This deſire is a primary and an original one. That is, it is one of thoſe primary, original, and immediate deſires, which men want to have ſatisfied, *without conſidering*, whether the ſatisfaction of it will or will not contribute to their felicity. It is like hunger, it muſt be ſatisfied. Man muſt feel it, and be influenced by it. He needs not be ſhewn the reaſonableneſs of gratifying it, in order to be perſuaded to yield to the call of nature. The violence of the appetite is more powerful than a thouſand arguments. Indeed, it is ſo ſtrong, that more than a thouſand arguments would be neceſſary to perſuade one not to gratify it. But, if we would be eſteemed, it is neceſſary to uſe the means of acquiring eſteem. If we cannot be eaſy in the thought of being diſeſteemed, we muſt abſtain from thoſe actions, which will make us be contemned. Now, nothing is more certain, than that one is always eſteemed for doing a virtuous action. For every man eſteems virtue, and, of courſe, thinks well of him, who practiſes it. The eſteem is proportionable to the virtue of the action. The more noble the action, the higher the eſteem which it procures to him, who does it. And the more virtuous actions one does, the more reaſon does he give others to think well of him. The moral character, therefore, of every man muſt be proportionable to the tenor of his conduct, and to the number of virtuous actions done by him. If the number of them is ſmall, the degree of his reputation will be proportionably ſmall. If the number of his virtues is great, the degree of his reputation

tation will be proportionably great. If it could be infinite, if his virtue were perfect, if *all* the actions which he did were virtuous, and if he did all, which the higheſt ſenſe of duty required him to do, his character would be morally perfect. He would not only be eſteemed, but be admired. Even the vicious would not be able to hinder themſelves from doing juſtice to his character.

Again, every one, who obſerves another do a vicious action, thinks ill of him on account of it. Therefore the more vicious actions one does, the worſe will be his character: for he gives others the more reaſon and the more occaſion to think ill of him. So that the badneſs of his moral character muſt be proportionable to the number of bad actions done by him. If the number of his vicious actions is ſmall, the badneſs of his moral character will be proportionably ſmall. If the number of his vicious actions is great, the badneſs of his moral character will be proportionably great. If all his actions are bad, and he not only never omits, but even ſeems to delight in ſeeking opportunities of doing ill, his character will be altogether bad.

§ 31. I mean not to ſay, that nothing but virtue is eſtimable. Nothing leſs. For nothing could be more abſurd. Wiſdom, knowledge, genius, prudence, wit, judgment, in ſhort every quality, which may be uſeful either to one's ſelf, or to others, is valuable, is worthy of eſteem, and adds to the merit of the man poſſeſſed of it. For it makes his character more perfect than it would be without it. But of all qualifications virtue is the moſt eſtimable. It not only does not diminiſh the eſteem, which one deſerves on account of his other talents, but adds luſtre to them. No doubt, genius will be genius, judgment will be judgment, learning will be learning, and abilities will be abilities, whether they are poſſeſſed by a good or by a bad man; and will, naturally, command a certain degree of reſpect and of eſteem, becauſe they are always more valuable than their contraries. But the eſteem, which they will procure, will be much leſs, if they are employed to bad purpoſes, than it would be if they were employed to good ones. 'Tis in thoſe caſes alone, in which they are employed to virtuous ends, that they acquire the greateſt poſſible meaſure of eſteem, with which they can expect to meet. Therefore, in all caſes, in which one has to chuſe between two different actions, a good and a bad one, he ought to prefer that one, which is virtuous, if he deſires to be really eſteemed; for the good is incomparably more eſtimable than the bad one. No doubt, a vicious action, which is indicative of an extraordinary extent of parts, will be admired. But ſtill it will be no more than the abilities, the genius, the parts, diſcovered by it, which ſhall be admired. Theſe will be carefully diſtinguiſhed from the morality or the virtue of the action. A man may diſcover great abilities in the formation and in the execution of fine ſchemes to betray the intereſt of his friend, to deſtroy the liberty of his country, to diſturb the peace of the world, or to ſatisfy the violence of a cruel or revengeful temper. But he will not thereby acquire real eſteem. On the contrary, he will be diſ-eſteemed; and that, proportionably to the flagitiouſneſs of his conduct.

Beſides, in all caſes, it may be ſaid, that every individual, poſſeſſed, as he muſt be, of a determinate portion of natural endowments, peculiar to himſelf, will be more eſteemed for *adding* virtue to them, and regulating his conduct by its dictates, than he could otherwiſe be. Therefore, every man ought to obſerve thoſe laws, ſince by obſerving them he will add to the eſteem, which he merits on *other* accounts, and by neglecting the obſervance of them he muſt leſſen it.

§ 32. But virtue has, in one reſpect, the advantage of every other endowment. Wiſdom, learning, parts, may procure eſteem. It is virtue alone which can procure love. A man may diſcover the greateſt extent of parts. But, if he employs them to bad purpoſes, he will not be able to hinder himſelf from being hated. 'Tis otherwiſe with good men. Every body likes a good man. Every one wiſhes well to him. No body hates him. Good men, therefore, have

all

the world for their friends. All are willing to ſhew their kind affections to-
rds them*. Of courſe, they will be more concerned about their happineſs than
ut that of bad men; and will be more diſpoſed to do good offices to them.
r we are naturally diſpoſed to do good to thoſe, whom we love; and
h more cheerfulneſs, exert ourſelves in behalf of them than of others.
this reſpect, therefore, good men have greatly the advantage of the bad.
r every body naturally hates vice and vicious men. The workers of iniqui-
are abhorred. By conſequence, they cannot expect to be regarded, with the ſame
rmth of affection, or to meet with the ſame favor, with good men. Their
ereſt will be leſs conſidered; people will not be ſo much concerned about it;
l will not be ſo forward to do them good offices, or ſo willing to beſtow
ors upon them. Of courſe, if intereſt is to be the motive of human conduct,
ſhall find it alſo concurring with others to induce men to the obſervance of
e Law of nature. All conſpire to the ſame end; all terminate in one view;
lead to the ſame point. A good man bids fairer than an ill one to ſucceed
life; becauſe both his views, and the means which he uſes to accompliſh them,
lawful and honeſt. Mankind are fond of lending aid to his endeavours and
aſſiſting him in executing his ſchemes; becauſe every body is well-affected to
intereſt; for no body has reaſon to be ill affected towards it. How different,
this reſpect, is the condition of good, from that of bad men! While the for-
er, not only being never diſpoſed to injure, but having conſtantly endeavour-
to promote the happineſs of the Creatures of GOD, are conſcious to themſelves,
t they deſerve ill of none, and well of every the loweſt of mankind, for whoſe wel-
re they have ſo warm a concern and ſo tender a regard, the wicked, conſcious how
ey are ill-affected to their fellows, expect the deſert of their vicious affecti-
s, and live in perpetual dread of ſuffering what they well know the maligni-
of their hearts makes them merit.

§ 33. At the ſame time, it muſt be confeſſed, that, if one can impoſe upon
e world, and make people believe him to be a virtuous, when he is, in truth
d at bottom, a bad man, his deceit will ſerve the ſame purpoſe with the reali-
; ſince it is opinion, which muſt govern mankind; and, ſo they have form-
it, it matters not, whether it be true or falſe, whether it be well or ill found-
. It muſt produce the ſame effects upon them.

But it is no leſs true, that one muſt be very cautious, in order to hinder his
poſture from being detected. And it is odds, if all his caution will avail.
is impoſſible for one to be always on his guard. It is difficult to act a part,
thout being liable to be diſcovered. Nature cannot be ſo exactly imi-
ed, that the imitation will not ſometime be detected to be no more than an
itation. Few copies bear ſo preciſe a reſemblance to their originals, as not to
diſtinguiſhable from them. Nature has a manner peculiar to itſelf. And,
one ſpeaks a language foreign to his heart, 'tis odds, but his cold tone, his un-
tural manner, his conſcious looks, his very vanity will betray him. Men
ve penetrating eyes. Sincerity has a manner eaſily diſtinguiſhable from one,
hich is affected. People from ſmall matters may take the hint, and upon en-
iry may find their ſuſpicions well founded. For this reaſon, men ought to ob-
rve the Laws of nature and of virtue; becauſe it is real, true, and genuine
rtue, which can alone, with certainty, produce the deſired effects.

§ 34. I would not be miſunderſtood. For it would beſpeak very little know-
dge of the world for one to ſay, that virtue muſt, in *all* caſes, be ſucceſsful in
Nothing is more contradictory to experience. Bad men frequently attain
eir ends better than good. They riſe higher in life, acquire larger eſtates, and
t more honours conferred upon them. But a few exceptions will not alter

* I mean not to ſay, that every one, who is poſſeſſed of *ſome* good qualities, muſt be beloved by *all* mankind.
e characters of men are uſually mixed, partly good, partly bad. Of courſe, a man, poſſeſſed of *ſome* good
lities, may be hated on account of the bad qualities, for which he is remarkable; for it is only the virtuous
ts of a character which are lovely; the vicious ones muſt be odious. Beſides, wicked men hate virtue. Con-
uently, they hate virtuous men.

the truth of the general rule. A man, who intends to go to the high-way, may ſometimes meet with a purſe. But will he make, is he *ſure* of making, ſo much money, as one may do by following his *lawful occupation?* Is his heart ſo much at eaſe? Is he never anxious about his perſonal ſafety? Is he ſuſpicious, afraid of all mankind? Does he eat his meat, and take his reſt in quiet? Is he ſecure, that he will not be diſcovered? And, if he is diſcovered, does he not bid fair to ſuffer a violent, an ignominious, an unnatural, and an untimely death? A man may happen to cheat his neighbour, and to enrich himſelf by fraud. But is he ſecure of being able to accompliſh his end? The ways of vice are crooked. Its paths are ſlippery. One may be detected, when he is leaſt ſuſpecting it. And, if he is detected, what are the conſequences? Contempt, infamy, and, frequently, poverty. Therefore, it may be affirmed to be the ſureſt way of ſucceeding, at leaſt, in the *ordinary* occupations of life, to deal honeſtly, and to obſerve the laws of virtue. People are afraid of dealing with diſhoneſt men. They are not ſure of them. They may be impoſed on by them. Thus, the wicked are by degrees abandoned by all mankind. The conſequence is, the loſs of buſineſs as well as of character.

Nay, if we attend impartially to the *political* life, in which it is generally thought to be impoſſible to ſucceed by other than the moſt flagitious means, we ſhall find, that this opinion is not ſo true, as it is commonly believed to be. Thus much will not be denied, that a man, in order even to acquire power, muſt at leaſt *put on* a fair external appearance. He muſt *pretend* to be honeſt, and to mean well; and, by the decency of his public behaviour, muſt make the world believe, that he does ſo. One, who ſhould diſregard all appearances, all decency, all character, would ſoon find, that he had acted an imprudent part, and would ſuffer for his folly. But, if a fair outſide is ſo uſeful, ought not the reality to be more ſo? Surely. In fact, you ſhall find, that in all caſes, in which an honeſt man has had the inclination, and has diſcovered that he had abilities to diſcharge the offices of public life, he has acquired that influence, which he deſired. What under heaven ſhould make men averſe to thoſe, who have the public intereſt at heart? What ſhould diſpoſe them to prefer to them miniſters, who have none but ſelfiſh views? 'Tis true, abilities are neceſſary for the diſcharge of the duties of public life. A man, who is not equal to an office, ought not either to get or to aſpire to it. But if one has abilities, he will ſucceed by honeſt, as well as another, poſſeſſed of no greater talents, will do by diſhoneſt means. And, if at any time we obſerve bad men getting the better of the good, and ſucceeding extraordinarily in life, we ſhall always, on enquiry, find, that it could not be otherwiſe, and that there were, in truth, natural cauſes of it; and theſe ariſing either from the temper or from the conduct of the *unſucceſsful* themſelves. Either the latter were indolent, and were not ſo active as their adverſaries. Nothing can be got for nothing; every thing muſt be purchaſed by labour; the Earth does not bear fruit without culture; a man cannot attain an end, if he remains with his folded arms, without uſing the means neceſſary to attain it. Or they have had vices, which overbalanced their virtues, or, at leaſt, diſguſted the world at them. Mankind cannot endure to be ill-uſed. No ſuperiority of parts will make them bear it. Gentle, ſoft, complacent manners are the moſt engaging. One, who wants them, is haughty, and in every word indicates his conſciouſneſs of his own ſuperiority, muſt not expect to be popular, or to have the good-will of mankind. His friends, thoſe, who know the warmneſs and the integrity of his heart, may bring themſelves to bear with his failings. But the bulk of men, judging from external appearances alone, will not be able to put up with them. They will be diſguſted; and will, therefore, ſeek the friendſhip of men, who can render themſelves more agreeable.

'Tis true, experience informs us, that thoſe, who acquire power, and figure in public buſineſs, ſometimes both acquire and maintain their influence by baſe means alone, and that virtuous men do not always arrive to the firſt places in any State.

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The reaſons are not remote, and muſt occur immediately to every one who attends to the condition of human affairs. Power or influence is not originally a deſirable object, and were it not for that *ſuperiority* which it beſtows on thoſe *diſtinguiſhed* by it, would not be much courted by mankind. It gives one, 'tis true, an opportunity of being uſeful in life: but it deprives him at the ſame time of the power of enjoying himſelf, and obliges him, beſides, to beſtow his attention on a thouſand trifles which can in no ſort intereſt him. Hence thoſe who have been thought by philoſophers to have the beſt taſte of life and reliſh its tranquillity, are not the moſt ambitious of exalted ſtations; and can ſeldom ſubmit to employ the means neceſſary for arriving at them. Man is a capricious animal, and he cannot penetrate into the breaſts of others; external pomp attracts his regards; the poſſeſſion of riches produces therefore the moſt abſurd prejudices in favour of the rich; and ſociety cannot eaſily be governed without the aid of thoſe arts, which great minds can hardly deign to employ. But men of abilities ſeldom poſſeſs the buſtling humour, becauſe they have ideas ſuperior to it; and thoſe diſtinguiſhed by their buſtling humour are ſeldom men of abilities. Beſides, thoſe poſſeſſed of power are uſually called to it either by the accident of their birth, or by the favour of ſuch as thereby *inherit* it. But the rank to which one is born can have little influence on his perſonal merit; thoſe diſtinguiſhed by their birth are often corrupted by the adulation paid them in their youth; their education is neglected, philoſophers have ſeldom acceſs to them, and thoſe who ſurround them, having not themſelves juſt notions of things, cannot be ſuppoſed to be capable of teaching them to others. Hence they are not, as Lord SHAFTESBURY expreſſeth it, accuſtomed to arraign their fancies; they enter ignorant into the world, and remain great children all their lives. 'Tis ſeldom therefore that their favourites can be ſelected on account of their abilities or their virtues; and it is not ſurpriſing that *good* men do not always obtain their ear. It is not perhaps proper to argue upon general points from particular inſtances: but I cannot help taking notice on this occaſion of the peculiar ſituation of BRITAIN. In it all does not depend on the pleaſure of one man, and the voice of the people is heard. Their ears are open; they liſten attentively to propoſals made them for their good; they may be deceived; but they can be deceived in thoſe caſes alone, in which they are *allowed* to be impoſed on. Endowed with reaſon, they can diſtinguiſh the characters, the deſigns, the ſyſtems, the principles, the conduct of different men; they can judge of them from the *data* which they have; and if they can be made to believe they are abuſed, they will rouſe on neceſſary occaſions, and caſting their eyes on the man formed by nature for the ſervice of his country, will oblige him to be dragged into public life, and make it vain to think of oppoſing him. Hence thoſe qualified by their abilities and by their integrity for public office, have a better chance here than elſewhere to make themſelves both important and uſeful in their country. Honeſty has many advantages; it makes a ſenſible impreſſion on mankind, can bear a ſtrict examination, and being like truth ever conſiſtent with itſelf, can endure every light. 'Tis otherwiſe with diſhoneſty, with folly and with falſhood; theſe are not able to ſtand the teſt, and can be ſupported by impudence and ſophiſtry alone. It muſt therefore be owing to the indolence inability or ſullenneſs of the good, if their influence becomes not in this country ſuperior to that of the bad; and the changes which continually happen are clear proofs of the truth of this doctrine. For by what arts are they uſually effectuated? Thoſe who want to acquire power, which they have not, affect a ſuperior concern for the intereſt of their country, and if they perſevere, are ſteady, and have any ſolid handle for laying bad ſchemes to the charge of thoſe in power, they acquire the confidence of the people; their arguments founded on truth and on the real intereſt of their country, become unanſwerable; thoſe who happen to hold the power in their hands, aſhamed, nay afraid to retain it, let it drop into the hands of others, who retain it as long as they have the integrity to purſue thoſe fair projects on which they had deſcanted before, and continue aſhamed to tread in the ſteps of their predeceſſors. As ſoon as they deviate out of the righteous path, they meet with their opponents in their turn, and are neceſſitated to give way to the vigour of attacks, made on power employed not to the promoting

promoting of public good, but to that of private intereſt alone. Thus power is continually fluctuating; it is taken out of the hands of thoſe who are believed to be bad, and put into thoſe of men believed to be good *.

§ 35. The arguments, which have been brought to prove that we ought to obſerve the laws of nature, ariſe from the conſtitution of man, from the intimate eſſence and from the eternal relations of things. They neither ſuppoſe nor require more than the exiſtence of human kind, and of thoſe other beings, whoſe exiſtence is neceſſary in order to realize the relations of life and to render the variety of human conduct poſſible. Their force therefore is not hypothetical, but abſolute; it depends not on the truth of any *ſuppoſition*. It is the ſame, whether you ſuppoſe or do not ſuppoſe a DEITY to exiſt; for his exiſtence is no part of the hypotheſis, on which they are founded: and it is the ſame whether you ſuppoſe that man ſurvives the ruins of his body and paſſes after death into another ſtate, or that he is annihilated by the diſſolution of the matter of which his body conſiſts. For the reality of a ſtate of future exiſtence is not a *poſtulatum* on which the truth of theſe arguments depends. Were there no other world than that earth which we inhabit, no other beings than thoſe whom we ſee, no other life than that which we at preſent enjoy, man would be bound to obſerve in all his conduct the laws of nature; becauſe he would have a precedent conviction that he ought to obſerve them (§ 23.), becauſe he would approve of himſelf for having obſerved them (§ 24.), becauſe happineſs peace and ſerenity of mind would be conſequent on the obſervance of them (§ 25. *ſqq.*), becauſe he would thereby procure himſelf the eſteem and the favour of others (§ 30.), and becauſe manifold external advantages would accrue to him from it (§ 32. *ſqq.*).

But the force of the arguments, which have been hitherto urged, will be greatly augmented if we conſider we have reaſon to believe both that a DEITY, a firſt and ſupreme cauſe, exiſts, to whoſe will it is agreeable that we obſerve the law of nature; and that we ſhall exiſt in a future ſtate in which we ſhall be conſcious of our identity, ſhall recognize ourſelves to have had an antecedent exiſtence in this world, and ſhall receive, as ſacred writ ſpeaks, according to the deeds done in the body. Theſe are truths not only important in themſelves, but fundamental in philoſophy, in morality, and in juriſprudence; they deſerve therefore to be particularly conſidered.

TITLE VI.

Of the Being and Attributes of GOD; *and of the Connexion, which the Belief of his Exiſtence has with moral Obligation.*

§ 36. THAT which the ſchoolmen have called *cauſality* is a *real* relation, ſuggeſted by every phenomenon in nature; and it has been admitted by all philoſophers, one only excepted, that it is impoſſible for a thing to *begin to be* without a cauſe. There muſt therefore have been a firſt, an original, and an uncreated SOMETHING, which exiſted from all eternity, and derived not its being from any thing external to itſelf, but was ſelf-exiſtent, independent, and eternal. For if we ſhall ſuppoſe a time in which there was nothing, it would have been impoſſible for any thing to have been ever brought into being. Indeed no propoſition can be clearer than this, that there muſt have been SOMETHING from all eternity. It ſeems to be one of thoſe, of the truth of which it is impoſſible to doubt; for it involves an abſurdity to ſuppoſe it to be falſe. How could any thing have ſtarted into exiſtence if there had ever been an inſtant, in which there was nothing? We form our ideas from things which are ſeen, and from them we reaſon about thoſe which are not ſeen. It is impoſſible for us to conceive a change to be produced in nature without a cauſe producing it: it is impoſſible for us to conceive a ſtate of exiſtence to be altered, unleſs ſomething produces the alteration: *a fortiori*, it is impoſſible for us to conceive, that any thing could ever have exiſted, if we ſhall once ſuppoſe a ſtate, in which there was nothing, to have been the real ſtate of

* See Lord Viſcount BOLINGBROKE's letter on the ſpirit of patriotiſm.

of things. Therefore, we muſt hold it to be impoſſible; for all our doubts, all our proofs, all our enquiries muſt ſtop as ſoon as we arrive at a maxim ſo clear, that it is abſolutely impoſſible to doubt of the truth of it *.

§ 37. This SOMETHING, which exiſted from all eternity, was the firſt *Cauſe* of every thing, which has been brought into being; for every change, which happens in nature, muſt be produced by *ſome* cauſe. Therefore, every change which has actually happened in things, muſt, either mediately or immediately, have been produced by the firſt and eternal cauſe; for it could proceed from no other; ſince there was no other, from which it *could* proceed. Every thing, therefore, which has exiſted, may be traced upwards, to this firſt Cauſe; and it may be affirmed, that that SOMETHING, which, it muſt be admitted, *exiſted* from all eternity, was the firſt, the original, and the eternal Cauſe of all things.

It is true, we have not a clear Idea of the power of creation; becauſe we never ſee it exerted. But it is poſſible to form *ſome* Idea of it; for we can ſuppoſe a time, in which we ourſelves, in which our friends, in which ſomething that has become familiar to us, did not exiſt. Again, we can ſuppoſe ourſelves, our friends, and other things exiſting; of courſe, we may conceive, that they were brought into being. In fact, we know the manner, in which animals are produced; and it is going no more than one ſtep farther to ſuppoſe them, or the matter of which they are formed, to have been created.

§ 38. It is impoſſible for men to have clear Ideas of things, which they have not ſeen; I mean, which have not fallen under the review of their ſenſes, either internal or external. Therefore, it is impoſſible for them to have clear Ideas of the Divinity, the firſt and ſupreme Cauſe of all things; for his eſſence is incomprehenſible; the manner of his exiſtence, of his perceptions, of his operations, is involved in obſcurity; 'clouds and darkneſs are round about him.' But by contemplating the univerſe and the things which are ſeen, we may, perhaps, be able to diſcover ſome of the *attributes* of his myſterious eſſence †.

The moſt juſt Ideas of a Cauſe are ever formed from its effects; the ſkill of an artiſt is beſt proved by his works; the deſigns of a creator are beſt diſcovered by obſerving his creatures ‡. In order, therefore, to inveſtigate the *attributes* and the deſigns of the firſt Cauſe, let us ſtudy the page of nature, and ſee, whether the Almighty does not reveal himſelf to us in his works.

§ 39. HE THAT PLANTED THE EAR, SHALL HE NOT HEAR? HE THAT FORMED THE EYE, SHALL HE NOT SEE ‖? 'Tis in theſe emphatic words that the Pſalmiſt invelopes as clear, ſhort, and concluſive an argument, as any, which has ever been brought to prove, that the firſt Cauſe of the univerſe is not brute, inanimate matter, but ſomething poſſeſſed of the faculties of perception, of reaſon, and of intelligence. The Ear was planted in order to make man hear, and the Eye was formed in order to make him ſee **. Therefore, the firſt Cauſe, which planted the Ear and formed the Eye, muſt have had *Ideas*; for he muſt have had an exact Idea of the effect, which he intended to produce, and of the manner, in which he intended to produce it. Of courſe, he muſt have had the faculty of perception, that is, he muſt have been a *percipient* being.

But he muſt have been not only a percipient, but a *deſigning* being; for, having the Ideas of hearing and of ſeeing, he has produced other beings, which are endowed with the faculties of hearing and of ſeeing. Of courſe, he muſt have

* See Traité ſur les Premieres Verités, par Buffier.

† The Wiſdom of Solomon, chap. xiii. ver. 1, 2, 3, 4, 5, 6, 7.

‡ Wiſdom of Solomon, chap. xiii. ver. 5.

‖ Pſalm xciv. ver. 9.

** I own, I never could enter into the notion, which has been taught by LUCRETIUS, by DES CARTES, and by other Philoſophers, that nature had no intentions; that final cauſes are imaginary; and that things were not intended to be applied to thoſe uſes, which have been made of them. See LUCRETIUS, lib. 4. ver. 821. MAUPERTUIS Eſſay de Coſmologie.

formed the *deſign* of producing them; and muſt have been able to *know the means*, by which his deſign was to be accompliſhed. He knew, therefore, that a thing, formed like the ear, would produce the ſenſe of hearing; and that one, formed like the eye, would produce that of ſeeing. The conſtruction of the parts, and their fitneſs to produce the end which he had in view, muſt, therefore, have been *known to him*. He muſt have been capable of forming a ſcheme, of propoſing to himſelf an end, and of having a deſign; that is, he was a *deſigning* being.

But a being, which is capable of deſign and of execution, muſt be rational and intelligent; for he muſt have the faculty of ſeeing, that the means, employed by him, will work the effect, which he deſires to produce. Of courſe, he muſt be able to ſee the connexion, which ſubſiſts between the means and the End. So he muſt be *rational* and *intelligent*.

Thus from this ſimple *phænomenon*, the *percipience*, the *rationality*, and the *intelligence* of the firſt Cauſe are demonſtrated.

§ 40. The rationality of the Deity muſt be *ſuperior* to that of man; for it produces effects, which he is not able to produce. He may vary the relations of matter, and may, by that mean, produce a *machine*. But the effects, produced by him, are merely material; he cannot form a machine, which ſhall hear; he cannot make an eye, which ſhall ſee. Therefore, his rationality muſt be vaſtly inferior to that, which planted the Ear and formed the Eye.

Indeed, the intelligence of man and that of the firſt Cauſe are incommenſurable; for the intelligence of man is limited; that of the firſt Cauſe is infinite. The intelligence of man is itſelf an effect produced by the firſt intelligence; of courſe, it is a ſingular proof of the ſuperiority of the intelligence of the firſt Cauſe. HE THAT TEACHETH MAN KNOWLEDGE, SHALL NOT HE KNOW? He that made man intelligent, ſhall he not underſtand? A Cauſe, able to produce ſuch an effect as is the intelligence of man, muſt itſelf be poſſeſſed of ſuperior intelligence; for it could not otherwiſe have communicated intelligence to man; ſince the power of giving intelligence to another implies more than the poſſeſſion of it. Man poſſeſſes it; but he cannot beſtow it on another; it is a quality, which is perſonal to himſelf, and is not communicable by him; he can create nothing like it; the effects, produced by him, are low, contemptible, and much inferior in dignity to it. Therefore, it muſt have required faculties and powers vaſtly ſuperior to his, to have produced a Creature ſuch as he is; for it is impoſſible to conceive, that no more than the ſame portion of intelligence, which is poſſeſſed by man, would be neceſſary to enable one to form a creature intelligent like him, and, of courſe, to plan the parts of which it behoved him to conſiſt, the relation which it behoved thoſe parts to have to one another, the connexion which it was neceſſary to make ſubſiſt among them, and the manner in which it behoved them to be united, ſo as to conſtitute one individual compound, MAN.

In this manner, an important ſtep is made in the argument, and it is proved, that the firſt Cauſe, the eternal, independent, and uncreated eſſence, was not *brute*, *inanimate matter*, but was *intelligent* and *rational*. If we ſhall proceed to conſider the heavens, and the earth, and the things which are viſible, we will ſoon be ſatisfied, that we have good ground to believe the firſt Cauſe to be *infinitely* intelligent, *infinitely* powerful, and *infinitely* good.

§ 41. Every one, who contemplates the univerſe as an effect, muſt, from its ſurpriſing perfection, be convinced, that the firſt Cauſe, from whence it proceeded, is poſſeſſed of a proportionable degree of perfection. Every one, who ſtudies nature as a work, muſt, from the exquiſite manner, in which it is finiſhed, conceive the higheſt opinion of the ſkill of that work-maſter, who made the world. One, who conſiders it as a machine, muſt, from the wonderful contrivance, with which it is framed, form the moſt exalted Ideas of that Artiſt, who deſigned it. The ineffable beauty of things; the immenſe grandeur conſpicuous in the univerſe;

univerſe; the infinite variety of the works of nature; the prodigious multiplicity of deſigns, which ſhe has in view, and which at one and the ſame time ſhe has to accompliſh; the wiſdom, with which theſe deſigns are carried into execution; the aptitude of the means employed to accompliſh them; the ſurpriſing conſiſtency, which is every where preſerved amidſt the multiplicity of them; and the exquiſite art, with which every thing is contrived; theſe demonſtrate, that that being, who was the firſt Cauſe, was poſſeſſed of an infinite degree of *wiſdom* and of intelligence. They fill the mind of every attentive beholder, and impreſs him with an awful ſenſe of the all-wiſe, almighty, and all-good Sovereign of nature. They not only lead us to imagine, but *convince* us, that the firſt cauſe of all things was ſome infinitely perfect being. And wiſdom, goodneſs, and power being the higheſt perfections, we therefore aſcribe them to that being whom we eſteem moſt perfect, and ſay that the firſt cauſe is *infinitely* wiſe, *infinitely* powerful, and *infinitely* good.

The immenſity of the univerſe implies neceſſarily the immenſity of its Author. Cauſes and Effects muſt ever be reciprocally adequate to each other. The vaſt magnitude of the heavenly bodies; their unmeaſurable diſtances from each other; their wide extent thro' the immenſities of ſpace; the regular arrangement, with which they are diſpoſed; the inconceivable rapidity of the motions, with which they are whirled in their orbs; the uniform conſtancy, with which they obſerve invariable laws; the infinite variety, which enamels the face of nature; theſe are demonſtrative proofs of *the power* of that being, from which all things derive their exiſtence. From theſe *phænomena* we have reaſon to conclude, that a Cauſe, able to produce and to govern ſo vaſt and ſo various a univerſe, muſt be poſſeſſed of *infinite* power, that is, 'muſt be able to do every 'thing, which it is poſſible, from the nature of things, to do.' For it is that, which is meant by the poſſeſſion of infinite power. Thus the infinitude of the *wiſdom* and of the *power* of the firſt Cauſe is demonſtrated.

But ſuperior wiſdom is ever the moſt pregnant ſymptom of an equal degree of goodneſs. It muſt be ſo, in a particular manner, in a being poſſeſſed of infinite wiſdom and of infinite power. For true wiſdom, in its own very nature, either is not different from goodneſs, or at leaſt includes it; ſince a being, which ſees things as they are, muſt know, that that, which is good, is eſſentially better than that, which is evil, and muſt neceſſarily prefer it. Beſides, a being, poſſeſſed of infinite power, cannot have any motive, it cannot lie under any temptation to do ill. From whence we reaſonably infer, that that being, which formed the univerſe with ſupreme wiſdom, and governs it by almighty power, muſt be alſo poſſeſſed of the greateſt *goodneſs*.

§ 42. It will readily be admitted, that the *power* of the firſt cauſe is capable of being proved from the *phænomena* of the material world. But it may, perhaps, be denied, that any concluſive argument can, from them, be brought to prove him to be good. For grant, it may be ſaid, that the natural world is formed with the greateſt art, is it ſenſible of happineſs or miſery? can, therefore, any proof be brought of the benevolent diſpoſition of the Creator and Governor of all things, from the manner, in which he has been pleaſed to form, to diſpoſe, or to govern it? It is of no importance to matter, after what manner it be uſed; ſince it is incapable of being conſcious of its own beauty, or of taſting felicity. Grant, therefore, that the higheſt beauty, order, and art are conſpicuous in the natural world, and that the celeſtial bodies are diſpoſed in the moſt wiſe and the moſt perfect arrangement, what is this beauty, it may be aſked, other than the beauty of a few bowls bigger than ordinary? What is this order other than the regular arrangement of thoſe bowls? What is the art, with which they perform their motions, more than the regular movements of a few tops of an extraordinary bulk? Children amuſe themſelves with bowls, with tops, and with other toys proportionable to their ſtrength. The almighty cauſe, it may be pretended, may be ſuppoſed to have thrown thoſe celeſtial bowls, to have moved the etherial

tops,

tops, and to have arranged his other toys in the order in which they are found, merely to amuſe himſelf, to paſs a liſtleſs eternity. If the animal world, that part of the creation, which is alone capable of feeling pleaſure and pain, be, in many reſpects, wretched and unhappy; is there, can there be any ſolid ground for concluding, that the firſt Cauſe, which governs the univerſe, is a good and benevolent being? The ineffable beauty of the things, what does it ſignify? If a *man* diſcovers, that he has no concern about the happineſs of others; *a fortiori*, if he makes them unhappy, when he has it in his power to make them happy, is there not good reaſon to ſay, that he is an ill, a malevolent man? After the ſame manner, it is from the diſtribution of happineſs among his *living* creatures, that the goodneſs of the Deity can alone be proved. If he has not made them happy; if it is evident, that he is indifferent about their felicity; it matters not, after what manner he has formed, diſpoſed, or moved the material parts of the univerſe. The moſt contemptible inſect, that ſportive wantons in the radiance of the ſun; the meaneſt animalcule, which eſcapes the microſcopic eye; the moſt loathſome reptile, which makes nature ſhrink; deſerves his regard, his attention, his notice, more than all the inanimate matter in the univerſe. If it is miſerable without reaſon, its miſery is a more ſatisfying proof of the malevolence of the firſt cauſe, than the moſt perfect arrangement of all the material univerſe can be of his benevolence.

'De très-grands Eſprits,' ſays Monſieur de MAUPERTUIS *, auſſi reſpectables 'par leur piété que par leur lumières, n'ont pu s'empêcher d'avouer, que la con- 'venance & l'ordre ne paroiſſent pas ſi exactement obſervés dans l'univers, qu'on 'ne fût embarraſsé pour comprendre comment ce pouvoit ètre l'ouvrage d'un Etre 'tout ſage & tout pouiſſant. Le mal de toutes les eſpèces, le diſordre, le 'crime, la douleur, leur ont paru difficiles à concilier avec l'Empire d'un tel 'maître.

'Regardez, ont-ils-dit, cette Terre; les mers en couvrent la moitié; dans le 'reſte, vous verrez des rochers eſcarpés, des régions glacées, des ſables brulans. 'Examinez les moeurs de ceux qui l'habitent; vous trouverez le menſonge, le 'vol, le meurtre, & par tout les vices plus communs que la vertu. Parmi ces 'Etres infortunés, vous en trouverez pluſieurs deſeſpérés dans les tourmens de la 'goutte & de la pierre; pluſieurs languiſſans dans d'autres infirmités que leur 'durée rend inſupportables; preſque tous accablés de ſoucis & de chagrins.'

§ 43. It would be painful to go into the detail, and to recount the miſeries of human life.

Ah little think the gay licentious proud,
Whom pleaſure, power, and affluence ſurround;
They, who their thoughtleſs hours in giddy mirth,
And wanton, often cruel, riot waſte;
Ah little think they, while they dance along,
How many feel, this very moment, Death
And all the ſad variety of pain.
How many ſink in the devouring flood,
Or more devouring flame. How many bleed,
By ſhameful variance betwixt man and man.
How many pine in want, and dungeon-glooms;
Shut from the common air, and common uſe
Of their own limbs. How many drink the cup
Of baleful grief, or eat the bitter bread
Of miſery. Sore pierc'd by wintry winds,
How many ſhrink into the ſordid Hut
Of chearleſs poverty. How many ſhake
With all the fiercer tortures of the mind,

Unbounded

* Eſſay de Coſmologie—avant propos.

Unbounded paſſion, madneſs, guilt, remorſe,
Whence tumbled headlong from the height of life,
They furniſh matter for the tragic muſe.
Even in the vale, where wiſdom loves to dwell,
With Friendſhip, Peace, and Contemplation join'd,
How many, rack'd with honeſt paſſions, droop
In deep retir'd diſtreſs. How many ſtand
Around the death-bed of their deareſt friends,
And point the parting anguiſh. Thought fond man
Of theſe, and all the thouſand nameleſs ills,
That one inceſſant ſtruggle render life,
One ſcene of toil, of ſuffering, and of fate,
Vice in his high career would ſtand appall'd,
And heedleſs rambling impulſe learn to think;
The conſcious heart of charity would warm,
And her wide wiſh benevolence dilate;
The ſocial tear would riſe, the ſocial ſigh;
And into clear perfection, gradual bliſs,
Refining ſtill, the ſocial paſſions work*.

* THOMSON's Winter, l. 323 Mr. Gray in his admirable Ode 'on a Proſpect of Eton College,' ſpeaking of the boys at ſchool, has ſome verſes which are appoſite to the preſent argument, and have often moved me.

Alas, regardleſs of their doom,
The little victims play!
No ſenſe have they of ills to come,
Nor care beyond to-day.
Yet ſee how all around 'em wait
The miniſters of human fate,
And black misfortune's baleful train!
Ah, ſhew them where in ambuſh ſtand
To ſeize their prey the murth'rous band!
Ah, tell them, they are men!

Theſe ſhall the fury paſſions tear,
The vulturs of the mind,
Diſdainful anger, pallid fear,
And ſhame that ſkulks behind;
Or pining love ſhall waſte their youth,
Or jealouſy with rankling tooth,
That inly gnaws the ſecret heart,
And envy wan, and faded care,
Grim-viſag'd comfortleſs deſpair,
And ſorrow's piercing dart.

Ambition this ſhall tempt to riſe,
Then whirl the wretch from high,
To bitter ſcorn a ſacrifice,
And grinning infamy.
The ſtings of falſhood thoſe ſhall try,
And hard unkindneſs' alter'd eye,
That mocks the tear it forc'd to flow;
And keen remorſe with blood defil'd,
And moody madneſs laughing wild
Amid ſevereſt woe.

Lo, in the vale of years beneath
A grieſly troop are ſeen,
The painful family of Death,
More hideous than their Queen:
This racks the joints, this fires the veins,
That every laboring ſinew ſtrains,
Thoſe in the deeper vitals rage:
Lo, Poverty, to fill the band,
That numbs the ſoul with icy hand,
And ſlow-conſuming rage.

To each his ſuff'rings: all are men;
Condemn'd alike to groan,
The tender for another's pain;
Th' unfeeling for his own.

But not only the human, every other animal kind *ſeem* to be ill-uſed by nature. What ſmall account is made of the brute creation! How little concern about the preſervation of animal life! How ſmall regard is had to their happineſs! How cruelly are they abuſed, with what inhumanity are they treated by mankind! How far are they from enjoying thoſe happy lives, of which their natures are capable! What horrid infractions are continually made of the Laws of nature, with regard to them! How injuriouſly, how wantonly, how unlawfully do mankind ſport themſelves with their peace, their felicity, and their lives!

Such melancholy proſpects of the hapleſs ſtate of animal kind are apt to diſtract the mind, and to awaken ſcruples in the breaſts even of ſuch, as have the moſt firm confidence in the benevolent intentions of Providence. One would be apt to conclude, that, ſince the animal world, which is alone capable of being happy or miſerable, is, in many reſpects, miſerable and unhappy, there is little reaſon for affirming, that benevolence, goodneſs, and mercy are meaſures by which the government of the Univerſe is conducted. In this manner we may ſuppoſe even a good man at ſome times to reaſon about ſome appearances in nature.

But it is not impoſſible to give a more favorable view of Providence, and to juſtify the ways of GOD to man.

§ 44. Every one, who attends to the conſtitution and to the condition of animals, muſt obſerve, that the organs, with which they are formed, appear plainly to be intended for certain natural uſes, and for them alone; that they are capable of procuring all the different kinds of pleaſure, which thoſe, poſſeſſed of them, deſire; that they do actually procure it, in caſe they are reſpectively applied to their natural uſes; that the deſires, with which animals are actuated, are proportioned to the powers, which they have of gratifying them; and that the powers, with which they are endowed, are ſuited to the deſires, which they have. They muſt, therefore, be the cauſes of their own unhappineſs, if they feel any. Of courſe, they ought not to blame the Deity for it, but to lay the blame on themſelves alone. He is not anſwerable for the miſapplication of the powers which he has beſtowed on them; becauſe every animal, which has a faculty of miſapplying them, is more perfect, than it would be, if it wanted that power, and was governed by blind inſtinct alone; liberty being one of the nobleſt faculties with which an animal can be endowed. Of courſe, animals, if they create to themſelves *unnatural* wants, cannot accuſe the Divinity of malevolence, in caſe they ſhall not get them ſupplied; for by exerting a power of creation, which it is unlawful for them to exert, they counteract the laws of his adminiſtration.

§ 45. Beſides, on an attentive view of human life, we ſhall find happineſs always connected with that which ought to produce it, and miſery always conſequent on that which ought to produce it. This, if we ſhall be able to prove it to be the real ſtate of things, will ſhew, that the Almighty and the Alwiſe loves his creatures, ſtudies their happineſs, and has the moſt kind and affectionate intentions towards them. Thus, we ſhall demonſtrate, that ſupreme goodneſs is an eſſential attribute of the firſt Cauſe.

Every one, who attends to his own convictions, muſt confeſs, that virtue is the only Cauſe of real merit; it is the only quality for which one deſerves to be rewarded. But it has been already proved, (§ 25, 26.) that true happineſs is never ſeparated from it; for every virtuous action, which one does, is productive of a pleaſure ſuitable to it; ſo a life, which were no other than a *Courſe* of virtuous actions, would neceſſarily be a happy one; for it would be no more than one *uninterrupted ſeries* of pleaſures. Again, Vice, it is plain, is the only cauſe of real demerit; it is the only thing, for which one deſerves to be puniſhed; but every vicious action, which one does, is the neceſſary cauſe of a pain. Of courſe, a life, which were no other than one repetition of vicious actions, would be a miſerable one; for it would be one *continued ſeries* of pains.

From

From hence it follows, that that being, who was the firſt cauſe of all things, muſt be himſelf good, and loves goodneſs; ſince he has made *true happineſs* inſeparable from *Virtue*, and has rewarded the virtuous with felicity. In the ſame manner it is proved, that he not only is not vicious, but hates vice; ſince he puniſhes with ſevere miſery the vicious, and ſuch as abandon the paths of virtue. Thus, has he given a ſanction to the laws of virtue, and diſcovers marks of a diſtributive juſtice in his government of the world. For true virtue is that which alone deſerves reward; but the only valuable reward is *happineſs*; and virtue is conſtantly and neceſſarily rewarded with happineſs. We have, therefore, plain marks of a diſtributive juſtice in the world, diſpenſing its *rewards* to ſuch, as *deſerve* them. Again, Vice is that, which alone merits puniſhment; but the only real puniſhment is miſery; and vice is naturally and neceſſarily connected with miſery. It is plain, therefore, that there is a diſtributive juſtice in the world, inflicting *puniſhment* on ſuch as *deſerve* it. Each of theſe propoſitions ſeems to be undeniable. Of courſe, the concluſion muſt be true.

§ 46. 'Tis true, the diſtribution of *apparent* happineſs or good is very unequal. Riches and poverty, power and dependence, length and ſhortneſs of days; in ſhort, all external things are diſtributed among mankind, without regard to the morality of their characters. The vicious are frequently found to be the favourites of fortune; they poſſeſs immenſe eſtates acquired by inheritance, by fraud, or by chance; they acquire ſuperiority over their fellows; they have many friends, much influence in life, and many dependents hanging upon them; the incenſe of flattery is continually offered to them; they inhabit ſuperb palaces, are courted by the reſt of men, and enjoy every thing which heart can wiſh. Whereas the Virtuous are often oppreſſed with pinching poverty, live in dependence, are avoided by their fellows, inſulted by the wicked, and abuſed by their ſuperiors; they ſometimes want the neceſſaries of life, and are frequently neceſſitated to labour inceſſantly for their bread. In ſhort, external things are not their portion.

But we muſt diſtinguiſh between *apparent* and *real* happineſs. One, who is at bottom miſerable, may be thought by others to be mighty happy; for happineſs is ſeated in the *mind*, and is a ſtate of it. But it is difficult to penetrate into the ſecret receſſes of the heart; we muſt judge from appearances. Indeed, the vulgar, by whom I mean all but Philoſophers, form their opinions concerning the happineſs of others from their external condition alone. But all, which gliſters, is not gold. One may affect to be mighty gay, when little gaiety is at his heart.

The only thing, therefore, which is valuable, is *real* happineſs. Of courſe, every thing muſt be eſtimated by its connection with it, and by its power of producing it. A thing, without which one cannot be *happy*, is a real good. A thing, without which one may be happy, or which is not *neceſſarily* the cauſe of happineſs, is not eſſentially a real good; it is an indifferent; for one may, *ex hypotheſi*, be happy without it; and it muſt depend on the uſe, which is made of it, whether it ſhall become good or ill, that is, whether it ſhall contribute to the happineſs or to the miſery of him who poſſeſſes it. A thing, by which one muſt be rendered unhappy, or which is neceſſarily the cauſe of unhappineſs, is a real ill.

In order, therefore, to form a juſt judgment concerning the diſtribution of the bounties of Providence, and to determine, whether it is equal or unequal, it is neceſſary, firſt of all, to define thoſe particular things which are really good, thoſe which are indifferent, and thoſe which are really ill. For, if we ſhall find, that thoſe, which are really good, are conſtantly diſtributed to the virtuous, we will have reaſon to juſtify the ways of God to man, and to affirm, that God is good; no matter, whether they do or do not poſſeſs any of thoſe, which are indifferent; for they both can and muſt be happy without them. Again, if we ſhall find, that thoſe things, which are really ill, are conſtantly

diſtributed

diſtributed to the vicious, it will become plain, that the firſt cauſe hates vice; for it matters not, tho they ſhould be found to poſſeſs ſome of the indifferents; ſince wicked men cannot be made happy by them; they muſt make a bad uſe of them; of courſe, their poſſeſſions muſt add to their miſery.

Now, it has been already proved, that virtue is its own reward; for it is naturally and neceſſarily the cauſe of happineſs; a man cannot be happy without it; for one, who is not virtuous, muſt be vicious. Therefore, virtue is a real good. But the happineſs attending it is, for it is itſelf, conſtantly beſtowed on the virtuous.

It has alſo been proved, that vice is its own puniſhment (§ 25, 26.); for it is naturally and neceſſarily the cauſe of miſery; one muſt be rendered unhappy by it. Therefore, it is a real ill; for the miſery, flowing from it, is conſtantly diſtributed to the vicious.

Thus far, therefore, we find the diſtribution of good and of ill equal; ſince virtue itſelf is eſſentially a real good, and vice is eſſentially a real ill.

§ 47. Let us take an impartial view of other things; and we ſhall find, that real happineſs depends much leſs upon them than is commonly believed.

All advantages may, in ſome ſort, be divided into perſonal and external. By perſonal I mean, all thoſe, which are included under the denomination of the ſtate either of the body or of the mind; and are qualities inherent either in the one or in the other. The external are ſuch, as power, wealth, fame, *&c.*

It may be bold, in this late age, but I will not ſcruple to affirm, not only that a man may be happy without moſt of thoſe things, which are external, but that he bids fairer to be happy without them than with them. If I ſhall be able to prove it of *riches* and *power*, it will be eaſily granted of all the reſt.

§ 48. It is a common obſervation, that wealth is an indeterminate term; for people differ widely from one another in the Ideas, which they annex to it. A man, who is uſed to work hard for his daily bread, thinks one, poſſeſſed of an eſtate of three hundred a-year, very rich; a Squire, poſſeſſed of 10,000 a-year, reckons the Gentleman of 300 poor; and CRASSUS would have thought himſelf much reduced, if he had had no more than 10,000 a-year.

Thus, it is impoſſible to define a preciſe ſum, without which one *cannot* be happy. It will not be pretended, that 100,000 a-year is neceſſary to it; for how many would be ſatisfied with 10,000! As little can it be ſaid, that 10,000 are neceſſary; for how many are contented with five! As little are five neceſſary; for many are very happy with one thouſand. Nay; not even a thouſand is neceſſary; for many a man is happy with a hundred. As little is a hundred; for multitudes are contented with no more than affords them ſubſiſtence. Thus, it appears, that a large eſtate, by which I mean every one, which affords more than ſimple ſubſiſtence, and exempts its poſſeſſor from the neceſſity of doing ſomething for his bread, is not neceſſary to happineſs. Therefore, a *large* fortune is not a real good. Of courſe, we have no reaſon to arraign the Deity for not having beſtowed one on every virtuous man; for every man, who is virtuous and has a proper temper, may be happy without one.

But I will go farther, and ſay, that every virtuous man, who lives, may be happy with the eſtate, which he has. For every man, as long as he lives, gets as much as maintains him; elſe he could not ſubſiſt. 'Tis true, one may be neceſſitated at *ſometimes* to earn it by hard labor, or, perhaps, to be ſupplied in a more ignoble manner. But it may juſtly be ſaid, that to a philoſophic mind, the way, in which he gets it, is of little importance, provided it be honeſt. Many, many a labourer, many, many a beggar, is, I am ſure, very happy, indeed, much happier than ſome, who pity their condition. Every man, therefore, may, as long as he lives, be ſaid to have enough; ſince he is ſubſiſted. Of courſe, if he has, as he ought to have, a cheerful, contented diſpoſition, he may be very eaſy.

I own, that riches may be the Cauſe of happineſs. But they may alſo be the

Cauſe

uſe of much miſery to thoſe, who poſſeſs them. For they are ills to ſuch, as her have not hearts to uſe them, or make bad uſes of them.

One, who is rich, and makes not uſe of his riches, muſt have an immoderate e of them. He muſt not have a heart to uſe them. He muſt be continually xious about the preſervation of them. He muſt grudge to beſtow even neceſ-ies on himſelf, muſt become hard-hearted, and refuſe the ſmalleſt benefaction others. Thus, he muſt become inſenſible to every generous feeling; he muſt ve a low, a vicious turn of mind; he muſt be avaritious. Of courſe, he uſt be miſerable. For the common ſenſe of mankind has given the appellation MISER or WRETCH to every avaritious perſon.

One, who does not hoard but ſpend his fortune, may make either a good or a d uſe of it. For money may be miſpent. It may be applied towards the ſa-faction of a cruel, of a fraudulent, or of a profligate diſpoſition. Therefore, may become a real ill. For every time, at which one makes a bad uſe of it, he es a bad action. Of courſe, he muſt be unhappy.

But I will go farther; for it is true, that opulence is *rather* an ill than a good, at is, it has naturally a tendency *rather* to diminiſh than to augment the hap-neſs of the rich. For it is apt either to produce an inordinate love of itſelf, d, of courſe, to make its poſſeſſor become a *miſer*; or to inflame the mind h pride, with vanity, with inhumanity, and with other vicious paſſions. 'Tis dom, that it diſpoſes men to make no other than a moderate, a reaſonable, a tifiable uſe of it. It enſures its proprietor of ſubſiſtence, makes him yield to lure of indolence, and teaches him the habit of whiling his liſtleſs moments in ntering only. Of courſe, it is accompanied with ignorance, enfeebles the rit, and produces a relaxed and diſſolute ſtate. Attended by idleneſs, it kes men prey upon themſelves, ſets their imagination to work; and, afford-them the means of gratifying the violence of their paſſions, induces them give full ſwing to their luſts. Thus, a total diſorder of the paſſions ariſes. ey are inflamed, and acquire an irreſiſtible power over the fortunate. Opu-ce, therefore, muſt have a natural tendency rather to detract from the happi-s of the opulent than to add to it. Look around you, conſider impartially condition of mankind, and you ſhall find, in fact, that the rich are generally happy than the poor; and that their miſery ariſes from their very riches. ey hearken not to the voice of reaſon; they yield to every impulſe, without mining it; they take for ſterling every purſuit, which bears the ſtamp of the hionable world. Thus, they are diſtracted by unnatural deſires, and are tor-ed by the fury of boiſterous paſſions. Of courſe, they meet with endleſs diſ-pointments; and are obliged to fly for refuge from one object to another, ex-cting continually to find ſatisfaction in ſome new object, in ſome new purſuit, ſome new poſſeſſion. But the poor man paſſes his days in tranquillity, goes continual round of his peaceful labors, and is not diſturbed by thoſe vulturs, ich gnaw the hearts of the great.

From all, which has been ſaid, one may, ſurely, be allowed to conclude, at a fortune is not eſſentially either a good or an ill. It is, at beſt, no more an an indifferent; for it may be the cauſe of miſery as well as of happineſs. nd it depends on the uſe, which is made of it, whether it ſhall produce the one the other. Of courſe, it is abſurd to arraign the Deity for not beſtowing e-tes on thoſe, who ſeem beſt to deſerve them. For a man, who is virtuous, th may and muſt be happy without one. And, by beſtowing them on the oſt worthleſs of mankind, he demonſtrates, how *ſmall* their *real* eſtimati-is.

§ 49. After having proved opulence to be, at beſt, an indifferent poſſeſſion; will not be difficult to prove the ſame thing of power. For it can hardly be nied, that one may be happy without it. And it will not, perhaps, be diffi-lt to ſhew, that one, who wants it, bids fairer to be happy than one, who s it.

If one has power, and does not uſe it, it not only avails him nothing, but hurtful to him. For it is the duty of every man, who is poſſeſſed of it, to employ it to the good of Society. Therefore, one, who makes no uſe of it, who does none of thoſe things which he has it in his power to do, is guilty of a moſt sacrilegious neglect of his duty*; for he neglects to do that good, which Providence has put it in his power to do to mankind. Of courſe, he acts viciouſly and, having a falſe and corrupted taſte of life, he muſt be unhappy. In fact, if it happens at any time, that thoſe, who have power, neglect to uſe it, it proceeds either from an indolent, or from a ſelfiſh diſpoſition. In either caſe it must be attended with pain; for mere indolence muſt produce a relaxed and a diſſolute ſtate of mind. It muſt give birth to the latent ſeeds of corruption, and muſt make them ſpring forth in abundance. Thus, a man, who can, out of mere indolence, neglect to uſe the power which is put into his hands, muſt have a bad diſpoſition. He muſt have a ſelfiſh heart, and muſt have little concern about the welfare of ſociety. Of courſe, he muſt be an immoral, a vicious man. So his power muſt add to the ſum of his miſery.

It muſt depend, therefore, on the uſes, which are made of it, whether it does or does not contribute to the happineſs of him, who poſſeſſes it. If it is employed to promote the good of Society, it muſt neceſſarily promote the happineſs of him who employs it after this manner; and the increment, which it makes to his felicity, muſt always be proportionable to the good, which is done by him, and to the extent, to which that good diffuſes its influence among mankind.

But Power *may* be employed to make men *unhappy*. Of courſe, it *may* render him, who makes that uſe of it, unhappy. Indeed, it muſt make him greatly ſo; for of all actions, thoſe which are intended to do moſt ill to others, do alſo most ill to him who does them; becauſe they are the moſt vicious. Who would not rather have been the meaneſt ſubject of the Roman Empire, than have been as diſſolute, as diſtracted, as wicked as NERO? It may, therefore, be the cauſe of miſery, as well as of happineſs. Of courſe, it is entitled to no higher denomination than that of an indifferent.

But I ſaid, I would go farther, and ſhew, that it is rather an ill than a good. For it has, in all caſes, naturally a tendency to corrupt more than to amend the heart. Few people can bear it with equanimity; it is apt to produce vanity, pride, and conceit. It leads one to over-value himſelf and his talents, and to aſcribe to perſonal merit the gifts of fortune or of fraud alone. Thus, it makes one become impatient of contradiction, expect ſubmiſſion from all the world, regard himſelf with partial eyes, and look upon the reſt of mankind as unworthy of his notice. It raiſes many vicious paſſions, and leads to many vicious actions; it is odds, therefore, but one, who is poſſeſſed of it, is not, on that very account, unhappy. In fact, if thoſe who have poſſeſſed it, knew the happineſs of a peaceful, humble, and quiet ſtation, they would bid adieu to their ambition, and retire from the inquietude of buſineſs into the happy abode of private life. With WOLSEY in the Play, they would ſay, *Vain Pomp and glory of the World! I hate ye*, and with him acknowledge, that they were *never ſo truly happy*, as after being deprived of them; *I know myſelf now, and I feel within me a peace above all earthly dignities; a ſtill and quiet conſcience.*

‘ De tous les ſentimens qui tyranniſent notre ame, il n’en n’eſt aucune de plus
‘ funeſte pour ceux qui en ſentent l’impulſion, de plus contraire à l’humanité
‘ & de plus fatal au repos du monde, qu’une ambition déréglée, qu’un deſir exceſſif
‘ de fauſſe gloire. Un particulier, qui a le malheur d’être né avec des diſpoſi-
‘ tions ſemblables, eſt plus miſerable encore que fou. Il eſt inſenſible pour le pro-
‘ ſent. Il n’exiſte que dans les tems futurs. Rien dans le monde ne peut le ſa-
‘ tisfaire. L’abſinthe de l’ambition mêle toujours ſon amertume à la douceur de
‘ ſes plaiſirs†.”

§ 50

* See a Letter on the Spirit of Patriotiſm, by the late Lord Viſcount BOLINGBROKE.
† ANTI-MACHIAVEL, ch. 6.

50. In truth, what are thoſe riches and power which the vulgar prize ſo
hly! What good do they bring to thoſe, who poſſeſs them! Do they give
n health? And is not the health enjoyed by the poor labourer, more valu-
e than all the pleaſures which they can afford? Would not thoſe who want
or by their intemperance have ruined it, give all which they have, to recover
Do they make him who enjoys them, ſleep ſounder than one who wants
n? Is his ſleep more quiet and more refreſhing? Is his heart more at eaſe?
ould not be difficult to ſhew, that the enjoyments of ſuch, as have been
favourites of fortune, are in reality much inferior to thoſe of private life.
n Kings, what have they, which private men may not enjoy?

O hard condition, and twin-born with greatneſs,
Subjected to the breath of ev'ry fool,
Whoſe ſenſe no more can feel but his own wringing.
What infinite *heart-eaſe* muſt kings neglect,
That private men enjoy! and what have kings
That privates have not too, ſave *Ceremony?*
And what art thou, thou Idol Ceremony?
What kind of God art thou? that ſuffer'ſt more
Of mortal griefs than do thy worſhippers.
What are thy rents; what are thy comings-in?
O Ceremony, tell me but thy worth.
What is thy ſhew of adoration?
Art thou ought elſe but place, degree, and form,
Creating awe and fear in other men?
Wherein thou art leſs happy, being fear'd,
Than they in fearing.
What drink'ſt thou oft, inſtead of homage ſweet,
But poiſon'd flattery! O be ſick, great Greatneſs,
And bid thy Ceremony give thee cure.
Think'ſt thou the fiery fever will go out
With titles blown from adulation?
Will it give place to flexure and low bending?
Canſt thou, when thou command'ſt the beggar's knee,
Command the health of it? no, thou proud dream,
That play'ſt ſo ſubtly with a King's repoſe,
I am a king that find thee; and I know
'Tis not the balm, the ſceptre, and the ball,
The ſword, the mace, the Crown-imperial,
The entre-tiſſued robe of Gold and Pearl,
The farſed title running 'fore the King,
The throne he ſits on, nor the tide of Pomp
That beats upon the high ſhore of this world;
No, not all theſe thrice-gorgeous ceremonies,
Not all theſe laid in bed majeſtical,
Can ſleep ſo ſoundly as the wretched ſlave,
Who with a body fill'd, and vacant mind,
Gets him to reſt, cramm'd with diſtreſsful bread,
Never ſees horrid night, the child of hell,
But like a lacquey, from the riſe to ſet,
Sweats in the eye of Phœbus; and all night
Sleeps in Elyſium; next day after dawn
Doth riſe, and help Hyperion to his horſe;
And follows ſo the ever-running year
With profitable labour to his Grave:
And (but for Ceremony) ſuch a wretch,
Winding up days with toil, and nights with ſleep,

Hath

Hath the fore-hand and 'vantage of a king.
The ſlave, a member of the Country's peace,
Enjoys it, but in groſs brain little wots
What watch the king keeps to maintain the peace,
Whoſe hours the peaſant beſt advantages *.

Thus it appears that all thoſe, which I called external things (§ 47.), are naturally indifferent; that is, a virtuous man *may* be happy without them, and a vicious one will not be made happy by poſſeſſing them.

§ 51. Thoſe which I call perſonal advantages may be divided into moral, rational, and bodily qualities. The moral are *the qualities of the heart*, or virtue and vice: the rational are *thoſe of the underſtanding*; ſuch as abilities, genius, knowledge: the bodily are *thoſe which relate to the body*; ſuch as health, ſickneſs, ſtrength, beauty, deformity. The firſt, that is, the moral ones have been proved already not to be indifferent; for a man who wants virtue *or* is vicious cannot, and one who has it *or* is virtuous muſt be happy. But the ſame thing cannot be affirmed concerning the other two. No *determinate* portion of thoſe which have been called *rational* endowments, it is plain, is neceſſary to happineſs: for no degree of them can be aſſigned, without which a man may not be eaſy. No doubt one poſſeſſed of the genius of NEWTON, the humour of SWIFT, the eloquence of CICERO, and the abilities of CÆSAR, may be *more* happy, for he muſt ſometimes feel higher joys than one who wants them. But happineſs is properly a ſtate in which the mind feels no uneaſineſs; there muſt therefore be various degrees of it, and it is true that every man may be happy with thoſe talents with which he is endowed. People have uſually a tolerable opinion of themſelves; and uncommon ſenſibility is often attended by great parts, which prevent it therefore from diſturbing the repoſe of thoſe poſſeſſed of it.

Thoſe which I called *bodily* qualities remain alone now to be conſidered; and without enumerating them one may ſafely pronounce, that they are all, one only excepted, indifferents. A man *may* therefore be eaſy without them. But man is not inſenſible; he has a body, muſt feel pain, and cannot help being uneaſy under its oppreſſion. It may however be borne; a brave ſpirit may do tolerably under it; and it ſeldom proves in fact that dreadful object which it is thought, when viewed at a diſtance, to be, and which puts an effectual end to the enjoyment of life. Beſides, it ariſes commonly from intemperance, from raſhneſs, and from folly; and is therefore more incident to the vicious than to the virtuous. Hence however it may be wreſted into a proof, for it ſhall afterwards be ſhewn that it cannot otherwiſe be made one, either of imperfection or of impotence in the government of the univerſe, it proves not that due attention is not given to the intereſt of the virtuous, or that real good and ill are diſtributed equally to the good and to the bad.

But I begin to fear I have ventured too far in defending a ſyſtem, which is exploded by the maxims of the preſent age; and I ſee methinks thoſe, who are called men of this world, giving contemptuous ſmiles at theſe doctrines. They will no doubt laugh at thoſe which they call the rants of Stoiciſm, the dreams of ſilly viſionary men. But the queſtion is, which of us have beſt reaſon to laugh: let them conſult their own experience; and ſay whether the account which has been given of their condition, is not a juſt one, whether it is not founded on fact, and is not agreeable to their own feelings. The dictates of reaſon, like the eternal relations on which they are founded, muſt remain unalterably true.

§ 52. It appears therefore upon the whole, that moſt other things but virtue are indifferent, and that the quantity of *real* happineſs enjoyed by every one bears uniformly a proportion to his merit. Hence it follows that the Deity, the firſt cauſe of the conſtitution of Nature, muſt love virtue

* Henry V. act iv. ſcene iv.

virtue, and that he exerciſes a ſtrict diſtributive juſtice in his government of the world; for no man can aſk more than that the virtuous be happy, ſince the value of every thing is proportionable to its power of contributing to the happineſs of him, who poſſeſſes it. (§ 46.). Therefore, if things are ſo conſtituted, that the virtuous muſt neceſſarily be happy, it is impoſſible to avoid granting, that the firſt cauſe of this conſtitution muſt be a good being, and muſt love virtue. The ſame doctrine muſt be held, *mutatis mutandis*, concerning vice; for it is apparent that he muſt hate it, ſince he has made the miſery of vitious men proportionable to the degree of their Vice.

§ 53. Ay, but riches, and other advantages, may be the means of augmenting the quantity of one's felicity. Why, therefore, has not the Deity beſtowed them upon the virtuous, who deſerve every good thing, and will make proper uſes of them? I anſwer, firſt, that the virtuous both may be, and actually are happy without them. Therefore, they have no right to aſk them, ſince their happineſs, about which alone they ought to be concerned, does not depend on the poſſeſſion of them. Secondly. It does not ſeem, that man has any *data*, on which he can preſume to find fault with the conſtitution of the Univerſe, ſince he finds virtue is the neceſſary Cauſe of happineſs. This Phænomenon alone ought to ſilence all his ſcruples; for it proves, that virtue reigns in nature. If one man is capable of being *more* happy than another, it is not a reaſon for quarrelling with the diſtribution of happineſs. It were as reaſonable to be angry with the Deity for having made other animals than men; for having choſen not to beſtow on them ſome of the faculties, which he hath given to the brutes; for having made them lower than the angels; or for having made ſome animals capable of a more exquiſite felicity than others. Every creature is capable of a quantity of felicity, ſuitable to its nature. Every man is capable of a quantity of happineſs, ſuitable to his nature. If a creature is happy, it has no reaſon to complain *. The variety, which appears in the animal world, is a part of that ſupreme œconomy, of that grand ſcheme, which is carrying on in nature, of that *opus, quod operatur Deus ab initio uſque ad finem* †, which it is impoſſible for man perfectly to unfold. Man may form conjectures, and may draw concluſions concerning the myſterious parts of nature. Thoſe conjectures may be probable; his concluſions may be founded on plauſible arguments. But it will be impoſſible for him fully to explain all the dark and intricate ways of Providence. However, Philoſophers are able to bring arguments, which deſerve at leaſt to be called ingenious, to prove, that a progreſſive ſyſtem of things is, in truth, more perfect than a quieſcent one, and that variety is eſſential to beauty. Thirdly. It is not to be lamented, that the virtuous are ſometimes not poſſeſſed of external advantages; for they would by them be expoſed to many temptations, would run a riſk of forfeiting their Virtue, and might thereby become unhappy. (§ 48. ſqq.) Fourthly. The means of acquiring them lie open to the Virtuous as well as to the Vitious. Wealth may be acquired by honeſt induſtry; Power by thoſe, who are equal to it. Such is the conſtitution of things, that labour is the price, by which every thing may be purchaſed. Indeed, it would be wrong, if it were otherwiſe. Laſtly. Thoſe in humble ſtation may exerciſe many virtues, which they would not otherwiſe have it in their power to exerciſe, and which do more than compenſate for their want of external advantages; for inſtance, a man, who is in want, has an opportunity of *involving* ‡ himſelf in his contentment, of *holding faſt* ‖ his integrity, and of being happy in the thoughts of being by his induſtry a uſeful member of Society.

* If the title which an animal has to life, were to be meaſured by the ill, which it does to others, of all animals man would be found to have the leaſt title to it. For he is the moſt noxious not only to other ſpecies, but to his own: he is the cauſe of more miſery than all the other animals together. One, therefore, who ſhould aſk why were toads, ſerpents and other uſeleſs noxious animals created, may be anſwered on his own principles, by telling him, that they were created to enjoy life, and by aſking him, why was man created?

† See Bacon *de augment ſcient.* lib. 1.

‡ —— et mea
Virtute me *involvo*, probamque
Pauperiem ſine dote quæro. *Hor.* lib. 3. Od. 29.

‖ Job, ch. xxvii. v. 6.

§ 54. But, the grand, the puzzling queſtion of all remains. If the Deity is a good being, why *any* vice, why *any* miſery at all? I anſwer by aſking, why any men, any animals at all? If there had been nothing but brute, inanimate matter, there would have been no vice, no miſery at all; but there would not have been any virtue, any happineſs at all; and is not the preſent ſtate preferable to one, in which is no life?

But might not men have abſtained from every tranſgreſſion of the Laws of virtue? I anſwer, that they have been endowed with liberty, have ſpontaneity, and are thereby more noble animals than they would otherwiſe have been. Of courſe they have a power of determining concerning their conduct. Beſides, they are actuated by paſſions, which are ſubſervient to various uſeful ends, give a higher reliſh to life, and make them have more enjoyment in its pleaſures, than they could have had without them. Thus, man, abuſing his liberty, overcome by the fury of his paſſions, and deaf to the dictates of ſober reaſon, is led to commit many tranſgreſſions. But it is not neceſſary, that the firſt cauſe, which created the univerſe, interpoſe in the government of it continually and on every occaſion, and prevent *every* abuſe of human liberty. He might as well not have made man free. It is ſufficient, that he has given him reaſon to govern and to controul the violence of his paſſions, interpoſe on neceſſary occaſions, reſtrain the *wrath* of man within thoſe bounds, which ſeem proper to his infinite wiſdom, and make his very vices ſubſervient to the manifeſtation of glorious ends.

I own, that ſome of the evils, which befal animal kinds, proceed from other cauſes than their own conduct. Some, for inſtance, from accident, others from the malevolence of other animals. But it would not be difficult, by going into the detail, to prove, that theſe alſo, which are the moſt inexplicable of all the *phænomena* of the moral world, flow from cauſes, which ought to be admitted into the government of it. And, grant them inexplicable, it is not a *petitio principii* to ſay, that there are ſome things, which it is impoſſible for us fully to explain. For we ſee from thoſe things, which we know, and are able fully to comprehend, that the firſt cauſe loves virtue, and that *they* are conducted by wiſdom and goodneſs. From whence we have reaſon to conclude, that thoſe things which we do not fully comprehend, are governed by the ſame wiſdom and goodneſs.

Indeed, it is ſurprizing, that we are able to underſtand ſo much of the intentions of Providence, ‘ of that work which God is making from the beginning to the end *,’ *opus quod operatur deus ab initio uſque ad finem.* An Oyſter knows much leſs of it. But it would be preſumptuous in it to decide poſitively from its own little narrow views, concerning the whole of things. Man tho’ much ſuperior, is far from being fit to judge of the το παν, a thing which, it is plain, he was not able to make, is not able to deſtroy, and cannot fully comprehend. It is enough to ſilence him, that he ſees *every* action produce *that* preciſe effect, which he cannot help thinking it *ought to have been made* to produce. A Syſtem, in which this is the caſe, muſt be perfect; for a reaſonable man cannot demand, that virtue and vice, wiſdom and folly, temperance and intemperance, prudence and imprudence, induſtry and idleneſs, courage and cowardice, knowledge and ignorance, ſpirit and dulneſs, ſhould be on a level, and ſhould produce the ſame effects. Therefore, he ought not to expect, that other conſequences than thoſe, which follow from his actions, ſhould follow from them. *All* the actions, which he does, ought not to be taken complexly into one account; every action ought to be conſidered ſeparately, for it is different from every other; and from the effects of each particular action a conjecture ought to be formed concerning the principles, which reign in nature.

Beſides, a time ſhall come, in which all our difficulties ſhall be reſolved, the apparent diſorder of the univerſe ſhall be brought to an end, and the misfortunes of the virtuous ſhall be no more.

§ 55.

* Eccleſ. ch. iii. v. 11.

§ 55. Thus, it appears from the moſt impartial, attentive, and diſpaſſionate view of the order of nature, that the firſt Cauſe, the Sovereign of the world, is a wiſe, good and powerful being. Of courſe, we muſt revere, love and fear him; and muſt, therefore, be diſpoſed to do that, which, we imagine it to be agreeable to his will, that we ſhould do. Admiring the infinity of his wiſdom, we muſt be perſuaded, that it will be wiſe for us to do that, which he wills us to do; for his wiſdom is incapable of erring. We muſt love him for the moral perfection of his character; muſt, therefore, love his creatures, and virtue; and muſt be watchful to diſcover and to obey his will; for man is naturally fond of doing things, which he finds will be agreeable to one he loves. If his friend or his benefactor gives the hint, he runs to do that, which is agreeable to him. Much more ought one to do that, which is agreeable to the will of the Deity; for the Deity is the beſt friend, the greateſt benefactor of every man, and deſerves moſt to be beloved. But he loves virtue. Therefore, it muſt be agreeable to his will, that we love it, and lead virtuous lives. We have the more reaſon to do ſo, becauſe we know, that he cannot himſelf form an erroneous opinion, and will not give us a bad advice. Thus, perſuaded, that there exiſts a ſupremely wiſe, good and beneficent being, the Cauſe of all things, and that he wills all his creatures to do that, which is good, we muſt ſee good reaſon to induce us to do that which is agreeable to his will, or muſt think ourſelves bound to do it *.

§ 56. But this proof of moral obligation is no more than a ſecondary and hypothetical one. It is not primary and abſolute. Indeed, it can hardly be ſaid to be different from the former ones, and its force depends, in ſome ſort, upon them. For our Idea of goodneſs is, ſurely, prior to our Idea of God. Unleſs we *ſuppoſe*, that there is ſome native excellency in virtue and goodneſs, ſomething really eſtimable in them, antecedent to our notion of Deity, and independent of his will, we can have no reaſon to ſay, that the Deity is wiſe and good †. Unleſs we are antecedently perſuaded, that a being who is wiſe and good, is more perfect on account of poſſeſſing theſe qualities, than he can be without them, we ought not to aſcribe them to that being, whom we believe to be the moſt perfect. But we cannot imagine any being to be more perfect becauſe he is poſſeſſed of theſe or any other virtues, unleſs we *ſuppoſe* or are antecedently perſuaded, that there is ſome native, real, eternal, and independent excellency, perfection, and worth in them. 'Whoever', ſays Lord SHAFTSBURY ‡, 'thinks there is a 'God, and pretends formally to believe that he is *juſt* and *good*, muſt *ſuppoſe* that 'there is *independently* ſuch a thing as *Juſtice* and *Injuſtice*, *truth* and *falſhood*, *right* 'and *wrong*, *according to which* he pronounces that God is *juſt*, *righteous*, and *true*. 'If the mere will, decree, or law of God be ſaid *abſolutely to conſtitute* right and 'wrong, then are theſe latter words of *no* ſignificancy at all. For thus if each 'part of a contradiction were affirmed for truth by the ſupreme power, they 'would conſequently become true.' Therefore, in order to know what is agreeable to the will of God, it is neceſſary in the firſt place to know what is good. For we ſay, that every action which is good, is agreeable to the will of God, not converſly, that every thing, which is agreeable to the will of God, is good. I own the laſt propoſition is as true as the firſt. But ſtill it is dependent on it, and *ſuppoſes* its truth. For ſince we attribute goodneſs to the Deity, it muſt be independent on his will, and antecedent to our Idea of him. In truth, how do we acquire the knowledge of his will, how do we know it to be agreeable to his will, that we ſhould obſerve the Law of Nature? Is it not, becauſe we ſee antecedently ſomething

* The relation, which Piety has to Virtue; the influence, which the various opinions concerning Deity muſt have on it; and the merit, which it gives to virtuous actions, are admirably explained by Lord Shaftſbury in the firſt Book of his inquiry concerning virtue.

† This doctrine is confirmed by experience. I know, it is commonly ſaid, that all mankind recognize ſome divinity. *Nulla gens tam fera, nemo omnium tam ſit immanis &c.* Cic. l. 1. c. 13.—Tuſ. quæſt. l. 1. c. 8. de leg. l. 1. c. 16. l. 2. c. 4. de nat. deo. But it is falſe. The miſſionary in his curious account of Greenland tells us, he could not bring the Greenlanders to have the moſt remote conception of what he meant by Deity. Some Indians know nothing of him either, who are, yet, remarkably honeſt in their dealings.

‡ Inquiry. Book I. Part III. Sect. II.

ſomething excellent and right in it, and in the obſervance of it? We believe him to be good. Therefore, we believe him to will that, which is good.

Beſides, it appears, that this is no more than a hypothetical proof of moral obligation, from hence, that no wiſe or reaſonable Man can ever think himſelf bound to do that, which will make him unhappy. Suppoſe therefore, the Deity to declare it, in the moſt expreſs manner, to be his will, that mankind ſhould do ſomething, which would make them miſerable upon the whole, without any compenſation of good, either preſent or future; it would be hardly poſſible for any man to believe, that he had good reaſon, or, which is the ſame thing, to think himſelf *bound* to obey the command? Thus, our obligation to obey the will of God *ſuppoſes*, that he wills us to do that, which will contribute to our Happineſs. Therefore, the Argument, founded upon it, can be no more than hypothetical. I own at the ſame time, that it is perfect; becauſe we know, that that which he commands us to do, does actually contribute to our felicity.

TITLE VII.

Of the Immortality of the Soul; and of the Proof brought from it, of Moral Obligation.

§ 57. THE great Author of the World has not only diſcovered to us his will, by the Convictions which he has given us of our duty, but hath alſo aſſured us, that he will reward thoſe, who diligently ſeek him and obey his Commandments: for he has annexed to virtue and to the practice of it not only a temporary happineſs, during our lives in this preſent world, but has aſſured us, that we ſhall exiſt in a future ſtate, ſhall in it be conſcious of our Identity, ſhall recognize that exiſtence which we had in this world, and ſhall be rewarded for our Virtue. The aſſurance, the proſpect of this reward is another motive, which ought to induce us to obſerve the Law of nature; For it would, ſurely, be prudent to forego ſome ſhort tranſitory enjoyment in hopes of everlaſting felicity. One, who by ſaving a penny loſes a pound, which he might otherwiſe have gained, is reckoned to make a fooliſh bargain. Suppoſe, therefore, virtue were the loſs of a penny in this world, would it not be wiſe to loſe it, in order to gain a pound in the next. But, in truth, virtue is profitable not only for the next, but for the preſent world; for it would be the *intereſt* of every man to be virtuous, tho there was to be no ſtate of exiſtence after the preſent one. Much more is it his intereſt to be ſo, when he conſiders, that he is ſure of being rewarded for his virtue in the life, which is to come. The force, therefore, of this argument depends upon the evidence, which we have, that there ſhall be a future ſtate, in which we ſhall exiſt conſcious of our Identity, and ſhall be rewarded for our conduct upon Earth.

Philoſophers have brought many arguments, as well phyſical as moral and metaphyſical, to prove it. It would be improper to enlarge upon them. I ſhall take leave to mention only one or two.

§ 58. Firſt. We ſee, that *matter* exiſts for a long time. The inanimate body of the Earth has exiſted for many ages, ſince its Creation. But it has been ſaid, that one man is more worthy of the notice of the Deity, and of exiſtence, for he is a nobler work, than all the inanimate matter in the univerſe. Therefore, he ought to exiſt *at leaſt as long* as it; For it would be abſurd to think the Deity capable of beſtowing on brute matter a duration which he has refuſed to his intelligent creatures. A Tree lives, poſſeſſes all its energies, and continues to bloſſom, and to bear its fruit much longer than a man. Its vigor, its power, its life,

life, laſts much longer than his. But would it not be abſurd to ſuppoſe, that the Deity has beſtowed upon it an energy, a vigor, and a duration, which he has denied to mankind? Of courſe man muſt live after death, and muſt be immortal. If his exiſtence is terminated with this life, his duration is not the tenth part of that of an Oak; for Natural hiſtorians inform us, that an Oak lives and continues to be identically the ſame Oak for 800 or 1000 years. But man is like the Graſs, which to day flouriſheth, and to-morrow is no more; the Days of his his years are three ſcore and ten.

Secondly. Is it poſſible to believe, that the all-wiſe, the all-mighty, and ſupremely good Author of nature could create a creature, ſuch as man, juſt to look about him and to die? 'What a piece of work is a Man! how noble in reaſon! how 'infinite in faculties! In form and moving how expreſs and admirable! In acti-'on how like an angel! In apprehenſion how like a god! The beauty of the 'world, the paragon of animals*.' Shall he, fair form, live a few days, and be no more! Is it poſſible to believe, that infinite wiſdom would rear ſuch a fine fabric, would make ſuch an exquiſite work, would form ſuch an exalted Creature, endowed with ſuch wondrous powers and faculties, poſſeſſed of ſuch intelligence, if he meant no more than to beſtow upon it a ſhort temporary exiſtence! How inconſiſtent does ſuch an intention ſeem to be with infinite wiſdom! It is impoſſible for us to reaſon abſtractly and *a priori* concerning the wiſdom of the Deity otherwiſe than from our own. Wiſdom is, in all caſes, that, which man calls wiſdom. Therefore, man muſt hold the wiſdom of the Deity to be ſimilar to his own. No doubt, it is infinitely more perfect; for the Deity is moſt wiſe. But it muſt be ſomething of the ſame kind with that of man. Therefore, a ſcheme, which appears to himſelf to be a wiſe one, he muſt believe, will alſo appear to the Deity to be a wiſe one; for he has no other way of reaſoning concerning agreeableneſs to infinite wiſdom. But it is plain, that no wiſe man would have created ſuch an exalted creature, as a NEWTON, a BACON, or a SHAKESPEAR, to get no more than a peep of the Univerſe, and to be preſently annihilated. Of courſe, we have reaſon to conclude, that the Deity would not do ſo. But how many NEWTONS, how many BACONS, how many SHAKESPEARS, never learned the Alphabet †! Why ſuch a ſplendid *apparatus* for ſo poor an end? If man is not immortal, one may with reaſon ſay, *parturiunt montes, naſcitur ridiculus mus.* The end ought, in all caſes, to be ſuitable to the means, and may be prognoſticated from them: but the means being ſo noble, it is impoſſible, that the end can be ſo low.

Thirdly. Man has an abhorrence of annihilation, a deſire of life, a longing after immortality; the ſoul ſhrinks back, and ſtartles at deſtruction. The Deity has not given us one deſire without giving us alſo a power of ſatisfying it. Is it, therefore, poſſible, that he can have given this fond deſire, this longing after immortality, without intending to gratify it? Is it credible that he can be ſo cruel, as thus to tantalize us? Could he have made a whole ſpecies feel the moſt intenſe thirſt, and deprive it of the poſſibility of allaying it? Could he have given it the proportions and the deſires of one ſex, and not have made the other? His

* Hamlet. Act II. ſc. 6.

† I like good poetry; its expreſſions are forcible; and it is crouded with Ideas. Therefore, I cannot forbear quoting the following lines. They paint in the moſt beautiful colours, the condition in which *nature* has placed many of human kind.

> In diſtant wilds, by human eyes unſeen,
> She rears her flow'rs, and ſpreads her velvet green.
> Pure gurgling rills the lonely deſart trace,
> And waſte their muſic on the ſavage race.
> Young's *univ. paſſ. ſat.* 6.

Mr. GRAY, one of the greateſt Poets England ever produced, has the ſame thought, ſomething diverſified, in his *Elegy*. I would have tranſcribed his lines; but many quotations are diſguſting; and I ſhould not have inſerted thoſe, which I have, had I not thought, that every juridical work needs ſomething to relax the attention of the reader, and that, by inſerting them, I was ſure of preſenting him with *ſomething* worth reading.

goodneſs is perfect; therefore he muſt have made man immortal, ſince he has pointed out an hereafter, and has intimated eternity to him.

Fourthly. I remember, Mr. HUME, whom I hope bigotry ſhall never hinder me from allowing to be a great philoſopher, in one of his *philoſophical Eſſays*, propoſes ſome ſceptical doubts, concerning the doctrine of immortality. I will not anſwer them; for they have been anſwered already in the proſpect, which has been given of the order of the univerſe. But I will be proud to ſhew, that a ſtrong argument ariſes, in favor of immortality, from that very ſyſtem, which excludes matter out of the univerſe.

In order to explain it, I ſhall take leave to argue upon the principles of that very Syſtem itſelf, and to proceed thus.

" Man can know no other than thoſe things, which he perceives, that is, than his perceptions. Of courſe, that, which is called matter, is no more than one of his perceptions; its exiſtence conſiſts in *being perceived;* it has no other exiſtence than as *a perception*. Of courſe, it has no *real permanent exiſtence;* for the perceptions of man are tranſitory, and are different every inſtant. The only beings which have *a real* and *a permanent* exiſtence, are thoſe, which have perceptions, but are not themſelves perceived. Perceptibility, therefore, or the power of being perceived by mankind, is ſo far from proving that that, which is perceived, has, that it proves it not to have a real exiſtence; it is the teſt of the *want* of it. I own, this doctrine is very remote from the vulgar apprehenſions of men. Even ſome, who have borne the name of Philoſophers, have deſpiſed, but they have, at the ſame time, miſunderſtood it; for few people are able to abſtract themſelves ſo much from their natural notions, for I will not call them vulgar prejudices, as to be able to enter into it and to underſtand it. But, if it is attentively conſidered, it will not be found to be ſo different from the real notions of mankind, as it appears, at firſt ſight, to be. In truth, what ſignifies the exiſtence of a ſtone, of a tree, or of inanimate matter? It is not conſcious of its own exiſtence; but what ſignifies exiſtence to a being which is not conſcious of it? Is it of any importance, whether it have an exiſtence ſuch as is attributed to it by the vulgar, or exiſts *only* in *being perceived?* The beauty of the Univerſe, the ſcene of things, the Ideas of man, remain the ſame in the one and in the other hypotheſis.

Thus, perceptions are ſubſtituted into the place of matter; and men are the percipient beings in which they inhere. Life, therefore, is no more than ' a ' ſcene exhibited to man;' Death is no more than ' a change of that Scene.' In the preſent one, various objects, various Ideas are in ſucceſſion preſented to him; but the *real*, the *percipient*, the imperceptible being remains the ſame amidſt the change, the ſucceſſion, the variety of its perceptions. In that ſcene which is next to be *drawn*, a new ſet of objects, a new ſet of Ideas ſhall be preſented to us; and ſtill the percipient being continue the ſame.

Thus, have Philoſophers imagined to themſelves, that life is no more than a ſeries of one ſett of perceptions, which ſhall, upon death, be ſucceeded by another. The principal utility of this Syſtem conſiſts in making the Idea of immortality more conceivable than upon the material ſyſtem it is by ſome thought to be; for it makes Death no more than a change of ſcene. The preſent one is drawn, and a new one opened.

Beſides, it affords an unanſwerable anſwer to the objection of the Materialiſts; for Materialiſts ſay, that man being material, muſt periſh as ſoon as the continuity of the matter of which he is made, is diſſolved. The matter, in its ſtate of diſſolution, muſt be ſcattered up and down the earth, and undergo various changes. Hamlet traces the noble duſt of Alexander, till he finds it ſtopping a bung-hole. But the ſyſtem, which I have been explaining, excluding matter out of the Univerſe, denying real permanent exiſtence to every thing which is perceived, and affirming that the only beings, which have a real permanent exiſtence, are thoſe percipient

pient beings, which have perceptions, but are not perceived by themſelves; this ſyſtem affords a deciſive anſwer to the objection made by the Materialiſts."

§ 59. But the Deity hath not left us to doubt concerning his exiſtence, his will, or immortality. He hath been graciouſly pleaſed in divers and ſundry manners to reveal himſelf to us, to promulgate his will, and to aſſure us of immortality. Thus, we have no longer cauſe to doubt; but ought to receive with humility and faith that revelation, which he hath been graciouſly pleaſed to make to us.

The evidences, which have been brought to prove the truth of the Chriſtian Syſtem, are various, and have been largely treated by able divines. The doctrines taught, the miracles wrought, the prophecies accompliſhed; theſe, and the evidence given by them, have been fully explained. But of them all the preſent accompliſhment of prophecies muſt have the moſt powerful effect upon *us*; becauſe the preſent accompliſhment of a prophecy affords ſenſible and immediate evidence of the prophetic faculty, and, of courſe, of the inſpiration of him, who made it. The chain of prophecies, and the connexion which they have with one another, have been well treated by Dr. SHERLOCK, in his elegant Diſcourſes on this ſubject. The prophecy concerning the diſperſion and the preſent ſtate of the JEWS is beſt explained by the JANSENIST MONTGERON in his curious account of the miracles pretended to have been wrought at the tomb of ABBE PARIS. The independency of the ARABS has been proved by the writers of the univerſal hiſtory. All theſe prophecies we find made in ſcripture, and we ſee them accompliſhed at preſent.

§ 60. It is *the affection* of the agent, which alone entitles an action to be denominated either good or ill, virtuous or vitious. One, which proceeds not from a ſincere affection to goodneſs, deſerves not to be called good. Therefore, an action, which is done not out of any virtuous affection, but merely out of dread of *the Power of* GOD, deſerves not to be called virtuous; for he, who does it, has no more of virtue in his temper, than a Tiger that is reſtrained by chains or by the awe which he has of his keeper, from doing harm. But an action, done out of that affection, which every good man muſt have to the *beſt* of beings, muſt be virtuous; becauſe it marks a high degree of virtuous affection.

In the ſame manner, an action, done merely out of the proſpect of reward, cannot be ſaid to be virtuous. It is no more than a bargain of intereſt; for it proceeds not from any generous, noble, or virtuous affection. But one, done out of the proſpect of a reward, which is itſelf ſuppoſed to be the perfection of virtue, is highly virtuous.

Thus, having eſtabliſhed moral obligation on a firm foundation, it is time to leave the thorny but ſublime ſpeculations of philoſophy, and to return to the proſecution of our ſubject.

§ 61. I ſaid (§ 18.) that a Law of nature is a rule, which, it is evident immediately from the light of nature, men ought to obſerve in regulating their voluntary actions? And *the* Law of nature is 'the ſum of thoſe rules, which, it 'is evident immediately from the light of nature, men ought to obſerve in re-'gulating their voluntary actions.'

But every law of nature may be conſidered as deriving its obligatory force from the Author of nature, and from his legiſlative authority. Therefore, it may be defined to be 'a rule, which man, by the uſe of his natural reaſon a-'lone, diſcovers it to be the will of God, that he ſhould obſerve conſtantly in 'regulating his voluntary actions.' And the law of nature is the ſum of thoſe rules, which man, by the exerciſe of his natural reaſon alone, diſcovers it to be the will of God, that he ought to obſerve conſtantly in regulating his voluntary actions.

§ 62. Since the evidence of the law of nature ariſes immediately from the light of nature, it is plain, that it muſt be founded on the nature of things. Therefore, it is commonly ſaid, and it is true, that it is immutable, that is, it

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is the ſame at all times, in all caſes, and in all places; for it is agreeable to the eternal, independent, and immutable relations of things. Therefore, it cannot be one law at one time and a different law at a different time. It is the ſame law at all times; for the relations, on which it depends, are the ſame at all times. It is the ſame in all places; for theſe relations are the ſame in all places. It is the ſame in all caſes; for the relations are the ſame in all caſes. Therefore, it is the ſame to all men at all times. So that a law, promulgated by nature to one, placed in *given* circumſtances, muſt be the rule, according to which *every* man, placed in the ſame circumſtances, ought to regulate his conduct; for this is preciſely the meaning of the immutability of the law of nature.

By conſequence, it cannot be altered, repealed, or abrogated by mankind. Their ordinances cannot have any effect upon it. An action, which is declared by the Law of nature to be a good one, cannot by any human Law be rendered a bad one; an action, which is declared by the Law of nature to be a bad one, cannot, by any ordinance of men, be made a good one. An action, which is declared by the Law of nature to be unlawful, cannot be made lawful; and one, which nature declares to be lawful, cannot be made unlawful by human law. Thus, nature declares it to be unlawful for a ſon wantonly to kill his father. Therefore, parricide cannot be rendered lawful by human laws. In the ſame manner nature makes it lawful for every one to defend himſelf againſt violence. Therefore, it cannot, by any human law, be rendered unlawful for one to do it; for human laws cannot alter the eternal relations of things; they cannot make that, which is good, become bad; or that, which is bad, become good; any more than they can make truth falſhood or falſhood truth. It muſt ever remain unlawful for one *wantonly* to put another to death, as neceſſarily as it is true, that the three angles of a right-lined triangle are equal to two right ones.

But it is alſo true, that the ſupreme legiſlative authority in every ſtate may enact and declare any thing, which caprice can ſuggeſt; for inſtance, that it ſhall be lawful for a man cauſeleſsly to kill another. I own, it will not thereby become *abſolutely* lawful for him to do it; becauſe, as it has been ſaid, human laws cannot make murder lawful, any more than they can make the three angles of a triangle not equal to two right ones. And they cannot exempt a murderer from the ſanctions, which nature has made the neceſſary conſequences of infractions of her Laws. But they can exempt him from every puniſhment, which human Laws inflict. It is therefore, in truth, uſeleſs to enquire, whether the natural law can be altered; for it will not be denied, that men cannot make good evil, or evil good. It will as little be denied, that the ſupreme legiſlative authority in every State may enact any law, which caprice can ſuggeſt, that it may give its ſtatutes full effect, and that it may carry them into execution; for men exact obedience to the Laws, enacted by them, by force. Therefore, that, which is enacted by them, may, in fact, get the better of the dictates of the Law of nature; for nature uſes not forcible means to make men obſerve her laws. She leaves it to their choice, either to obſerve or not to obſerve them.

At the ſame time it is true, that men ought not, in their Code, to enact any laws contrary to thoſe, which are enacted by nature; for all men are, in all caſes, bound to obſerve the Law of nature. Therefore, they ought to regulate all their Laws by it, and to make them no more than declarations of it. (§ 4.).

TITLE VIII.

Of the Law of Nations.

3. MANKIND, as hath been obſerved, made a gradual progreſs from the moſt ſimple to the ſocial, and from thence to the civilized te; and it has been proved to have been in ſome ſort neceſſary for them to er into ſociety. Individuals therefore muſt, after as well as before they en- ed into it, have had intercourſe with one another, and *differences* could not t ariſe between them: hence it became immediately neceſſary for them, to tabliſh rules by which they ſhould regulate their conduct, to appoint officers r taking care that theſe ſhould be obſerved, and to nominate judges for rminating the differences which ſhould ariſe among them. Thus government as inſtituted, and men were obliged to ſubmit to it.

But it is impoſſible for any power to extend its influence over all the habita- e earth: nature hath by ſeas, by mountains and by impaſſable deſerts divided into different regions, which theſe natural boundaries hinder from having an ſy communication with one another. Soon therefore after government was ſtabliſhed, it became neceſſary for mankind to divide themſelves into different ations.

One country may by its ſituation, its climate, its ſoil, or the ingenuity of its habitants produce a commodity which another wants. Thus it continued, fter their ſeparation, to be neceſſary for them to trade; curioſity might lead in- ividuals to have intercourſe with one another; and the ſubjects of one ſtate ould not avoid having dealings with thoſe of others. Theſe could not but ive riſe to national quarrels, and they were during war as well as by other auſes obliged to have correſpondence with one another. Hence they were ne- ceſſitated to eſtabliſh rules for regulating their commerce, which they ſhould bſerve in their *national* as well as individual capacity; and theſe are called *the aws of nations.*

§ 64. *The* law of nations therefore is 'the ſum of thoſe rules, which nations ought conſtantly to obſerve in regulating their conduct towards one another;' and one of theſe laws or *a* law of nations may be defined to be 'a rule, which nations ought conſtantly to obſerve in regulating their conduct towards one another.'

§ 65. The laws of nature, it hath been ſaid, are obligatory on all men, at all times, in all caſes and in all places. But nations are no more than a mul- titude of individuals: therefore men are bound to obſerve them in their collec- tive as well as in their individual capacity; and the obligation, under which they lie to do ſo, is as ſtrong in the one caſe as in the other. Beſides, nations in- dependent of one another, have not any common ſuperior, whoſe will they are bound to obey. They muſt therefore reſort to that light which nature ſhews them, and muſt recognize the authority of that reaſon, which GOD hath given them by beſtowing it on the individuals of whom they conſiſt: for they have no other authority, which they all acknowledge. It diſcovers both the rules themſelves; and being common and the ſame to all mankind, ſhews their obli- gation to obſerve them. The rules therefore, which nations ought to obſerve in regulating their conduct towards one another, can be no other than the laws of nature, the dictates of equity, or 'ſuch rules as it is evident immediately from 'the light of nature they ought to obſerve.'

§ 66. But nations, like the individuals of whom they conſiſt, are capricious and ſelfiſh; they are ſometimes in their dealings forgetful of the dictates of hu- manity; and the ſword muſt be the ultimate arbiter of all their diſputes. Hence the law of nations is divided into the primary and the ſecondary. The prima- ry is, 'that which has been deſcribed, derives its authority and obligatory force 'from the light of nature alone, and needs not to be confirmed by treaties.' It is therefore no other thing than the law of nature applied to the affairs of nations,

inſtead of being applied to thoſe of individuals; and it agrees with that natural law, which hath been explained, in ſeveral reſpects. Thus they agree 1) in the *manner* in which they are diſcovered; they are both diſcovered by the light of nature: ſo that every rule which it is evident immediately from the light of nature, or which the obvious dictates of natural equity demonſtrate nations ought to obſerve in regulating their conduct towards one another, is one of the primary laws of nations, and is obligatory upon them. They agree 2) in the *conſtancy* with which they ought to be obſerved: for nations ought to obſerve the law of nations, as conſtantly as individuals that of nature, the conſtancy of the obligation being equally a part of both definitions. They agree 3) in the *authority* on which their obligatory force depends; it is that of natural reaſon. But natural reaſon is ever the ſame; therefore they agree 4) in their *immutability*. They differ in their objects: that which is properly called the law of nature, has for its object the affairs of individuals alone; but the law of nations relates to thoſe of entire nations.

§ 67. Independent ſtates have no legiſlative authority which is acknowledged to be ſuperior to them: in order therefore to determine whether any *given* rule is one of thoſe laws, which nations ought to obſerve, it is neceſſary to appeal to reaſon, and to examine it by thoſe firſt principles which are incontrovertible, becauſe they are evidently agreeable to it. For the obligatory force of every one of theſe laws is, as hath been obſerved (§ 66.), deducible from the light of nature alone: right reaſon therefore muſt be the ſupreme teſt of the pretenſions which they have to be numbered among thoſe laws, and every individual muſt be entitled to form an opinion for himſelf from the principles which he holds to be true.

But ſome men are endowed with ſuperior abilities, and have given particular attention to ſome branches of ſtudy: their opinions therefore muſt have conſiderable authority at leaſt in every diſputable caſe; and one is well entitled to cite them for proving the truth of the principles maintained by him. 'Tis true men are not at all times equal to themſelves, and inattention as well as other cauſes may in particular caſes lead them into errors. But theſe may be diſcovered by attending to the principles on which the concluſions are founded, and to the preciſion with which they are connected with one another; and one has upon the whole more reaſon to expect to find truth in the deciſions of thoſe, who have beſtowed pains on the conſideration of a ſubject, than from the precipitate determinations of unthinking men. A ſolution given by Sir ISAAC NEWTON of a mathematical problem would, ſurely, be more depended on than that of one who was not much acquainted with mathematics; and the deciſions of GROTIUS, of COCCEII, of HEINECCIUS, of MONTESQUIEU, and of thoſe others who have written on the law and have by their writings proved themſelves to be able men, muſt have more weight than thoſe of men who have beſtowed little attention on the ſtudy of it. Hence we find nations in all controverſies, which they have with one another, making their appeals to the authority of writers of eſtabliſhed fame, and holding themſelves to have proved the juſtice of their pretenſions, if they could ſhew their arguments to be ſupported by it. This was done lately in the notable caſe of the Sileſia-loan, in which the Council for the people of Britain, beſides proving their concluſions from thoſe which they held to be the undiſputed principles of reaſon, made great uſe of the authority of the Doctors and appealed to it on every occaſion.

Beſides, conſiderable reſpect is due alſo to the uſages of nations, which are civilized. Men have naturally more humanity and a higher ſenſe of juſtice, than ſome will allow them to have; their conduct is uſually blameleſs; and nations convinced that they ought to obſerve the rules of juſtice, and that commerce could not otherwiſe be maintained, generally obſerve them. Hence the law of nations is in the pandects defined to be 'that which nations *uſe*;' *jus gentium eſt, quo gentes humanæ utuntur, l.* 1. § 4. *ff. de juſt. et jure*; and conſtant obſervance, continual uſe, univerſal cuſtom is a ſtrong proof of the title, which any given rule has to be counted among the laws of nations. *Quod naturalis ratio inter omnes homines conſtituit,*

ſtituit, id apud omnes peræque cuſtoditur; vocaturque jus gentium, quaſi quo jure om- gentes utuntur. l. 9. ff. de juſt. et jure. 'Tis true, men are actuated by ſel- motives. Therefore, they are, in ſome caſes, regardleſs of the dictates of manity; they may err, and their errors may become general. Beſides, it y happen to be diſputable, whether that, which ſome people hold to be a w of nations, is one in truth; for ſome caſes muſt be dubious. Therefore, may happen to be difficult to trace ſome of the deciſions of the learned, and the cuſtoms of nations upwards to thoſe firſt and indubitable principles, which nentioned. Hence, the Law of nations has, by the Doctors, been divided in- the primary and the ſecondary.

§ 68. The primary, it has been ſaid (§ 66.) is that, which is immutable, and ich, it is impoſſible for mankind to doubt of their obligation conſtantly to ſerve. The ſecondary 'conſiſts of certain rules, which are diſputable, arbi- rary, and mutable; and which are, therefore, fixed by treaties.' Its obliga- y force depends upon the arbitrary deciſions of men. Therefore, it muſt de- e its authority from that conſent, which nations give, from thoſe promiſes ich they make, and from thoſe engagements, under which they bring them- ves by treaties to obſerve it. Since it derives its force from treaties, it is plain, t it is mutable. It may be altered by thoſe ſtates, which obſerve it; for its ligatory force depends upon conſent alone. Therefore, the obligation to ob- ve it laſts no longer than that conſent. Of courſe, as ſoon as nations agree to obſerve it, but to obſerve another rule in place of it, it ceaſes to be o- gatory.

I ſay, as ſoon as nations *agree* not to obſerve it; for it is not optional to a ſtate her to obſerve or not to obſerve it. It ought to notify its diſſent to thoſe o- r ſtates, with whoſe concurrence it was enacted; for the primary Law of na- ns is immutable and conſtantly obligatory. Therefore, it is neceſſary that ry alteration be made, and begin to be carried into execution, without infrin- g that primary Law. But it enacts, that notice of the intended alteration be en the other ſtate by that one, which intends to make it, before it begins to be ried into execution; for it is entitled to have full time to deliberate concerning conduct which it ought to hold after the alteration.

TITLE IX.

Of Civil Law.

9. MAN has, by his wants, by his ſocial affections, and by force, been obliged to enter into Society. He is bound *conſtantly* to obſerve the ws of nature; (§ 18. *ſqq.*) but he is endowed with liberty, and he is imperfect. erefore, he muſt be *inconſtant* in his conduct, and muſt frequently abandon the ns of virtue; for the conduct of every imperfect, paſſionate, rational crea- muſt be irregular (§ 15. 20.). Iraſcible, he may injure his fellows; ſelfiſh, may invade their property; concupiſcible, he may violate their chaſtity; am- ous, he may encroach upon their rights; ignorant, he may not know his du- heedleſs, he may neglect to do it.

o ſoon, therefore, as mankind form themſelves into great ſocieties, govern- t and legiſlation become neceſſary. For regard to the general peace as well o perſonal ſafety muſt make thoſe, who are *aſſociated*, endeavour to hinder e- individual from tranſgreſſing the Laws of nature, and from doing that ill, ch he might by his paſſions be led to do. For this purpoſe, they muſt t out his duty to him; muſt eſtabliſh rules for regulating his conduct; and t, by proper motives, induce him to obſerve them. Thoſe rules, which are

eſtabliſhed

eſtabliſhed in ſociety for regulating the conduct of the members of it, are called CIVIL LAWS.

But the impulſes of paſſion may, in ſome caſes, be more powerful than all other motives. Hence, the Laws may be tranſgreſſed; the public tranquillity may be violated; differences may ariſe among private men. But it would diſturb the peace of the world, if one was, on every occaſion, to do juſtice to himſelf and, with his own hand, to puniſh thoſe, who offended him. It were, as it were, in ſociety to live out of it. Therefore, Officers muſt be appointed for taking care that the Laws be obſerved, for puniſhing tranſgreſſors, and for determining diſputes. Thus, the different powers, which are neceſſary to every aſſociated form, the legiſlative which eſtabliſhes the rules, the judicative which applies them to particular caſes, and the executive which carries them into execution, diſcloſe themſelves in every even the moſt ſimple aſſociation of mankind.

§ 70. The end, therefore, of government, of legiſlation, and of civil inſtitutions is to oblige man, to obſerve conſtantly and in all his actions the Law of nature; for the end of them all is to oblige him to do his duty. But it is his duty conſtantly to obſerve the Law of nature (§ 19. ſqq.) 'Tis true, the commentators on the Roman Law call *juſtice* the end of Civil Law; and their *notions* may be extremely true. But they expreſs themſelves, ſurely, in very improper terms; for the word *juſtice* conveys an Idea very different from that which is conveyed by the words 'the obſervance of the Law of nature.' This is the real end, at which all Civil Law ought to aim. 'Tis true, all things are not practicable; it is neceſſary, therefore, to diſtinguiſh the practicable from the impracticable, and not to beſtow time, pains, or expence in attempting impracticabilities. There is a perfection, which is Ideal, and at which, it is probable human government ſhall never arive. But it would be wrong for men to deſpond. They ought, ſurely, to aim at the nobleſt ends, and to do all, which it lies in their power to do, in order to arrive at them. Therefore, human Governments *ought to* aim at getting men conſtantly to do their duty. In fact, this is the end, at which they all either aim or pretend to aim; for beſide thoſe inſtitutions, which are made in order to hinder them from doing *injuſtice* to one another, ſchools are erected, religion is eſtabliſhed, and prieſts are conſecrated, in order to inſtruct them in the duties, which they owe not only to their neighbours but to GOD and to themſelves, to teach them virtue, and to perſuade them to practice it. Accordingly, the Roman Lawyers ſeem to have had Ideas of the end of Government more exalted than thoſe of their modern commentators. They had an eye to the *pulchrum*, the *honeſtum*, το καλον, the perfection at which virtue can be ſuppoſed to arrive; for they command us not only to give to every man that, which belongs or is due to him, and to abſtain from doing hurt to others, but to live *honeſtly*. *Juris præcepta ſunt hæc; honeſte vivere, alterum non lædere, ſuum cuique tribuere, l.* 10. § 1. *ff. de juſt. et jure.* Thus, one of the fundamental precepts, on which their ſyſtem is erected, is *honeſte vivere* *. They conſidered, that an action might perhaps, be permitted by human Laws to be done, which, nevertheleſs, ought not to be done. *Non omne quod licet, honeſtum eſt. l.* 144. *ff. d. r. j.* Therefore they commanded men to obſerve the *honeſtum* in their conduct. Nay, they went ſo far, as to hold every thing, which was diſhoneſt, *inhoneſtum, turpe*, to be *impoſſible*. *Quæ facta lædunt Pietatem, exiſtimationem*, verecundiam *noſtram*, (*ut generaliter dixerim*) *contra bonos mores fiunt; nec facere nos poſſe credendum est. l.* 15. *ff. de condit. inſtitut.*

§ 71. The real end, therefore, of human Government and of Civil Law is to oblige men to obſerve the Law of nature. Conſequently, if men were of themſelves diſpoſed to obſerve it, there would be no neceſſity for human laws; for there would be no occaſion to uſe forcible means, in order to make them do

* The meaning of the *honeſtum* is beautifully explained by CICERO in his books *de officiis, de finibus*, and other works.

that, which they were willing to do without them. United by affection, and enamoured of virtue, they would conſpire together in diffuſing happineſs among their kind. In ſuch a ſituation Society, nay Government, might be eſtabliſhed; but the principal, if not the ſole view of thoſe veſted with authority would be to form ſchemes, by executing which with united endeavours the happineſs of the people might be promoted. It is true, therefore, as St. PAUL ſays, that 'the 'Law is not made for a righteous man, but for the lawleſs and diſobedient, 'for the ungodly and for ſinners, for unholy and profane, for murderers of fa- 'thers and murderers of mothers, for manſlayers, for whoremongers, for men- 'ſtealers, for liars, for perjured perſons, and if there be any other thing that is con- 'trary to ſound doctrine.' Laws were made not for the righteous, but for the wicked: For the righteous *are a Law unto themſelves*; their own hearts would lead them to do that which is right and juſt, whether any laws had ever been enacted by Civil Government. But the wicked, impelled by the violence of furious paſſions, and actuated by the moſt ſelfiſh motives, need to be reſtrained by force, and by the fear of puniſhment from tranſgreſſing the Law of nature.

§ 72. Since rules muſt be eſtabliſhed for regulating the conduct of mankind, it is plain, that there muſt, in every ſtate, be a power, ſubject to none, and ſuperior to every other; for rules muſt be eſtabliſhed; therefore, there muſt be ſome power to eſtabliſh them, that is, there muſt be a *legiſlative* power. This power both muſt and ought to be ſupreme, abſolute, and uncontrolable; for the neceſſities and the peace of ſociety require, that the rules, eſtabliſhed by it, be obſerved by mankind. Therefore, its will muſt be obeyed. But there could be no rules, which men could either know or be obliged to obſerve, if there was not a power, acknowledged by them to be ſupreme. In every ſtate, therefore, there muſt be ſome where lodged a ſupreme legiſlative power, whoſe will is law, and muſt be obeyed.

§ 73. The legiſlative authority muſt, in every ſtate, be not only ſupreme, but *one*. If there were two contending powers, each laying claim to it, endleſs diſorder, diſturbance, and diſpute would ariſe in ſociety; for their different ordinances would neceſſarily produce frequent colliſions; the people would live in conſtant perplexity, doubtful whether they ſhould obey the Laws enacted by the one or thoſe enacted by the other power; the rights of mankind would, thereby, be rendered precarious; the ſubjects would want fixed rules for conducting their affairs, the judges for regulating their judgments. Beſides, each of the parties, contending for ſupremacy, would be ambitious of having its own laws alone obeyed by the people. Thus, parties would be formed; civil diſcords would ariſe; force alone could determine the controverſy; and the ſtate would be involved in confuſion and civil war, till one of the parties ſhould, by its ſuperior ſtrength, cunning, or addreſs, obtain the maſtery, and ſhould be acknowledged by the other to be the alone legiſlative power. Thus, the ſuppoſition of more than one legiſlative power neceſſarily implies manifold abſurdities.

§ 74. From what hath been ſaid concerning the origin of Government, the end of civil Law, and the neceſſity of the exiſtence of a ſupreme power in every ſtate, it is plain, that *a* civil Law may be defined to be a general rule, eſtabliſhed by the ſupreme legiſlative power in any ſtate, which the ſubjects of that ſtate are obliged to obſerve in regulating their voluntary actions. And *the* Civil Law is 'the ſum of thoſe general rules, eſtabliſhed by the ſupreme legiſlative power 'in any ſtate which the ſubjects of that ſtate are obliged to obſerve in regulating 'their voluntary actions.' From theſe definitions it will be eaſy to ſhew the nature of Civil Laws; for from them it appears, I. That civil Laws are *rules*. II. That they are rules for regulating *only* the *actions* of men. III. That they are rules for regulating their *voluntary* actions alone. IV. That they are *general* rules. V. That they are eſtabliſhed by the *ſupreme legiſlative power of the ſtate*. VI. That they are rules, which all the *ſubjects* of that ſtate, and they alone, are obliged to obſerve.

§ 75. Civil Laws are rules (§ 74, *ax.* 1.); for all Laws are rules. (§ 2. 3. 16. 17.)

§ 76. They are rules for regulating actions alone. (§ 74. *ax.* 2.). By an action I mean that, which is different from thought, is oppoſite to it, and produces a ſenſible effect. The thoughts of the heart are known to the Searcher of hearts alone; they fall not under the obſervation or cognizance of man. By conſequence, they cannot be ſubjected to any rules, eſtabliſhed by him. He cannot control them; he cannot hinder one from having them; becauſe he cannot diſcover them. Of courſe, it would be in vain for him to attempt to do it. Therefore, tho' one, who entertains wicked thoughts, may, in the eye of GOD or of conſcience, be culpable; human Laws can take cognizance of his actions alone; for they relate to them alone.

Hence it has been admitted by all legiſlators, that no man either can or ought to be puniſhable for his thoughts. *Cogitationis pœnam nemo patitur. l.* 18. *ff. de pœnis.* Society is injured not by thoughts, but by actions. 'Tis true, a legiſlature may be ſo ſilly as to *enact*, that men ſhall think after a determinate manner, and may annex a ſanction to its ſtatute. But it is impoſſible for it to know with certainty, whether its will is or is not obeyed; for it cannot penetrate into the heart. So long as man continues to *think* only, and forbears to *act*, there can be no evidence of his guilt.

Since the thoughts of the heart are not diſcoverable by man, it is plain, that thoſe exerciſe a moſt unlawful tyranny, who hold inquiſitions, in order to diſcover the *ſentiments* of others. Nothing is ſo much a man's property, as his thoughts; no body has a right either to know them, or to compel one by torture to diſcloſe them. *La vie et les biens ne ſont pas plus à eux que leur maniere de penſer.—Qui peut ravir l'une peut encore mieux ravir l'autre.* As long as one chuſes to conceal them, and forbears by ouvert acts to declare them, no human tribunal is entitled to attempt to diſcover them, much leſs to pronounce deciſively concerning them. Hence the Goſpel forbids us to judge, leſt we be judged. We may entertain unjuſt ſuſpicions concerning our brethren, who may have as good reaſon to entertain the ſame concerning us.

Since Society is injured by actions alone, it is plain, that thoſe exerciſe a moſt unlicenſed tyranny, who endeavour to bind with fetters the thoughts of men, and to reſtrain the freedom of ſpeculative diſquiſitions. One need never be anxious about the cauſe of virtue or that of truth. They may ſuffer by being concealed, but can never ſuffer by being examined. Truth will ever be conſiſtent with itſelf; and the cauſe of virtue is too well founded to ſtand in need of tyranny to ſupport it.

From the ſame principle it follows, that the freedom of the Preſs ought not to be limited; for men have a right to think for themſelves, and to publiſh their thoughts to the world. Reſtraints, impoſed on the Preſs, may well do harm; they hardly can do good to ſociety. In truth, liberty, learning, religion, improvement, every thing, in ſhort, which is valuable in life, is connected with it. *Pour jouir de la liberté, il faut que chacun puiſſe dire ce qu'il penſe; et pour la* conſerver, *il faut encore que chacun puiſſe dire ce qu'il penſe* *. 'Tis monſtrous, therefore, at this time of day, for men to attempt, under the pretext of the authority of laws, which ought never to have been enacted and are gone into deſuetude, to introduce an inquiſitorial power, by attempting to reſtrain the liberty of the Preſs. Every body knows, that thoſe, who appear, in particular caſes, to be moſt zealous for reſtraining it, and affect a ſuperior regard for religion, are, at bottom, uſually actuated by the meaneſt motives. In order to acquire a low popularity with the ignorant, to ſatisfy private reſentment, or to ſerve the turn of political enmity, they forfeit their integrity, and ſacrifice the rights of mankind. 'Tis often of little importance, ſays the great MONTESQUIEU, in a free ſtate, whether individuals reaſon well or ill. It is enough,

* *De l'eſprit des loix. liv.* 19. *ch.* 17.

enough that they reaſon; for from thence proceeds that liberty, which enſures the effects of theſe very reaſonings. 'Dans une nation libre il eſt très ſouvent in-'different, que les particuliers raiſonnent bien ou mal. Il ſuffit qu' ils raiſonnent. De-'lá ſort la liberté, qui garantit les effets de ces mêmes raiſonnemens.' The cry has always been raiſed by artful men, that religion was in danger. Little do they conſider, how much proner men are even to ſuperſtition, much more to religion, than to irreligion and to atheiſm. Religion, therefore, can never be in danger. The danger always is, that ſuperſtition may prevail. Thoſe, therefore, who have the honeſty to combat it, notwithſtanding all the obloquy with which they may be reproached by the furious or the flagitious, deſerve well of mankind. All the atheiſtical works, which were ever publiſhed, have never done ſo much real miſchief to religion, as the imprudent, inquiſitorial fury of the Zealots.

I mean not to ſay, that the Law approves, in all caſes, of the thoughts of the heart. Nothing leſs. They may be wicked and abominable; and men, as they are culpable for harboring them, would be puniſhable for them, in caſe they were diſcovered; for the Law would preſume, that perſons capable of entertaining them, might prove dangerous members of ſociety, and might carry their wicked intentions into execution. But, it being impoſſible to diſcover the ſecrets of the heart, the Law requires, in all caſes, ſome ouvert act, before it pronounces deciſively concerning them; for evidence cannot otherwiſe be got of them, than from actions, which are the objects of the external ſenſes*.

But the well-being of ſociety is greatly connected with the thoughts of men's hearts; for wicked ways of thinking are uſually accompanied by ways of acting equally wicked. Hence, every wiſe legiſlature, by eſtabliſhing ſchools, academies, and ſeminaries of virtue, ought to take particular care, that the minds of the Citizens be early formed to it, be inſtructed in wiſdom, and be led to embrace juſt opinions concerning the conduct which they ought to hold in the world.

§ 77. But laws extend not even to *all* the *actions* of men. They are rules for regulating *voluntary* actions *alone*, (§ 74, *ax.* 3.) that is, ſuch, as proceed from choice, and are ſuppoſed to be ſubjected to the volition, power, and controul of man; for ſome actions, it has been ſaid, are voluntary; others are involuntary. (§ 14.). Law relates to the former alone; for they are alone controllable by man. All human Laws *ſuppoſe* mankind endowed with a power of acting in different ways, and of determining themſelves to act in one of thoſe ways, rather than in another. Thus, they *ſuppoſe*, that one, who has committed murder, might have abſtained from committing it; that one, who has made a promiſe, might have forborne to make it; that one who has bound himſelf by a formal deed, might have not bound himſelf. 'Tis, therefore, to ſuch actions alone as are voluntary, or as it is ſuppoſed man either may or may not do, that Civil Laws relate. Their involuntary actions are not under their power; they depend not on the free-will or choice of man, but proceed from neceſſity, which hinders them from being otherwiſe than as they are. Thus, a man who is in health, uſes exerciſe, and abſtains for hours from food, cannot hinder himſelf from growing hungry; becauſe the uneaſineſs, attending hunger, ſeems to depend on the material conſtitution of man, and to be a neceſſary conſequence of the Laws of nature. Therefore it would be abſurd to make a law forbidding any man to grow hungry. In the ſame manner, it would be abſurd to make a Law, forbidding him to do any thing, which he has it not in his power either to do or not to do. Such laws could not be obeyed; they could not ſerve any good purpoſe; therefore, they would be abſurd.

Since Laws are referable to ſuch actions alone, as are in the power of men, it is plain, that they can extend to *future* ones alone, that is, to thoſe, which are to be done *after* the Law is exacted, arg. p. ſt. R. I. c. 13.-§ 5. c. 23.—R. II. c. 7. 8.—l. 7. C. *de legib.* For man cannot regulate others than theſe. Actions,

* See Sir WILLIAM YOUNG's ſpeech in Lord LOVAT's trial.

ons, which are done, are, like time which is paſt, irrevocable, and out of the power of thoſe who did them. Men both do and ought to regulate their conduct by the Laws, as they ſtand at the ſucceſſive times at which they act. Therefore, it would be unjuſt to enact Laws, which ſhould have a retroſpect; for men do their duty by acting conformably to the preſent Law. If they obſerve it, they are not culpable; of courſe, they ought not to ſuffer for it. Laws, therefore, are never underſtood to have a retroſpect. I ſay, are never underſtood to have a retroſpect. No doubt, if they expreſsly bear that they ſhall have it, execution muſt be given to them; for they muſt be interpreted. It may be hard; But the will of the Legiſlature muſt be obeyed; words, which are clear cannot be explained away. l. 7. C. *de legib.*

Indeed, it may, in ſome caſes, be proper to give them a retroſpect. For inſtance, if one has been guilty of ſome extraordinary tranſgreſſion, which either is not puniſhable by the common Law, or deſerves the animadverſion of the ſupreme power itſelf on account of the peculiar circumſtances attending it, it may be proper for the Legiſlature to teſtify its diſpleaſure at the delinquent and its deteſtation of his crime, by enacting a Law and inflicting an extraordinary puniſhment upon him. But this, if it is attentively conſidered, is not properly to give Law a retroſpect. It is to inflict on a criminal a puniſhment adequate to a crime committed by him.

In the ſame manner, if a Law is ambiguous, and needs to be explained by the legiſlature itſelf, it may ſometimes be reaſonable to give a retroſpect to the interpretation, that is, to apply to caſes prior to the explanatory law, that interpretation which has been given by the Legiſlature. 1427. c. 107. The occaſions, on which it may be proper to do ſo, muſt be left to be determined by the judge according to Circumſtances.

§ 78. Laws are *general* rules. (§ 74. *ax.* 4.) l. 8. *ff. de leg.* for they attend not to the circumſtances of perſons, of times, and of places, by which *particular caſes* may be diſtinguiſhed. They relate not to them; but are conceived in general terms, ſo as to be applicable to every caſe, which is intended to fall under them. *Jura non in ſingulas perſonas, ſed* generaliter *conſtituuntur.* l. 8. *ff. de legib.* Hence the Law is by PAPINIAN called *commune præceptum.* l. 1. *ff. de legib.* They may therefore be called *general* rules in two different reſpects; 1) in reſpect of the perſons, who are to be governed by them; 2) in reſpect of the things, to which they relate.

They are called general rules 1) in reſpect of the perſons, who are to be governed by them: for every one of them is, as far as its nature admits, obligatory on *all* the Subjects. They are *all* bound to regulate their conduct by them. I ſay, 'as far as their nature admits;' for ſome Laws are intended to produce more extenſive effects than others. Such, for inſtance, is the Law concerning murder. It, by its own very nature, is originally, primarily, and immediately intended to extend to every individual member of the commonwealth. Its influence, therefore, is more general than that of one, which originally, primarily, and immediately concerns thoſe alone, who live within the limits of a particular County. Again, the influence of this one muſt be more general than that of one, which relates to a ſingle individual alone. However, all of them are general rules; for *all* the citizens are obliged, in *every* caſe, in which they have occaſion, to regulate their conduct by them.

Beſides, thoſe can hardly be called Laws, which relate not to the general intereſt of all the members of the commonwealth. Such as relate to the concernments either of private men, or of private corporations, are properly called *private acts*; for they contain not any rule, which *can* be obſerved by the people. They either grant a privilege to ſome particular perſon, or ordain a penalty to be inflicted upon him. Therefore, the effects of them muſt be very limited; for the end, intended by them, may ſoon be accompliſhed.

Beſides,

Beſides, they may be ſaid to be general rules; becauſe the judges are bound to regulate by them their deciſions of all thoſe caſes, which come before them, and to which they are applicable. And this is true not of thoſe laws alone, which are the moſt general, and are declared to be publick ones, but of thoſe, which are private. For the judges are bound in all their deciſions to have regard even to thoſe private ones, in caſe the parties-litigant plead them. I ſay, in caſe parties plead them; for there are in all countries ſome Laws, which are not underſtood to make a part of the public Law of the land. Therefore, they are not preſumed to be known to the judges of it; for they are, as it were, private, latent deeds, which are not notorious. Of courſe, the judges cannot take notice of them, unleſs the parties, who are entitled to do it, found ſpecially upon them. In this reſpect, they differ from thoſe Laws, which are called public; for the Judges are bound to know thoſe, which are public, and to govern their deciſions by them.

Laws may be ſaid to be general rules, 2) In reſpect of the caſes, to which they relate; for they are accommodated to things, as they generally happen. They are ſuited to the ordinary courſe of events, and ſeldom take uncommon caſes into view. It is impoſſible for a legiſlature to imagine all that variety of contingencies, with which human affairs may be diſtinguiſhed. *Neque leges, neque ſenatuſconſulta ita ſcribi poſſunt, ut omnes caſus, qui quandoque inciderint, comprehendantur: ſed ſufficit, et ea, quæ plerumque accidunt, contineri. l.* 3. 4. 5. 6. 10. 11. 12. 13. *ff. de leg.*

§ 79. Laws are rules eſtabliſhed by the ſupreme legiſlative power of the ſtate. (§ 74. *ax.* 5.) For in every ſtate there muſt be a *ſupreme* power; this power muſt be *one*; (§ 72. 73.) 'tis it, which has alone the power of eſtabliſhing rules, which muſt be obſerved by all the ſubjects, or, which is the ſame thing, of enacting laws; for Laws are thoſe eſtabliſhed rules, which muſt be obſerved by the people.

Since the ſupreme power has alone the power of legiſlation, it is plain, that it matters not in whom it be veſted. So it be ſupreme, it has the legiſlative power, and its laws muſt be obeyed, whether it be veſted in one or in many.

Since laws are rules eſtabliſhed by the ſupreme legiſlative power, it is plain, that it muſt have a power both of enacting new ones, and of amending, repealing, or altering thoſe, which were enacted in former times: for 'tis it, and it alone, which makes them; therefore, its will is Law; and every thing, which it declares to be its will, is Law, whether it be ſomething, which it never willed before, or ſome amendment, alteration, or repeal of that which it had willed before. Of courſe, it muſt have a power both of enacting new Laws, and of amending, altering, or repealing old ones; otherwiſe it could not be ſaid to be ſupreme, which it is, however, confeſſed to be; for it is ſuperior to every other power, and is ſubject to none. But one, poſſeſſed of ſupreme power, may actually do any thing, which it pleaſes. Its dictates are uncontrollable, and muſt be obeyed.

I chuſe to ſay, that the ſupreme power has the power both of making new laws, and of altering or repealing old ones, rather than uſe the expreſſion of the Roman Law, that it is *legibus ſoluta*, is not *bound* by the Laws, and is not *obliged* to obſerve them; for that expreſſion is ſuitable to thoſe Governments alone, in which the ſupreme power is veſted in one abſolute deſpotic Monarch. Beſides, it is liable to be miſapprehended, and may be made the foundation of very falſe and ſophiſtical concluſions.

In ſtates, in which one man has uſurped the ſupreme, abſolute, and uncontrollable power, for all deſpotic power is founded on uſurpation, every his will is Law. Therefore, he is unaccountable for his conduct. So he is not bound to obſerve the Laws; becauſe he may alter his mind, and may act as he pleaſes. Of courſe, not only has he the power of making, altering, and repealing laws, but he is not even bound, in his private conduct, to obſerve

them; ſince he cannot be made accountable for it. Therefore, he is properly ſaid to be *legibus ſolutus. Princeps legibus ſolutus eſt. l.* 31. *ff. de legib.*

But in ſtates, in which the ſupreme power is veſted not in one, but in many, it would be abſurd to ſay, that that body, which is veſted with it, is *legibus ſolutum*, is not bound by the Laws; becauſe the expreſſion might be miſunderſtood to mean, that the individuals, of which the Collective body conſiſted, were not bound to obſerve the Laws in their private conduct; than which no propoſition can be more falſe; for it is not in their private and individual capacity, it is in their public and collective one alone, that the members of the ſupreme legiſlative body can be ſaid to be not bound by the Laws.

The collective body is, indeed, *legibus ſolutum;* for its ſtatutes are laws; but the individual members of it are not. They are bound to obſerve the Laws, and are accountable for their conduct; becauſe every one, who is not veſted with abſolute authority, muſt neceſſarily be accountable to ſome body. Therefore, it ſeems to be more proper to ſay, that the ſupreme legiſlative power has power to make, alter, and repeal Laws, than that it is not bound by them.

Indeed, every power, whether ſupreme or ſubordinate, is bound to obſerve ſome laws; for every man, be he king or be he ſubject, is bound to obſerve the eternal laws of natural equity, and to regulate his conduct by them. Therefore, tho' it is true, that Monarchs, who are abſolute, *may* not obſerve them, and cannot *actually* be called to account for their conduct, it is, however, their duty conſtantly to obſerve them; the obligation is perpetual; they ought to do every thing, which they can do, to make their people happy, and ought to conſider the power, of which they are poſſeſſed, as a truſt depoſited with them, in order to be employed to promote the good of Mankind. 'C'eſt donc 'la Juſtice, qui doit faire le principal objet d'un Prince. C'eſt donc le 'bien des peuples qu'il gouverne, qu'il doit preferer à tout autre intérêt. Le 'Souverain, bien loin d'être le mâitre abſolu des peuples qui ſont ſous ſa domi-'nation, n'en eſt que le premier magiſtrat*.' He ought not to think, much leſs ought he to act as if he thought, that his power was beſtowed on him for no other end, than to afford him the means of ſatisfying his pride, his vanity, or his paſſions. He is bound not only not to abuſe mankind, but to do all, which he can do, to make them happy. Therefore if he abuſes his power and his ſubjects, he commits a moſt ſacrilegious breach of the truſt repoſed in him, is culpable for his conduct, and is accountable for it. His people have a right to do juſtice to themſelves; and it is *prudence alone*, which ought to reſtrain them from exerciſing it; for it ought never to be exerciſed but on extraordinary occaſions.

Since the ſupreme Legiſlature has the power of making, altering, and repealing laws, it follows, that its poſterior ſtatutes muſt derogate from thoſe, which were prior to them; l. 4. *ff. de conſtitut. princip.* l. 26, 27, 28. *ff. de legib.* for it is the will of the Legiſlature, which is Law. By conſequence, the Law muſt always be its preſent will; for the ſame principle, on which the former will was allowed to be Law, at the time at which it was declared, entitles the poſterior will to have the authority of Law at the time, at which it is declared. Therefore, if the Legiſlature at different times makes contrary Laws, that, which is laſt enacted, has alone obligatory authority.

Since it is the ſupreme power, which has alone the power of legiſlation, it is plain, that no inferior power has a right to make Laws, which ſhall be obligatory on all the people. Hence, neither any private perſon, nor any inferior magiſtrate, nor any corporation has power to make them. 'Tis true, Judges, magiſtrates, and corporations may lay down general rules to be obſerved either by themſelves in the exerciſe of their authority, or by thoſe ſubject to their juriſdiction. But theſe are not properly Laws; for their authority is not univerſal, it extends not to *all* the Subjects; it is limited to thoſe, who live within the territory of the inferior power, which makes them. Beſides, they are not obligatory even upon them,

* Anti-Machiavel, chap. 1.

them, in caſe they are repugnant to the general Laws, enacted by the ſupreme legiſlative power of the State.

§ 80. The *Subjects* are *bound* to obſerve the Laws, and to regulate their actions by them; (§ 74. *ax.* 6.) for Government being neceſſary to the happineſs of ſociety, it becomes neceſſary for mankind, therefore, it is their duty to ſubmit to it. By means of it, every one lives in peace, enjoys his property, and is protected from injuries. Thus, he feels the advantages of it; therefore, he ought to put up with the ſubjection, without which theſe advantages cannot be obtained. Of courſe he ought to ſubmit to it. By entring into ſociety, he brings himſelf under an obligation, and tacitly engages to obſerve the Laws enacted in it; for they are neceſſary to its ſubſiſtence. Hence Law was by DEMOSTHENES called πόλεως συνθήκη κοινὴ, *communis reipublicæ ſponſio* l. 1. 2. *ff. de legib.*

§ 81. This obligation is general; it extends to *all* the ſubjects, that is, to 'all thoſe, who either by birth or by reſidence are really ſubjected to the coercive power of the State.' For, it being neceſſary for men to aſſociate together, to inſtitute government, and to divide themſelves into different nations, there muſt be ſome rule, by which every individual may know the State to which he is bound to attach himſelf. The moſt obvious as well as natural ſeems to be that, by which men become Subjects of a particular State 1) by *birth*. For thoſe, who originally entred into Society, intended by entring into it not their own utility alone, but that of their poſterity. Therefore, they muſt be preſumed to have ſtipulated the advantages ariſing from it, not only to themſelves, but alſo to their children. Of courſe, their children muſt remain ſubjected to the Laws of that ſociety, by which both their fathers and themſelves have been protected. They were once young, and might have been deprived of their lives or of their eſtates; the Laws have protected them during their helpleſs condition; therefore, they owe gratitude and obedience to them. Beſides, people uſually have an attachment to their native country, becauſe they were born, were educated, ſpent their early days, made their firſt acquaintance, contracted their firſt friendſhips, and have their eſtates ſituated in it; it was the abode of their fathers, and the ſoil from which they ſprang. Hence, the Law of every nation has held a man to be peculiarly attached to that Country, in which he was born, and has ſubjected him to the Authority, which is ſupreme in it. Every one, therefore, is held to be a ſubject of that ſtate, to which he is aſſociated by birth.

The natural connexion, which one has with his Country, is ſo ſtrong, that the obligations, and, by conſequence, the rights ariſing from it, deſcend to his children; for one is held to be bound to continue always faithful to the intereſt of his country; he is ſuppoſed to love it, and to have great obligations to it. Therefore, when he is abroad, he is ſuppoſed to keep it ever in his eye, and to be reſolved to return to it. Of courſe, a temporary abſence does not looſe him from the obligations, under which he lies to it. Conſequently, he does not, by abſence, loſe thoſe rights, which he had acquired, and which he enjoyed in it. He has it in his power at any time, at which he pleaſes, to return to it, and to the actual poſſeſſion of them. So the Law feigns him, on his return, never to have been abroad. Of courſe, himſelf, his family, and his eſtate have all the ſame rights, which they would have had, in caſe he had always remained at home. His children, therefore, are held to have been born in the Country of their father, and to be ſubjects of that State to which he is ſubject. This is a right which they have. So they may lay claim to it by coming to their father's Country, when they pleaſe. Hence the Children of thoſe, who were born within the dominions and were thereby natural ſubjects of a particular State, are alſo Subjects of it.

Thoſe, who by the accident of their birth are ſubjected to a State, are ſaid to be *natural-born* ſubjects of it. Different from them are ſuch, as are ſubjected to it by their *reſidence* within its dominions; and may, therefore, be ſaid to be adventitious ſubjects, or *foreigners*. Their ſubjection is neceſſary; ſince they

they are actually liable to be punished, in case they transgress the Laws; the power of the state extending *really* to them: for it extends to all, whom it finds within its territories. Therefore, it would be absurd for them to imagine, that they were not bound to observe its laws. Besides, during their residence within its territories, they are protected by it. Therefore, they owe respect and obedience to it.

'Tis true, the obligation, arising from residence, is not so strong, as that which arises from birth. For the obligation, superinduced by residence, is brought voluntarily by one upon himself. Therefore, it is no more than temporary and dissolvable; it lasts no longer than the residence, from which it descends; one may, by removing out of the territories of the state, free himself from all obligations of obedience to its Laws. But that obligation, which arises from birth, is not brought voluntarily by one upon himself; it arises necessarily from an accident, which does not, in any sort, depend upon his choice. Therefore, it is perpetual and indissolvable; it attends him to the most remote corner of the Globe, and to the last moment of his life; he cannot, by any volition, by any act of his, loose himself from it.

§ 82. But the power of a state is confined within its own territories; for it has no coercive power without them. So nature, by limiting them, has set *real* bounds to its jurisdiction. Besides, one is bound to observe the laws of that state, within which he resides; since it is to them, that he owes his immediate protection. From hence it follows, that one, who was born within the dominions of a state, must, in case he goes into the territories of another state, regulate his actions by the laws of that state, within which he is. At the same time, the obligations, which he has to his native country, being indissolvable, he must ever continue to bear allegiance to it. Of course, he is bound to regulate his conduct in such manner, as may not be inconsistent with that duty, which he owes to it. Hence, it is not lawful for him to carry arms, or to do any action, which the Law of nature or of his country has declared to be treason against it.

But cases frequently happen, which admit not of delay, but require immediate dispatch. In them, it is usually impossible to get the advice of council learned in the Law. Therefore, in all cases, in which it cannot be expected that the advice of council either should or could be got, it will be sufficient, if a foreigner regulates his conduct by the Law of nature. For the necessity of the case makes his ignorance of the Law of that Country, in which he is, excusable. He either could not or was not bound to ask the advice of Council. He had not, therefore, any other law, by which he could regulate his conduct, than the obvious dictates of the Law of nature. He was not culpable, if he acted conformably to it. Therefore, it ought to be the rule of judging concerning all his actions, transactions, or negotiations, about which he either could not or it could not be expected that he should ask the advice of learned Council. 'Tis otherwise in those cases, in which he ought to have asked their advice, before he acted, and ought to have conformed himself to it. In them it is the Law of the Country, by which he must be judged; for he is bound to know it. Therefore, if knowingly, as must be presumed, he transgresses it, he is inexcusable, and has no body but himself to blame, if he suffers for it.

§ 83. Since the obligation of obedience extends to *all* the subjects, (§ 81.) it is plain, that it is no matter, whether they be high or low, noble or ignoble, rich or poor, young or old, male or female; for *all* the subjects indiscriminately are bound to observe the Laws.

§ 84. But men are bound constantly to observe the Laws of nature, and are imperfect. Therefore, the Laws, enacted by them, may sometimes happen to be contrary to those of nature. Of course, cases may happen, in which it may be lawful, nay in which one may be bound to disobey them; for every one, it has been said, (§ 19.) is bound *constantly* to observe the Law of nature. Therefore,

Therefore, it may be, in ſome caſes, one's duty to diſobey the Laws enacted by men.

I agree with the council for Dr. SACHEVEREL in thinking, that it is improper to ſpecify the particular caſes, in which one may or ought either to diſobey or to reſiſt the ſupreme power; for Government and order are eſſential to the happineſs of the world. Therefore, one ought not raſhly to unhinge it by diſobedience, much leſs to diſturb its peace by reſiſtence. Diſobedience is apt to introduce confuſion, and to beget a contempt of that power, which ought to be reſpected by mankind. Diſorder, if once introduced, is not eaſily re-eſtabliſhed. Much leſs, therefore, ought one forcibly to reſiſt or to rebell againſt the ſovereign power: for civil war is attended with many calamities; it interrupts the peaceful labors of men; of courſe, it cauſes many of the people to want bread, becauſe they cannot find work. Beſides, it produces rapine, anarchy, and bloodſhed. Therefore, thoſe, who raſhly raiſe rebellions againſt a well eſtabliſhed Government, are, ſurely, guilty of an atrocious crime.

But caſes may happen in which it may be lawful to diſobey, nay, not only to diſobey but to rebel. For diſobedience and Rebellion are very different. Some actions, which will juſtify the one, may not juſtify the other.

In general it may be ſaid, that one ought to diſobey in all caſes, in which it is a worſe action to obey. For one ought not in *all* caſes to abſtain from obeying a Law, which *appears* to contain a command that is, in itſelf, immoral. It is not every degree of immorality, which will juſtify diſobedience. Obedience is a moral duty, as well as others; and the obligation to it may be ſtronger than that to diſobedience. In all thoſe caſes, therefore, in which the obligation to obey is ſtronger than that to diſobey, that is, in which it is a worſe action to diſobey than to obey, one ought to obey; becauſe by obeying he does his duty, and by diſobeying he would be guilty of a breach of it. But in all thoſe, in which the obligation to diſobey is ſtronger than that to obey, that is, in which it is a worſe action to obey than to diſobey, one ought to diſobey.

'Tis true, by diſobedience one trangreſſes the Civil Law, and may be puniſhable. But one ought rather to expoſe himſelf to puniſhment, and to undergo it, than do a bad action.

Again, in ſome caſes the conduct of the ſupreme power may juſtify not only diſobedience, but even rebellion; and theſe may be determined by an application of the rule, which has been juſt now explained.

Much muſt depend on the nature of that Government, which is diſobeyed. A people, who enjoy the bleſſing of a good political conſtitution, ought to be cautious to avoid doing any thing, which may make them run the riſk of loſing it. Such as live under an abſolute monarch, can hardly be worſe than they are. Therefore, regard to their conſtitution ought never to reſtrain them from reſiſtence; they ought to be reſtrained from it only by regard to the conſequences, which it may have on the happineſs or unhappineſs of their country.

Of courſe, it may be affirmed, that a people, living under an abſolute monarch, have a right, and are entitled to avail themſelves of every opportunity, which they may have of bettering their political conſtitution, of acquiring liberty, and of curbing or reſtraining within proper limits the power of the Crown. I ſay, they have a *right* to do it; for all Government is intended for the good of mankind. Therefore, they have an indefeaſible right to eſtabliſh that form, which muſt, by its own nature, make them moſt happy. But happineſs and dependence are inconſiſtent. Indeed, it is impoſſible for one, who knows that his life, his property, and his all are dependent entirely on the caprice of one man, to be eaſy. Of courſe, a nation, which is ſubjected to the abſolute dominion of a monarch, cannot be ſo happy as one, which lives under the Government of certain fixed and eſtabliſhed rules. Liberty, therefore, is the moſt valuable acquiſition. Without it, a people cannot be eaſy and happy. Of courſe, a nation has a right to ſeize every opportunity of acquiring it. 'Tis true, prudence

may hinder one, on many occaſions, from doing that, which he has a right to do. Therefore, the probability of ſucceſs, the conſequences of failing, and all other circumſtances ought to be taken into conſideration, in order to form a judgment, upon the whole, concerning the wiſdom or folly of the attempt.

But it is otherwiſe in the caſe of a Government, which is tolerably poiſed, and makes the people free. One ought not, in it, to attempt any thing by force, unleſs there is a probability of doing conſiderable ſervice to the conſtitution; for abſolute Government is ſo univerſal, and has been ſo artfully inculcated on mankind to be of divine inſtitution, that it has ſtrong *prejudices* prevailing in its favor. Beſides, ambition, folly, and popular fury mix themſelves ſo much with all popular commotions, that it is odds if much good will come of them. Therefore, it will generally be wiſer for men to put up with even the inconveniences of a tolerable conſtitution, than to betake themſelves to force, and thereby to run the riſk of loſing their liberty *.

But it may happen in ſome caſes, that a free people ought to riſk all rather than ſubmit to the determinations of its ſupreme power. One of them I will affirm to be that, in which the ſupreme power ſhould make a ſurrender of the liberty of the people to an abſolute monarch, and confer upon him an *unlimited* power: for liberty, I apprehend, as it is ineſtimable, is inalienable; mankind have a right to it ſo inherent, that no deed, no contract, no time, no poſſeſſion can deprive them of it. Therefore, no legiſlature has a right to alienate it. The ſupreme power is entruſted in their hands not that they may deſtroy, but that they may preſerve the liberty of their Country. For the people have not themſelves power to deprive themſelves of it; they have no more right to hurt themſelves by making a ſurrender of it, and to ſubject themſelves to abſolute power, than an individual has to hurt himſelf by the amputation of a limb or by putting an end to his life. Much leſs have they a right to hurt their poſterity by entailing ſlavery upon them. The deeds of a private man, who is deprived of the ſober uſe of his reaſon, are annulled by the Law. Much more ought ſuch deeds, as are done by the people during their phrenzy, to be held to be void. If, therefore, the legiſlature of a free people ſhould, † like that of the DANES, by a law paſſed in the moſt formal manner, veſt a ſupreme hereditary abſolute power in the King alone, and ſhould ratify the deed with the moſt deliberate ſolemnity, the people would not be bound by the Law. On the contrary, I ſhould account it the duty of every good man to exert his utmoſt efforts, to uſe every mean, which he had it in his power to uſe, in order to prevent the execution of the Law, and by force to preſerve the conſtitution of his country. I ſhould reckon it his duty rather to die in the defence, than to ſurvive the liberty of it.

§ 85. Since Laws are rules, which the ſubjects are bound to obſerve (§ 74.) it is plain, that there ought to be ſome way, in which they may come to the knowledge of that which is enacted by them; for it would be abſurd to exact obedience to a Law, which is unknown. Therefore, Laws muſt be *promulgated*, that is, they muſt be publiſhed in ſuch manner, as may make the people know that, which is enacted by them. After they are held to be promulgated, they are obligatory on the people.

§ 86. But it has been ſaid, that men, actuated by paſſions, are liable to tranſgreſs. Therefore, means muſt be employed to hinder them from doing it. 'Tis ſeldom poſſible, to force men *actually* to do any action; for ſome actions cannot be done without the conſent of thoſe who do them. Beſides, it is impoſſible for a Government to keep a guard on all its ſubjects; it cannot, at all times,

* I don't know, whether I have not ſaid too much in favour of ſubmiſſion; for men are naturally prone to it. Experience informs us, that they bear patiently the greateſt abuſes, and ſubmit tamely to the moſt direful oppreſſion. No fear, therefore, that they be raſh in reſiſting. And it is, perhaps, more humane to propagate a free than a ſubmiſſive ſpirit. The governed need always to have their ſpirits *raiſed*, that the Governors may ſtand in awe to offend them.

† See Lord Viſcount MOLESWORTH's account of DENMARK, c. 6. 7. a book, which no friend of liberty ought to want.

times, have its eyes upon them; if they will, it cannot hinder them from tranſgreſſing. But it is poſſible to propoſe *motives*, by which the people may be *induced* to do ſome actions, and to abſtain from doing others. They may be told, that puniſhment will be inflicted upon them, in caſe they ſhall tranſgreſs, and that they will be rewarded for obſerving the Law. Hence, the fear of puniſhment and the hope of reward are motives, by which men may be induced to obſerve the Law. Therefore, they are uſually called its *ſanctions*.

Puniſhment is 'that ill, which Law ordains one to ſuffer and to be in-'flicted upon him for tranſgreſſing it.' The fear of it is the principal mean, employed in order to induce men to do their duty. Without it Government would be at an end; for every paſſion might be indulged, and the fear of private revenge would not have power enough to reſtrain the violence of it. Therefore, puniſhment is the principal, if not the ſole ſanction of Civil Law.

I ſhall afterwards have occaſion to conſider fully the nature, the end, and the proportions of it. But we have all of us heard of the cruelty, which has been lately exerciſed towards the PORTUGUEZE conſpirators. Their crime was atrocious; but the puniſhments, inflicted upon them, offended againſt humanity, and were horribly ſevere. 'Tis, therefore, with avidity, that I ſnatch this opportunity of obſerving, that mild puniſhments are alone ſuitable to that moderation, which is the principle of the Britiſh Government, and diſtinguiſhes this above all the nations of the Earth. We had reaſon to regard with abhorrence a conſpiracy formed, as it ſeems, by reſentment and ambition alone, againſt the life of a monarch. But I am perſuaded, the world would now be much leſs ſurpriſed to hear, that the relations of the conſpirators had revenged, with the hazard of their blood, the cruelties, with which their friends were abuſed. Barbarities never can, never do produce any good effects. The frequent revolutions, of which we read in the hiſtory of China, happened always during reigns remarkable for their ſeverity. In Britain the King now lives ſecure, becauſe he never ſhocks the humanity of his people by exhibitions of cruelty, which are often the delight and the ruin of abſolute Princes.

One may, therefore, well be allowed to doubt, whether death alone is not a puniſhment ſevere enough in all caſes, in which a criminal is condemned to be deprived of his life. I mean not to ſay, that pecuniary ones may not be added to it: much otherwiſe; for fines, confiſcations, forfeitures are ſometimes reaſonable. But it appears to me, that in *all* caſes, in which a criminal is ſentenced to loſe his life, he ought to be put to death in a manner as eaſy and as little painful as poſſible, and ought not, on any occaſion, while he is yet alive, to ſuffer *any* corporal ill beſides. 'Tis ſufficient to deprive him of his life, and it is inhuman to ſubject one by torture to more than a thouſand deaths. I have, therefore, been often ſurpriſed, that the antient puniſhment of treaſon has not been aboliſhed among us. It is a remnant of that cruelty, which is natural to rude, fierce, and barbarous times, and which it was inconſiſtent with the tyrannical ſyſtem, that prevailed before the 1688, to correct. That year was not more remarkable for the glorious Revolution, which it produced in the Government, than it is memorable for the ſignal one, which it made in the opinions of men. We found, that the King had forfeited his right to the Crown; we excluded him from it; and principles, conſiſtent with humanity and with the happineſs of mankind, were introduced into the adminiſtration and were eſtabliſhed among the people of Britain 1689. c. 13. 18. We are all ſenſible, that the puniſhment, appointed for traitors, is horrid; and tho' the antient form of the ſentence, which uſed to be pronounced, is ſtill retained, our ſenſibility has hindered it from being ever executed with rigor upon them. Methinks, therefore, it would be worthy of the mildneſs, which has diſtinguiſhed the preſent reign, to cauſe to be repealed a Law, which is ſo ſevere, that we cannot allow ourſelves to think of executing it. Let us, if it is neceſſary, inſult the remains of criminals, after they are dead;

let

let us ſtigmatize their memories, corrupt their blood, and confiſcate their eſtates: but let us forbear to talk of torturing them alive, of tearing their bowels, and of burning them before their faces; let us deprive ourſelves for ever of the power of doing it; and let us not retain the ſmalleſt reſemblance of the cruel ſyſtem of former times. 'Suivons la nature, qui a donné aux hommes la honte 'comme leur fleau; & que la plus grande partie de la peine ſoit l'infamie de la 'ſouffrir *.' It would not, perhaps, hurt the reputation of a member of either houſe of Parliament, to promote the abolition of every uſage, which had the moſt diſtant appearance of being barbarous and inhuman †.

The other ſanction, to wit, that of reward, can hardly have place in ſociety; for *every one*, who obſerves the Laws, cannot receive a reward for his obſervance of them, ſince the bulk of the members of every ſtate both do and muſt obſerve the laws in the generality of their actions: ſociety could not ſubſiſt otherwiſe. Therefore, if rewards were to be beſtowed merely for the obſervance of the Laws, every one would be equally entitled to them. But that, which is conferred on every one alike, cannot be called a reward; for a reward is 'an *extraor*-'*dinary* benefaction, beſtowed on one for having done ſomething, by which 'he has *diſtinguiſhed* himſelf above his fellows, and has more merit than they.' It is in this, and in this ſenſe alone, that the ſanction of reward can have place in human ſociety.

For the mere obſervance of the laws produces no more than protection to him, who obſerves them; it hinders him from being expoſed to puniſhment. But that, as it has been ſaid, is not the ſame thing with being rewarded. Rewards can be beſtowed for extraordinary ſervices, for uncommon merit alone ‡. And it is not improbable, that the Roman Lawyers attended to this doctrine, when, explaining that which they call the *virtue* of Law, and enumerating the particulars of which it conſiſts, they ſay, it conſiſts in *commanding*, *forbidding*, *permitting*, and *puniſhing*; and omit *rewarding*. *Legis virtus hæc eſt, imperare, vetare, permittere, punire.* For Laws may either command ſomething to be done, or forbid ſomething to be done, or permit ſomething to be done, or puniſh one for having done ſomething.

§ 87. It remains to be remarked, that civil Law takes, in all caſes, its proper denomination from that ſtate, over which its influence extends. Thus, the ſum of thoſe general rules, which are eſtabliſhed by the ſupreme legiſlative power of England, and which the ſubjects of England are obliged to obſerve in regulating their voluntary actions, is called 'the Law of England, or the Engliſh 'Law.' The ſum of thoſe which the people of Scotland are bound to obſerve, is called the Law of Scotland, or the Scotch Law. And the ſum of thoſe, which the ſubjects of France are bound to obſerve, is the Law of France, or the French Law.

Sometimes, indeed, 'the civil Law' is uſed, in a ſtrict ſenſe, for the Roman Law alone; for it has acquired, by its native excellency and by cuſtom, a ſort of excluſive right to this denomination. Therefore, in moſt caſes, in which you find mention made of '*the* civil Law' alone, without any addition, you ſhould underſtand the Roman Law.

Sometimes the Civil is oppoſed to the Criminal Law; the Civil being that which relates to the patrimonial intereſts of private perſons, the Criminal that, which concerns the prevention and the puniſhment of crimes.

The

* See *de l'eſprit des loix*. liv. 6. ch. 9. ſqq. liv. 12. ch. 18.

† The ſame obſervation may be made upon the cuſtom, which is eſtabliſhed in England, of preſſing criminals, in order to force them to plead.

‡ Du Halde in his hiſtory of China informs us of a noble inſtitution in that Country. People are in it rewarded for their *illuſtrious* actions. The Mandarin of the Province is by Law obliged to give notice to the Emperor, of every remarkable or generous action; and the Emperor orders a ſuitable reward to be given him, who did it.

See the Divine Legation of Moses, vol. I. book 1. ſect. 2. in which the learned and ingenious Author proves the impoſſibility of admitting the ſanction of reward into Civil Society.

The Scotch Law is ſometimes called the Municipal Law of Scotland. It gets this denomination from the *municipia* of the Roman empire, Towns, which, tho' they were ſubject to the Romans, were allowed to govern themſelves by their own Laws *. Hence, mention is frequently made of the *Lex municipalis*. It is oppoſed to the *jus civile*; and the name of municipal has been given to the Civil Law of each of the States in Europe.

Having thus explained the origin of Government and the nature of Civil Law in general, it will be proper, before we proceed to treat of the diviſion of it, to apply the Principles, which we have been explaining, to the Law of Scotland in particular, and to treat 1) Of the power, which is ſupreme and legiſlative in Scotland, and 2) of thoſe, who are ſubject to that power.

* See A. Gell. noct. Att. l. 16. c. 13—Hein. antiqu. Rom. append. l. 1. § 114. ſeqq.

A

SYSTEM

OF THE

PRINCIPLES of the LAW of *SCOTLAND.*

PART I.

BOOK II.

TITLE I.

Of the ſupreme legiſlative Power of SCOTLAND.

§ 88. LAWS, it has been ſaid (§ 79.), muſt be enacted by the ſupreme legiſlative Power of the State; for the Subjects are not bound to obſerve any others. 'Tis neceſſary, therefore, for the people to know with whom the ſupreme legiſlative power is veſted, that they may know the Laws, which they are bound to obſerve.

The Antients divided the age and the hiſtory of the world into three periods, the ἄδηλον, the μυθικὸν, and the ἱστορικὸν, the *dark*, the *fabulous*, and the *hiſtorical*. The ἄδηλον was that period, which extended from the Creation of the world to the flood of OGYGES; it was called ſo, becauſe the events and the hiſtory of it were involved in obſcurity. The Period, which intervened between the Ogygian deluge and the firſt Olympiad, or rather, for it would have been nearer the truth to have ſaid, between it and the firſt years of the reign of CYRUS, was full of uncertainty and of fable, and was, therefore, called the *fabulous* Period; for certain hiſtory began only from the days of CYRUS *. So the time, which has

* The words of CENSORINUS *de die natali, cap.* 21. are, 'Nunc vero id intervallum temporis tractabo, quod ἱστορικὸν VARRO appellat. Hic enim tria diſcrimina temporum eſſe tradit. Primum, ab hominum principio ad cataclyſmum priorem; quod propter ignorantiam vocatur ἄδηλον. Secundum, a cataclyſmo priore ad Olympiadem primam; quod, quia in eo multa fabuloſa referuntur, μυθικὸν nominatur. Tertium, a prima Olympiade ad nos; quod dicitur ἱστορικὸν, quia res in eo geſtæ veris hiſtoriis continentur.'
See BURNET. *Archæologiæ philoſophicæ, lib.* 1. *cap.* 1.——BEVEREG. *Inſtit. chronolog. lib.* 1. *cap.* 2.

has intervened between his reign and the preſent days, is the alone hiſtorical time*. It appears to me, that the hiſtory of Scotland may be divided ſome how after the ſame manner, into three Periods. That, which preceded the reign of FERGUS I. may well be ſaid to be ἄδηλον; for it is altogether involved in obſcurity. That long period, which laſted for more than a 1000 years after his death, for I will not be more preciſe, is that which I would call fabulous; for the hiſtory of Scotland during that long period is full of fable; it is founded, not on authentic teſtimonies, but on uncertain tradition; it has much the air of Romance; And, ſuppoſe there was, perhaps, ſome foundation for one or two of the ſtories told in it, it deſerves, nevertheleſs, to be held, upon the whole, to be fabulous. The *hiſtorical* age of Scotland begins at ſooneſt 1000 years after the days of FERGUS.

But it is incontrovertible, that the conſtitution of the Government of Scotland has, from the moſt antient date of the certainty of its hiſtory, been, in ſome reſpects, free; for Parliaments aſſembled in it, as early as the days of MALCOLM II.; the Statutes made during his Reign are ſtill extant; The King was not poſſeſſed of abſolute or of legiſlative Power. But the Laws were enacted by the States of the kingdom.

I ſaid, the *conſtitution* of the Scotch Government was free, for I mean not to ſay, that the *people* were ſo. Nothing leſs; for nothing could be more diſagreeable to truth. The people were not free; the Country was not in peace; juſtice was either unequally, or not at all diſtributed; inteſtine feuds diſturbed the general repoſe; the nation was not happy, for the people were ignorant and barbarous. The proprietors of land were abſolute over their own territories. All thoſe who held lands of them, tenanted farms belonging to them, lived upon their grounds, or were by their name or by other accidental ties attached to them, were entirely dependent upon them. Vaſſals were the ſlaves of their Superiors, tenants of their Landlords, and every one of the Chieftain of his Clan. The nation was divided into many ſeparate tribes, ſubjected, each of them, to the tyrannical dominion of ſome barbarous Lord. Theſe were frequently at enmity with one another; So rapine, bloodſhed, diſorder and injuſtice prevailed.

But the power of the Crown was not abſolute; for that dependence, which the Commons had on their Chieftains, exalted the influence of the proprietors of land. Men ſeem, one would almoſt think, naturally, to have ſomething of a ſervile diſpoſition; and every one looks upwards to thoſe, whom, he has been taught, birth, family, or fortune render his ſuperiors. Thus, that power, which, accompanied by an independent ſpirit, is divided at preſent among many, and produces ſubordination and liberty, was, in antient times, veſted in a few; and the nobles, oppreſſing, each of them, thoſe very dependents, whoſe number contributed to their exaltation, were more than a match for the Crown †.

Thus the legiſlative power was not veſted in the King alone. It was veſted in the King and the Parliament of Scotland. And it continued with them, as long as the nations were ſo unfortunate, as to be diſunited. But by the Union of the kingdoms, which ſecured the peace, the liberty, and the happineſs of Britain on

* This diviſion of time was very proper for the antients; for they enjoyed not the light of the ſacred Scriptures, and were ignorant of the hiſtory told in them. But we have the happineſs of having hiſtorical knowledge of many events, which happened during the *dark* and the *fabulous* periods of the Antients.

† See a letter written 1320, by the nobility, barons, and commons of Scotland to Pope JOHN. The following words of it diſcover the notions, which even in thoſe days, the people of Scotland entertained concerning their liberty and the regal authority. Speaking of King ROBERT BRUCE, they ſay, 'quem etiam divina diſpoſitio, et 'juxta leges et conſuetudines noſtras, quas uſque ad mortem ſuſtinere volumus, juris ſucceſſio, et *debitus noſtrorum* '*conſenſus et aſſenſus*, noſtrum fecerunt principem atque regem; Cui tanquam illi, per quem ſalus in populo facta 'eſt, pro noſtra libertate tuenda, tam jure quam meritis tenemur, et volumus in omnibus adhærere. Quem, ſi 'ab inceptis deſiſterit, regi Anglorum aut Anglicis nos aut regnum noſtrum volens ſubjicere, tanquam *inimicum* 'noſtrum, et ſui *noſtrique juris* ſubverſorem ſtatim *expellere niteremur*; et alium regem noſtrum qui ad defenſionem 'noſtram ſufficeret, faceremus: quia, quamdiu centum vivi remanſerint, nunquam Anglorum dominio aliquate-'nus volumus ſubjugari. Non enim propter gloriam, divitias aut honores pugnamus, ſed propter *libertatem* ſo-'lummodo, quam nemo bonus niſi ſimul cum vita amittit.'

on the firmeſt baſis, it was happily transferred to the King, and to the Parliament, conſiſting of the houſe of Lords, and of that of the Commons of Great Britain, and in them it is veſted at this day.

§ 89. Since the ſupreme legiſlative power has all along been veſted not in the King alone (§ 88.) it is plain, 1) that ordinances made by the Crown alone are not Laws (§ 79.); 2) that they are not obligatory on the people, the people may diſregard them, unleſs the King is by Law authoriſed to make them; 3) that the King, when iſſuing his orders, acts in no other capacity than as the firſt Magiſtrate of the Nation.

§ 90. But it is veſted in the King and Parliament. Therefore, thoſe ſtatutes, and thoſe alone, which are enacted by their *joint* authority, are entitled to be held to be Laws, and are obligatory on the People. (§ 79. 88.)

§ 91. Since the ſupreme legiſlative power is veſted in the King, in the houſe of Lords, and in the houſe of Commons, they muſt jointly have the ſole power, not only of making new Laws, but alſo of altering and repealing old ones. (§. 79.) I ſay, jointly; for ſeparately their ordinances have not the authority of Law; they are deciſive of thoſe particular caſes alone, to which they relate.

This doctrine is ſo true, that not only every member of the houſes of Lords and Commons is ſubject to the Laws of the land, but the King himſelf is not ſuperior to them; none of them is exempted from the obligation to obſerve them; they muſt all regulate their conduct by them. Indeed, the Sovereign is as much bound to obſerve the Laws, as the meaneſt of his Subjects; for he is not veſted with the power of legiſlation. Therefore, he muſt be inferior to the Laws; ſince he has no power of altering them. 'Tis true, he is poſſeſſed of great and high prerogatives. But theſe are not ſelf-derived; they are granted by the Law, and are determined by it; beyond the bounds, which it preſcribes, he is not allowed to go. The meaneſt officer of the Law has to the privileges belonging to his office the ſame right, which the Sovereign has to thoſe poſſeſſed by the Crown. The Law grants both, and the Law protects both. The Sovereign, indeed, is vaſtly ſuperior in dignity to any other officer of the State; but his ſuperior dignity ariſes principally from the great extent and number of the prerogatives of the Crown compared with thoſe of the Officer. By the conſtitution of this fortunate Iſland, the power and the prerogative of the Crown are both extended and limited by Law in the wiſeſt manner. The nature of things ſeems not to admit of abſolute perfection in the Condition of human ſociety. It is, perhaps, impoſſible for the Power of a Prince to be determined ſo exactly and with ſuch preciſion, as to enable him to do all the good which he pleaſes, and to incapacitate him from doing any ill. That Prince who is allowed to do all the good which he pleaſes, muſt neceſſarily on ſome occaſions, and in ſome circumſtances, have it alſo in his power to do ſome ill, or to abuſe his power of doing good. Again, he, who is reſtrained by the Laws from doing any ill at all, muſt neceſſarily be ſometimes reſtrained from doing good. Hence thoſe Monarchies deſerve to be held to be the beſt, in which thoſe two powers of doing good and of doing ill are ſo wiſely tempered and blended together, that the Prince can do at the ſame time the greateſt good and the leaſt ill; where the ill which he may do, ariſes from the power which he has of doing good, and is overbalanced by it; and the good which he is reſtrained from doing, ariſes from the fear of his abuſing a more unlimited degree of Power, and is overbalanced by it. Such ſeems to be the Power, with which the King is veſted by the Laws of this land *.

* The perfection of the Conſtitution of Great Britain is demonſtrated by the Preſident MONTESQUIEU, in his treatiſe *de L'Eſprit des Loix*, in which he has a chapter inſcribed *de la conſtitution d'Angleterre*. 'Tis ch. 6. liv. 11. And we have in its favour the teſtimony of one, who by the energy of his mind, the univerſality of his accompliſhments, and the ſplendor of his actions, has excited the admiration of Europe. '*Il me ſemble*,' ſays the Illuſtrious

§ 92. The Laws, therefore, which either have been or are enacted by this ſupreme Legiſlature, all the Subjects of Scotland are bound to obey; they muſt regulate their actions by them; for it is the duty of ſubjects to regulate their conduct by the Laws enacted by the ſupreme legiſlative Power of their Country. (§ 80.)

§ 93. But no Laws have obligatory authority without the territories of that State, by whoſe legiſlative power they are enacted. (§ 82.) Therefore, neither the Law of Denmark, nor the Law of England, nor the Law of any other country is authoritative in Scotland. The people ought not to regulate their conduct, the Judges ought not to make their Deciſions by them. 1425. *c.* 48.—1503. *c.* 79. I chuſe to make particular mention of the Law of Denmark; becauſe the Iſlands of Orkney, which are now ſubject to the Crown of Great Britain, were in antient times ſubject to that of Denmark. Therefore, an act of Parliament was made, 1503. *c.* 79. ordaining all the people of Scotland, and the Iſles in particular, to be governed by the Laws of Scotland alone. I mention the Law of England, becauſe an expreſs *proviſo* is made in the treaty of Union of the two kingdoms, that the Law of Scotland ſhall continue as it was at that memorable æra, except in ſo far as it 1) is altered by that Treaty, or 2) has been or ſhall be altered by the Legiſlature of Great Britain. Therefore, the Law of England has no authority in it; the people ought not to regulate their conduct, nor the Judges their judgments by it. The Law of Scotland, and it alone ought to be the rule, by which both the Courts of Law in Scotland, and *the Houſe of Lords in England*, when *reviewing* the Judgments of thoſe Courts, ought to regulate their Judgments.

§ 94. The Canon Law had once great authority in Scotland, becauſe the Popiſh religion was once eſtabliſhed in it. Thus, many of its ſtatutes, having taken deep root in the Law of Scotland, muſt, in ſo far as they have been *adopted* into it, be obligatory. But their obligatory authority ariſes from the tacit or expreſs approbation of the Scotch Legiſlature, and from the adoption which it has made of them; for of themſelves, as they are enacted by the Supremacy of his Holineſs, whoſe Supremacy and whoſe Holineſs are not acknowledged in this Country, they have no obligatory legal authority in it.

TITLE II.

Of the Subjects of SCOTLAND.

§ 95. I ſaid, the *Subjects* are bound to obſerve the Law of Scotland; (§ 92.) That is, 'thoſe, who, either by reſidence, or by birth, are ſubjected 'to the ſupreme and coercive power of the kingdom.' (§ 81.)

It is eaſy to determine, who are ſubjects of Scotland by their Reſidence; 'tis of more importance to determine, who are held to be *born* ſubjects of it: For ſuch, as are born ſubjects of it, are its natural Subjects; therefore, they are held to be its firmeſt friends; of courſe, they have many rights and privileges, which are not allowed to *adventitious Subjects*, *aliens*, or foreigners. (§ 81.)

§ 96. Since the connexion ariſes from birth, it is plain, 1) that all thoſe, who are born in Scotland, are Subjects of it; and entitled to all the Rights, to which natural-born Subjects are entitled.

§ 97. Since

luſtrious Author of the ANTI-MACHIAVEL 'que s'il y a un gouvernement dont on pourroit de nos jours propoſer 'la ſageſſe pour modèle, ſans blâmer les autres, c'eſt celui d'Angleterre. Là le Parlement eſt l'Arbitre du 'peuple et du roi, et le roi a tout le pouvoir de faire du bien; mais il n'en a point pour faire le mal.' *Anti-machiavel*, ch. 19.

§ 97. Since the kingdoms of Scotland and of England are now incorporated into one united kingdom of Great Britain, it is plain, 2) that all thoſe, who are born in the one nation, are held to be natural-born ſubjects of the other, and are, therefore, entitled to all the rights, privileges, and advantages, belonging to the natural-born ſubjects of it. Thus, a natural-born ſubject of Scotland is held to be a natural-born ſubject of England, and is, therefore, entitled to all the rights, privileges, and advantages, to which a natural-born ſubject of England is entitled; becauſe he is a natural-born Subject of the united kingdom of Great Britain. In the ſame manner, a natural-born ſubject of England is held to be a natural-born Subject of Scotland, and is, therefore, entitled to all the Privileges, rights, and advantages, to which a natural-born ſubject of Scotland is entitled. So it is expreſsly provided by the fourth article of the treaty of Union, 1707. *c.* 7.

§ 98. But Great Britain has ſent large Colonies into diſtant lands, which have thereby been ſubjected to its dominion. Therefore 3) all thoſe, who are born in any the moſt diſtant corner of its dominions, are held to be natural-born Subjects of Great Britain, and, by conſequence, of Scotland.

§ 99. All thoſe, who are born out of the dominions of Britain, are by birth foreigners. Therefore, they are not, *ſtrictiſſimo jure*, natural-born ſubjects, and of courſe, are not entitled to the rights, privileges, and advantages of natural-born ſubjects of it.

But the Law, attending to the indiſſolubility of that connexion which one has with his native country, and to the ſtrength of that love which he bears to it, (§ 81.) hath by ſpecial Statute enacted, that children, 'whoſe fathers were 'themſelves, at the time of the birth of theſe children, natural-born ſubjects of 'Britain,' ſhould alſo be held to be natural-born ſubjects of it, to all intents, 'conſtructions, and purpoſes whatſoever.' 7*mo*, ANNÆ, *c.* 4.——4*to*, GEORGII II. *c.* 21.

In order, therefore, to entitle perſons, who have been born out of the dominions of the Crown of Great Britain, to be held to be natural-born ſubjects of it, it is neceſſary 1) that their *fathers* were natural-born ſubjects of it; for the Law ſays, children, whoſe *fathers* are natural-born ſubjects, the act of Parliament, 4*to* GEO. II. c. 21. mentioning the *father* alone. 'Tis true, the act, 7*mo* ANNÆ, c. 4. uſes the general expreſſion of *the children of all natural-born ſubjects*; from whence it may be ſaid, that children whoſe *mothers*, as well as thoſe whoſe *fathers* are natural-born ſubjects, are themſelves held to be natural-born ſubjects. But it is otherwiſe; for the act 4*to* GEO. II. c. 21. is a corrective one. It was enacted, in order to explain certain ambiguities, which were diſcovered in the act 7*mo* ANNÆ. Therefore, it ought to be ſtrictly interpreted. By conſequence, ſince it mentions the father, and him alone, it cannot be extended to the mother. Indeed, this interpretation of it is agreeable to the principles of the common Law; for children, born in lawful wedlock, follow the condition of their father; *l.* 19. *ff. de ſtatu hom.* Therefore, they muſt be ſubjects of that ſtate, to which he is ſubject; *l.* 1. § 2. *l.* 6. § 1. *ff. ad municipalem.*

From hence it follows, that baſtards, that is, children born out of lawful wedlock, are natural-born ſubjects of that ſtate, within whoſe dominions they are born; for their father is unknown. Therefore, they are not entitled to the benefit of the acts of naturalization *.

2) It is neceſſary, that the father be a *natural-born ſubject*, that is, that he either be born within the Britiſh Dominions, or *be held* to have been born within them; for it is not neceſſary, that he be *actually* born within them, the ſtatute making it neceſſary, 3) that the father be a natural-born ſubject of England

* It was otherwiſe by the Roman Law; for baſtards followed the condition of their mothers, *l.* 19. *ff. de ſtatu hom.* Therefore, they were natural-born ſubjects of thoſe ſtates, to which their mothers were ſubject, *l.* 1. § 2. *ff. ad mun.*

land or of Great Britain *at the time of the birth* of the child. So that two cases are implied in it, since one cannot alter the place of his birth. Therefore, the words 'at the time of the birth,' shew plainly, that the statute intends not only such fathers, as were actually born within the British Dominions, but such as were naturalized.

4) It is remarkable, that the act uses the words, 'born out of the ligeance of 'the Crown of England, or of Great Britain,' and omits Scotland; from whence it may be thought, that the children of one, born in Scotland before the Union of the kingdoms, are not entitled to the benefit of this act of Parliament. But it is otherwise; by the treaty of Union, it was agreed, that the Subjects of the one kingdom should have all the rights, privileges, and advantages, which either did at the time of the conclusion of that treaty, or should at any time afterwards, belong to those of the other. The Legislature, therefore, meant not to exclude the children of those, who were born in Scotland before the Union, from the benefit of this act. 'Tis for this reason, that it makes use of the words, 'of 'Great Britain' and 'of *the Crown* of Great Britain.' They apply to Scotland as well as to every other part of the dominions of Great Britain.

Since children, whose fathers were, at the time of the birth of those children, natural-born subjects of Britain, are themselves held to be natural-born subjects of it to *all intents, constructions, and purposes whatsoever*, they must be held to have been *born in* Great Britain. Of course, they must have all the rights, privileges, and advantages, which they would have had in case they had been born in Great Britain, or which any other natural-born subject, born in Britain, has. Therefore, they have the benefit of this act, and have all the rights depending upon it. By consequence, the *children* of the *sons* of those *fathers* must also be natural-born subjects of Britain, and that, tho they should happen to be born abroad; for their fathers, tho they were actually born abroad, are, however, held to have been born in Britain. For the same reason, the *children* of the *male children* of the *sons* of those *fathers* are also all of them natural-born subjects of Britain; for their fathers, tho they were also born abroad, are also held to have been born in Britain. And so on *in infinitum*; for the benefit of this act descends to the latest generation, the posterity of all the males is successively naturalized. I say, the *males*; for it is necessary, in order to entitle one to the benefit of this act, that his *father* was a natural-born subject. Therefore, tho it be true, that all the *children* of that father, daughters as well as sons, are naturalized, it is plain, that the sons alone can *transmit* the benefit of it to their children. Thus limited, the benefit of the act passes to the most remote descendents; for the words, *to all intents, constructions, and purposes whatsoever*, are so general, that they admit not of another interpretation. Indeed, it would be absurd to limit it to the first generation; for a British Peer, happening to carry his lady abroad with him, might have a son during his residence in foreign parts. This son, it is not denied, would be inheritable to the honor and estate of his father; and would have all the rights of a natural-born subject. But, if he should happen to go abroad, and to have a son, this second son, in case the act was otherwise interpreted, would be an alien, and, of course, would not be inheritable to the estate of *his* father. So it would pass to collaterals, who had not so natural a right to succeed to it: which is absurd.

The right, therefore, given by this act, remains with the family, *always till* it is *forfeited.*'

But the children of *all* fathers are not entitled to it. The Law has made some exceptions to the general rule. 4*to.* GEO. II. *c.* 21.

1) It excepts the children of such fathers, as are, *at the time of the birth of the children*, attainted of high treason; for those, who are attainted of high treason, have violated the allegiance which they owed to their country. Therefore, they have forfeited the rights, which their birth gave them. So their children, if born abroad, are expressly deprived of the benefit of the act.

2) The

2) The Law excepts the children of ſuch fathers, as are, *at the time of the birth of the children*, liable to the penalties either of High-treaſon or of felony, in caſe they return into Britain without the licence of the King.

3) It excepts thoſe children, whoſe fathers are, at the *time of the birth of the children*, in the actual ſervice of any foreign Prince or ſtate *then* at Enmity with the Crown of Great Britain, that is, which has declared war againſt Great Britain, or againſt which Great Britain has declared war. 4to G. II. *c.* 21.

The act contains ſome exceptions in favour of ſuch children of perſons attainted of high treaſon, liable to the pains of it or of felony on their return, or ſerving a ſtate at enmity with Britain, as 1) Have come into the Britiſh dominions, have continued to reſide in them for two years between the 16th of November 1708 and 25th of March 1731, and have during that time profeſſed the proteſtant religion; 2) Have come into the dominions of Great Britain, have profeſſed the proteſtant religion, and have died within them at any time between the 16th of November 1708 and the 25th of March 1731; 3) Have been and continued in the actual poſſeſſion or receipt of the rents and profits of any lands, tenements, or hereditaments in Great Britain or Ireland, for one whole year, at any time between theſe two days; or 4) Have *bona fide*, and for good and valuable conſideration, ſold, conveyed, or ſettled any lands, tenements, or hereditaments in Great Britain or Ireland, provided the perſon, claiming title to them, under the ſale, conveyance, or ſettlement, hath been and continued in the actual poſſeſſion or receipt of the rents and profits of them for the ſpace of ſix months between the ſaid two days. All ſuch children are declared to be excepted from the exceptions, and to be natural-born ſubjects of Britain.

Laſtly; All thoſe individuals, who are naturalized by an act of the legiſlature, are held to be natural-born ſubjects of Britain.

§ 100. The ſtrength of a nation depends on the number of thoſe, of whom it conſiſts. Hence, every mean ought to be uſed to increaſe the number of the inhabitants of Britain. A nation, which is itſelf free and happy, ought to communicate its happineſs and its liberty to as many of human kind as poſſible. Therefore, it ought to invite foreigners to come and live in it. For this purpoſe, it ought to communicate its privileges to them, and to naturalize all who will reſide in it, and whom it is ſafe to naturalize. Hitherto, indeed, we have been ſo barbarous, and ſo niggardly of the good things which we enjoy, as to refuſe to communicate them to others, and to grudge the enjoyment of them to thoſe, who would be made happy by it *.

We ought eſpecially to endeavour to invite inhabitants to that vaſt and deſerted continent, over which we domineer. It could well maintain much greater multitudes of mankind, than are ſcattered over it. Therefore, the legiſlature has enacted, that all foreign proteſtants, who ſhall reſide for ſeven years conſtantly in our American Colonies, and ſhall ſubmit to the terms preſcribed by the Law, ſhall be held to be natural-born ſubjects of Britain. 13*tio* G. II. *c.* 7.—20*mo*, G. II. *c.* 44.

TITLE III.

Of Public and Private Law.

§ 101. HAVING thus treated of the power, which is ſupreme and legiſlative in Scotland, and of thoſe, who are ſubject to it, it will be proper 1) to explain the moſt remarkable diviſions of Civil Law; and 2) to enumerate the particulars, of which the Law of Scotland conſiſts. (§ 87.)

* See Dr. TUCKER's excellent Eſſays on Naturalization.

It would be uſeleſs to explain all the diviſions, which have been made, of Civil Law. I ſhall take notice of no more than two; to wit, 1) that, by which it is divided into *public* and *private*; and 2) that, by which it is divided into *written* and *conſuetudinary*.

All Law is enacted by the ſupreme legiſlative power of the ſtate; (§ 79.) and is obligatory on *all* the ſubjects (§ 80.) Therefore in reſpect of the power, by which it is enacted, as well as of thoſe, by whom it is to be obſerved, all Law is equally public.

But ſome laws relate *immediately* to the ſtate of the public, others relate immediately to the utility of private men. Thoſe, which relate immediately to the ſtate of the public, and concern it, are called public Laws: ſuch are thoſe, for inſtance, which define the power of the King; which authoriſe magiſtrates, and diſtinguiſh their juriſdictions; which eſtabliſh religion, and the miniſters of it; which impoſe taxes; appoint armies to be levied; or enact any other thing, which concerns the public utility more immediately than the intereſt of private perſons. The public Law, therefore, may be defined to be 'that, which fixes, 'determines, and enacts things pertaining to the public.'

The private Law is oppoſite to the public, and relates *immediately* to the rights, intereſts, concernments, and eſtates of private perſons. Therefore it may be defined to be 'that, by which rules are eſtabliſhed to be obſerved by the 'Subjects in the management of their Private affairs, and according to which all 'private and patrimonial differences ought to be determined.' *l.* 1. § 2. *ff. de juſtitia et jure.*

§ 102. Some laws, I ſaid (§ 78.) are held to be notorious; others are private, latent, and are not held to be notorious. Therefore, the judges are bound to take notice of the former; but they are not bound to know any thing of the latter. Hence, thoſe Laws, which are held to be notoriouſly known, and to which the Judges are bound to attend, tho parties neglect to plead them, are called public Laws. Thoſe, again, which are not held to be notoriouſly known, and to which the Judges are not bound to attend, unleſs they are ſpecially pleaded by Parties, are called Private Laws.

TITLE IV.

Of written Law; and of the written Law of SCOTLAND.

§ 103. LAW is divided into written or ſtatutory, and unwritten or cuſtomary Law. Written or ſtatutory Law, as is plain from its name, is 'that, to which the legiſlature gives its expreſs ſanction, and which is promul-'gated to the people in writ.' It is called Statutory, becauſe it gets the expreſs ſanction of the legiſlature. It is called Written, becauſe it is reduced into writing. Hence, written Laws are called *Statutes*. From this definition it is plain, that it is diſtinguiſhed from cuſtomary Law by two characteriſtics. I. It gets the expreſs ſanction of the legiſlature. II. It is reduced into writing, and in that condition, having got the expreſs ſanction of the legiſlature, is promulgated. For both theſe Ideas are eſſentially implied in that of written Law.

The expreſs ſanction of the legiſlature, is, it is true, that, which principally diſtinguiſhes it from cuſtomary Law; for cuſtom owes its authority to the tacit approbation of the legiſlature.

But it is abſolutely eſſential to the Idea of it, that it be reduced into writing, and in that ſtate get the ſanction of the legiſlature. For, let a legiſlature give its ſanction to a Law in the moſt expreſs, and promulgate it in the moſt formal manner, it would be abſurd to call it a *written* Law, unleſs it were actually reduced

duced into writing. Indeed, if it was not reduced into writing, it would neceſſarily ſoon become conſuetudinary, becauſe the very remembrance of that, which was enacted, would ſoon be forgotten; ſo the interpretation and the authority of it would depend entirely on the cuſtoms of the people: for from them, and from them alone, that, which had been enacted, and the true import of it, either could or ought to appear. So that a ſtate, which has not actually reduced its laws into writing, muſt be governed by Cuſtom alone *.

§ 104. Laws are rules eſtabliſhed by the ſupreme legiſlative power. (§ 79.—89. 90. 91.) The ſupreme legiſlative power in Scotland was, before the union of the kingdoms, veſted in the King and Parliament of Scotland. Since that time it has been veſted in the King, and in the two houſes of the Parliament of Great Britain. (§ 88.). Therefore, the written or ſtatutory Law of Scotland muſt conſiſt of thoſe acts, which 1) Were enacted by the Scotch legiſlature before the union, or 2) Have been enacted ſince by the legiſlature of Great Britain.

§ 105. I have heard, that the ſtatutory Laws of England are divided into two kinds, 1) Thoſe which were made before time of memory; 2) Thoſe which were made within time of memory. The written or ſtatutory Law of Scotland may be divided ſome way after the ſame manner. All thoſe Statutes, which were in Scotland enacted before the reign of the firſt King JAMES of Scotland, may, like thoſe which were in England enacted before the reign of the firſt RICHARD of England, be ſaid to have been enacted before time of memory. Thoſe, which have been enacted at any time ſince the beginning of the reign of King JAMES I. of Scotland, may, like thoſe enacted in England ſince the commencement of the reign of the firſt RICHARD of that kingdom, be ſaid to have been enacted within time of memory.

§ 106. To the firſt diviſion belong all thoſe ſtatutes, comprized in that Collection which is known by the name of the Books of *Regiam Majeſtatem*. It contains the following Treatiſes.

I. It begins with the antient laws of MALCOLM II. who, our Hiſtorians inform us, began his reign in the year 1004. They are generally aſcribed to MALCOLM II. Yet ſome Lawyers, as well as Antiquarians, have thought, that they are the laws, not of the ſecond, but of the third MALCOLM. The reaſons, on which they found their opinion, ſeem not to be ſolid. Sir JOHN SKENE, who was the editor of this Collection, aſcribes them to MALCOLM the II. They are inſcribed '*Leges* MALCOLMI MACKENNETH *ejus nominis ſecundi;*' and ſeem to have been always held to be the Laws of MALCOLM the II. And it is not probable, that an error could well be committed in this matter. 'Tis true, there are officers mentioned in them, whoſe offices are ſaid to have been inſtituted after the days of MALCOLM II. But, *firſt*, it is remarkable, that theſe laws are written in the Latin Language. Therefore, it would be neceſſary to give every officer ſuch a name as ſeemed to ſuit his office beſt. *Secondly*, The ſtate, the language, the antiquities, and the Government of Scotland are too much involved

* It is ſurpriſing, that ſeveral great men, who have written on the Civil Law, have made the *jus ſcriptum* of the Romans, to be different from the *jus in ſcripturam redactum*; and that they have required nothing but *formal promulgation* to conſtitute written Law. Common ſenſe teaches, and indeed it follows from the very nature of the thing, that in all caſes, in which written and unwritten or cuſtomary law are oppoſed to one another, as they are in the Civil Law of the Romans, there muſt have been ſome Law actually reduced into writing. For it has been proved, that promulgated Law muſt, in caſe it is not reduced into writing, preſently degenerate into cuſtomary Law, and that it cannot be different from it. Indeed, it ſeems to be extremely abſurd to think, that the Roman Lawyers, if they meant by their *jus ſcriptum* nothing more than *jus promulgatum*, ſhould have choſen to make uſe of the word *ſcriptum*; a word, which conſtantly and immediately conveys the Idea of writing, and was always underſtood of it, and never of promulgation; eſpecially when there was, in their language, a word ſo obvious as *promulgatum*. There is not, ſo far as I have been able to obſerve, a ſingle text, which would lead one to put ſuch a forced and unnatural conſtruction on the word *ſcriptum*. On the contrary, the *jus ſcriptum* is, every where thro' the *corpus juris civilis*, underſtood preciſely in the ſame ſenſe, which is annexed to it in the foregoing definition. Even the *reſponſa prudentum* are referred to the written Law, § 3. *I. de jure naturali*; becauſe they were once reduced into writing, and had once at leaſt an expreſs ſanction given to them.

volved in obſcurity for any man to take it upon him to decide poſitively, that either a word, a cuſtom, or a magiſtrate was not in uſe in the days of MALCOLM II. or before thoſe of MALCOLM III. We want *data*, on which we can pretend to be ſo preciſe. Beſides, is it credible, that, if thoſe were the laws of MALCOLM III. no notice would have been taken in them of that celebrated Law of Clan-MACDUFF, which, it is certain, was enacted during the reign of the third MALCOLM? For theſe reaſons, it ſeems to be moſt probable, that theſe Laws are, as their rubric bears them, and all our Hiſtorians have held them to be, the Laws of MALCOLM II.

II. The ſecond article of the Collection is that, which contains the ſtatutes of DAVID I. including 1) The *Regiam Majeſtatem* properly ſo called; 2) The *Quoniam Attachiamenta*; 3) The *Leges Burgorum*; and 4) The *Aſſiſa de ponderibus et menſuris*. All theſe ſeem to be referable to DAVID the I. who began his reign in the 1124. 'Tis true, ſeveral Antiquarians aſcribe them not to him, but to DAVID II. who was the ſon of ROBERT I. and began his reign in the year 1329. They ſeem chiefly to be moved by the difficulties, which occur on ſuppoſing them the Laws of DAVID I. But the truth is, that difficulties occur on both ſuppoſitions; and thoſe, which ariſe from ſuppoſing them to be the Laws of DAVID I. ſeem to be both fewer and more explicable than thoſe, which flow from the other ſuppoſition.

1) It is certain, that king DAVID I. enacted ſome Laws; for the Legiſlature itſelf, 1426, *c.* 68. aſcribes ſome to him. By this act of the fourth parliament of king JAMES I. held in the year 1426, it is enacted, 'that the ell ſhall contain 'thirty ſeven inches, as is contained in the *ſtatute* of king DAVID the *firſt*, made '*thereupon*.' From hence it is plain, that the *Aſſiſa de ponderibus et menſuris* is the Law of DAVID I. For it was made expreſsly, 1) In order to fix the ſtandard of the weights and meaſures of Scotland. So it may well be ſaid, agreeably to the letter of 1426, *c.* 68. to be *made thereupon*. 2) It enacts, that the ell ſhall contain thirty ſeven inches, c. 1. § 7. *Ulna debet habere in ſe triginta ſeptem pollices.* Beſides, it was impoſſible for the Legiſlature to err in this caſe, becauſe the act of parliament was made in the 1426, not 60 years after the death of DAVID II. for he died in the year 1370. Thus, two facts are incontrovertibly proved, 1) That DAVID I. made ſome Laws; 2) That the *Aſſiſa de ponderibus et menſuris* is part of his Law.

2) The ſtatutes, aſcribed to WILLIAM the Lion, are *univerſally* allowed to be the genuine ſtatutes of that king. But he was no more than the grandſon, and one of the *ſucceſſors* of DAVID I. and began his reign in the year 1165, about twelve years after the death of his grandfather. Therefore, the Laws, aſcribed in theſe ſtatutes of WILLIAM to king DAVID, muſt be thoſe of DAVID I. for it is impoſſible, that they can be the Laws of DAVID II. ſince DAVID II. did not begin to reign till the 1329, almoſt two hundred years after the death of king WILLIAM. But in theſe ſtatutes of WILLIAM reference is expreſsly made to the Law of king DAVID I. *ſt. W.* *c.* 1. And the Law, to which reference is made, is found in the *R. M. l.* 1. *c.* 16. and in no other place. By conſequence, it muſt be the *Regiam Majeſtatem*, to which the ſtatutes of WILLIAM refer. Therefore, the *Regiam Majeſtatem* muſt be the Law of DAVID I.

3) A ſimilar, indeed a ſtronger argument may be drawn from thoſe ſtatutes, which are not denied to be the genuine Statutes of ALEXANDER II. the ſon of WILLIAM, and great-grandſon of DAVID I. for in them, *ſt.* A. II. *c.* 12. expreſs reference is made to the Laws of king DAVID, and the very words of the ſtatute of ALEXANDER II. are found in *R. M. l.* 1. *c.* 16. § 1. In that and in the following chapters is found the Law, to which reference is made in that ſtatute of ALEXANDER II. Of courſe, the *Regiam Majeſtatem*, at leaſt that part of it, muſt have been extant in the days of ALEXANDER, and muſt have then been underſtood to be the Law of DAVID I. But, if part, there is the greateſt

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reaſon to believe, the whole was extant, and was underſtood to be a ſyſtem of the Law of DAVID I.

4) The *Regiam Majeſtatem* bears expreſsly, that it was written by order of King DAVID. Therefore, it muſt have been written by the order of DAVID I. for, if it had been another, it would have diſtinguiſhed him by calling him DAVID II.

5) This argument is ſtrengthened, if we conſider, that the ſtatutes of DAVID II. are extant, and are diſtinguiſhed by his very name. They are entitled, *Aſſiſæ & ſtatuta* DAVIDIS *ſecundi*. Is it probable, that, if the *R. M.* had been written by his command, it would not have ſome where ſaid ſo? Or that it would not have been *certain* that he was the author of it? Every thing concerning his reign is certain, for it falls within the hiſtorical period of the affairs of Scotland. Of courſe, ſince it is uncertain, whether he was the Legiſlator of *Regiam Majeſtatem*, 'tis impoſſible that he could be the author of it. For, if he had, it would have been incontrovertible. This argument is alone deciſive.

From all that has been ſaid, it ſeems to be moſt probable, that the *R: M.* is a ſyſtem of the law of Scotland, and that it was compoſed by order of DAVID I.

'Tis true, 1) That the preface of the *Regiam Majeſtatem* ſeems to have been tranſcribed from the proœmium of the Imperial Inſtitutions of the Civil Law, and that the Pandects were not diſcovered till the year 1130. But it is no leſs true, that the Inſtitutions were never loſt. Therefore, it was *poſſible*, that in the Days of DAVID I. the compiler of the *Regiam Majeſtatem* might have taken the preface of his ſyſtem from that of the Imperial Inſtitutions; nay, it is probable, that he would do it. One, who was employed by King DAVID to compoſe a ſyſtem of the Law of Scotland, muſt have been a man *learned* in the Law. Of courſe, it is impoſſible to believe, that he would be ignorant of the grand ſyſtem of the Civil Law, compoſed by order of JUSTINIAN. The hiſtory of that Emperor, and of the Law, would inform him of it. Much more impoſſible is it to believe that, before he began to compoſe his ſyſtem of the Law of Scotland, he would not conſult a work ſo celebrated as the Imperial Inſtitutions of that of the Romans. Beſides, the knowledge of the Civil Law made a very rapid progreſs, immediately after the diſcovery of the Pandects. In a few years it was known and was ſtudied over all Europe. Of courſe, it is not at all improbable, that it might have made its way into Scotland before the 1153, the year in which king DAVID I. died.

'Tis alſo true, 2) That there are in it ſome ſtatutes, which ſeem to be contrary to the Law of Scotland, and are referable to that of England alone. But it does not from thence follow, that the *Regiam Majeſtatem* was tranſcribed from GLANVILLE's ſyſtem of the Law of England: For this treatiſe contains ſeveral poſitions, which are entirely contrary to the Law of England, and are referable to that of Scotland alone. Theſe, ſurely, were tranſcribed from the *Regiam Majeſtatem*; at leaſt, it is as reaſonable to ſay, that they were tranſcribed by GLANVILLE out of the *Regiam Majeſtatem*, as that the others were tranſcribed from him into it.

Beſides, the *Regiam Majeſtatem* was the work of a private man; the legiſlation of Scotland was not in thoſe days extenſive; and the language was poor. He might, therefore, have recourſe both to the Law and to the juridical terms uſed in England, and might explain many uſages, which yet he did not mean to ſay obtained in Scotland. We ſee, every day, people diſpoſed to do the ſame thing at preſent. 'Tis difficult for an author to keep ſo cloſely to the proſecution of his ſubject, as never to inſert things, which do not belong to it. Affectation and vanity might lead him to diſplay his knowledge of the Law of another country. The uſe, therefore, which is made in the *Regiam Majeſtatem* of ſome of the technical terms of the law of England, does not prove it to be tranſcribed from any ſyſtem of the law of that country. It proves no more than that the juridical language of Scotland was, in thoſe antient days, very poor. If it proved more, it would prove too much; for technical terms of the Law of England

are uſed in ſome Scotch ſtatutes, which are by every body allowed to be authoritative and genuine. For inſtance, tenure by ſoccage is mentioned in the *ſ. ſt. R.* I. but it would be abſurd from thence to ſay, that theſe ſtatutes were not genuine: Or that the Laws of MALCOLM were copied from ſome Engliſh treatiſe, and were not genuine, becauſe they make mention of *Litera ſaiſinæ*, and formal ſeiſins were not introduced before the reign of JAMES I.

For theſe reaſons it may be affirmed, that the *Regiam Majeſtatem* is, or, at leaſt, was intended for a ſyſtem of the Law of DAVID I. The *Quoniam Attachiamenta* was written by the ſame author about the ſame time.

But at whatever time they were written, thus much ſeems to be incontrovertible, that they make part of the written Law of Scotland; for they are expreſsly acknowledged by the Legiſlature itſelf to make part of it; 1425, *c.* 54.—1471, *c.* 47.——1475, *c.* 63.—— 1487, *c.* 115.

The *Leges Burgorum* are alſo part of the written Law of DAVID I. They are *univerſally* held to be genuine, and are owned by the Legiſlature to be authoritative, 1474, *c.* 53.— *L. B. c.* 125.

III. The third article of the collection contains the ſtatutes of thoſe Kings, the antiquity, authenticity, and authority of which are not diſputed, to wit, 1) *Statuta ſive aſſiſæ regis* WILHELMI, who began his reign in the year 1165 *: 2) *Statuta* ALEXANDRI *ſecundi*, who began his reign in the 1214; 3) *Statuta prima* ROBERTI *primi*, and *Statuta ſecunda* ROBERTI *primi*, who began his reign in the year 1306; 4) *Aſſiſæ et ſtatuta* DAVIDIS *ſecundi*, who began his reign in the year 1329; 5) *Statuta* ROBERTI *ſecundi*, who began his reign in the 1370; and 6) *Acta Parliamenti* ROBERTI *tertii*, who began his reign in the 1390 †.

But this Collection cannot be ſaid to have at preſent the ſame authority, which it ſeems once to have had in Scotland; for Scotland has all along been much governed by Cuſtomary Law; the people were fierce and barbarous, the country wanted police, and the Government had not authority. Hence the Laws which were enacted, were not obſerved; thereby, they became obſolete, and went into deſuetude. It may, therefore, be ſaid, that thoſe, contained in this Collection, have not authority, farther than they have been *confirmed*, *ratified*, and *ſupported* by Cuſtom; for it is hardly allowable to ſay, that they are authoritative in all thoſe caſes, in which they either have not been repealed by contrary cuſtom, or are agreeable to the Dictates of natural equity. One would fall into innumerable errors, who ſhould form his opinions concerning the deciſions of the preſent law of Scotland, from the words of them alone. Indeed, in order to form juſt opinions concerning points of Scotch Law, it is in all caſes neceſſary, not only to conſider the Letter of the ſtatutory Law of Scotland, but alſo to attend to thoſe fixed principles, which are, as it were, rooted in it, and are diſcoverable from the writings of the lawyers, and the ſeries of the judgments of the Courts of law, as well as to thoſe of the Civil. For it is from a complex view of them all, that juſt concluſions can alone, in any caſe, be drawn. Hence I have choſen to ſay, that all thoſe Statutes, which were in Scotland enacted before the reign of JAMES I. were enacted before time of memory, (§ 105.) not that they fall beyond the hiſtorical period of *the affairs* of Scotland, for that period, I ſaid (§ 88.) begins from the age of the MALCOLMS; but becauſe they fall beyond the hiſtorical period of its *legiſlation*: for, tho' we have ſtatutes which were enacted before the reign of JAMES I. the Law and the remembrance of it were, nevertheleſs, uncertain till that time.

§ 107.

* The *Leges foreſtarum* are thought alſo to be authentic, and to have been enacted by WILLIAM the *Lion*.

† The remaining books contained in this collection, ſeem not to have ever been underſtood to be authoritative.

§ 107. The ſtatutes, which have been enacted ſince the beginning of the reign of JAMES I. of Scotland, are thoſe, which may be ſaid to have been enacted within time of memory, (§ 105.) For it is certain, that they were ſolemnly enacted by the Scotch Legiſlature. Of courſe, it is indiſputable, that they have, at this day, obligatory authority, in ſo far as they either, 1) Have not gone into deſuetude, or, 2) Have not been abrogated by cuſtoms contrary to them, or, 3) Have not been repealed by poſterior ſtatutes; for, in either of theſe ways, the moſt poſitive ſtatute may loſe its obligatory force.

Of theſe the articles of the treaty of the Union of the two kingdoms make a remarkable part. They contain the conditions, upon which Scotland and England agreed to become one united kingdom. Of courſe, rights were in conſequence of them acquired by each part of it; rights, which muſt be held to be ſacred and inviolable, for treaties ought to be religiouſly obſerved. Scotland, therefore, ought not to be deprived of any of thoſe, which it acquired by the treaty of union; for it agreed to that treaty on the faith of the religious obſervance of all the articles of it.

§ 108. By it the ſupreme legiſlative power was veſted in the Parliament, and in the King of the united kingdom of Great Britain, (§ 104.) Therefore, the Laws, which have, ſince the Union, been enacted by the Britiſh Legiſlature, and *extend to Scotland*, muſt be held to be part of the written Law of this country. I ſay, all the acts of the Britiſh Legiſlature, *which extend* to Scotland; for many of them are not referable to it, and are not intended by the Legiſlature to extend to it. By the treaty of union it was provided, that the Law of Scotland ſhould, in many articles, remain after it the ſame as it had been before. Therefore, an alteration of the antient Law of Scotland is not to be *preſumed*. But by attending to the words, the ſpirit, and the ſcope of every Britiſh ſtatute, we ought to determine, whether it does or does not extend to Scotland. Indeed, it ſhould not, in any caſe, be left doubtful, but, by the addition of a ſhort deciſive clauſe, be rendered clear, whether an act does or does not extend to it. Thus, the Law would not be rendered inexplicable by the introduction of the forms and the technical terms of the Law of England, and it would ceaſe to be inexecutable according to the ſtanding Law of Scotland.

§ 109. Laws, it has been ſaid, muſt be promulgated, (§ 85.); for the people are bound to obſerve them. Therefore, there ought to be ſome way, by which they may come to the knowledge of the will of the Legiſlature.

In antient times the acts of the Scotch Legiſlature uſed to be promulgated by publiſhing them, and by reading them at all the conſiderable places of Scotland, *p. ſt. R.* I. *c.* 32.— 1425, *c.* 67. —1457, *c.* 89.— But after the invention of the Art of Printing, which has rendered the communication, the publication, and the acquiſition of knowledge ſo eaſy, and has thereby diffuſed a light, perhaps inextinguiſhable, over the earth, it became leſs neceſſary to proclaim them. For the only way, in which it is poſſible to acquire full, preciſe, and accurate knowledge of a Law, is by reading it over at leiſure, and with attention. 'Tis impoſſible for one to underſtand the meaning of it by hearing it once or twice read aloud from a public place, ſuch as a market-croſs; the noiſe, the hurry, and the confuſion, which are ever to be found at ſuch places, make it difficult for one to hear, much more, to underſtand perfectly that which is read: Laws require more time, more attention, and more thought to be beſtowed upon them than it is poſſible for one to beſtow upon them on ſuch occaſions. Hence, the abſurdity of this method of promulgating Laws, by proclaiming them at all the conſiderable places of the kingdom, ſoon became apparent. Beſides the impoſſibility of publiſhing, in this manner, that which was enacted by them, it afforded pretexts of ignorance of the Law; for the number of the places, at which it was neceſſary to proclaim every act of parliament, was ſo great, that it was odds, if they were not omitted to be proclaimed at ſome of them. Hence it uſed to be pleaded, that the people were not obliged to obſerve or to mind the Laws, be-

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cauſe they had not been proclaimed at all the market-croſſes, at which it was neceſſary to proclaim them; an excuſe, which ſeems to have been a good one, and could not be refuſed to be ſuſtained. In order to put a ſtop to that, which, after the acts of the Scotch Legiſlature began to be printed, 1540, *c.* 127. was no more than a fraudulent pretext, the Legiſlature enacted, 1581, *c.* 128, that the acts of parliament ſhould be proclaimed at the market-croſs of Edinburgh alone; that proclamation, made at it, ſhould be held to be as valid and effectual a promulgation of them, as if they had been proclaimed at the head-boroughs of *all* the ſhires of the realm; and that they ſhould become obligatory on the People forty days after they had been proclaimed. From this time, to the firſt day of May one thouſand ſeven hundred and ſeven, on which day the Scotch parliament was effectually, perpetually, and happily diſſolved by the commencement of the union of the kingdoms, the acts, enacted by it, uſed to be formally proclaimed at the Market-croſs of Edinburgh. But even this was an uſeleſs ſolemnity. Hence, the Laws, enacted by the Britiſh Legiſlature, are not promulgated otherwiſe than by being enacted. As ſoon as they are made, they are held to be promulgated, and to be known to the people. The Law preſumes, that men, if they will attend to any thing, will attend to that, which is doing, or which is enacted by the ſupreme Legiſlature of their country: This, ſurely, if any thing, concerns them. Beſides, the members of parliament are the repreſentatives of the people. Therefore, every member of the common-wealth is ſuppoſed to be preſent in parliament either by himſelf or by his repreſentative; and all thoſe acts, which concern the public utility, make a part of the public Law, and are, therefore, ſaid to be *public*, are ordered to be printed authentically by his Majeſty's Printer, and are, by being printed, effectually promulgated.

The diſquiſition therefore, concerning the forms of the promulgation of the Law of Scotland, appears to be matter rather of curioſity and of antiquity, than of uſe: For there is not, now, any ambiguity concerning the parts, which conſtitute the written Law of Scotland. They are all comprized in a few ſmall volumes, and beſides, have been authenticated by being printed by authority. And the acts of the *Britiſh* Parliament are alſo certainly known.

§ 110. It remains to be remarked, that neither the *acts of ſederunt*, nor the *judgments of the court of ſeſſion*, nor thoſe of the other courts of Scotland, make a part of that, which is *properly* called the written Law of Scotland.

It would be improper, after having ſaid that acts of ſederunt are not laws, to call them "Laws enacted by the court of ſeſſion." But they are, as it were, Laws. For the Legiſlature hath given it power to make acts, ſtatutes, and ordinances, and to eſtabliſh rules, by which the quick and the impartial diſtribution of juſtice may be promoted; 1537, *c.* 43.—1540, *c.* 93. Therefore, they may be defined to be *ſtatutes made by the court of ſeſſion*. But it muſt be remembred, that Laws have been defined, (§. 74. 79.) to be rules eſtabliſhed by the *ſupreme legiſlative Power* of the ſtate. Therefore, the acts of ſederunt, as has been ſaid, are not Laws; for the ſupreme legiſlative Power in Scotland is veſted, not in the court of ſeſſion, by which they are made, but in the king and parliament of the realm. They are, therefore, no more than rules, which the court of ſeſſion declares it will obſerve, and which therefore, it ought to obſerve in the diſtribution of juſtice. I ſay, the judges of it ought to obſerve them; for by making them they lead the people to believe, that they are reſolved to do ſo; and, of courſe, to regulate their affairs by that ſuppoſition. But they are not entitled to be called Laws, any more than by-laws made by magiſtrates of boroughs, or the regulations which the ſheriff-deputies of Scotland have reſolved to obſerve.

'Tis true, the court ſometimes by its acts of ſederunt does more than regulate the forms of procedure before itſelf: It eſtabliſhes general rules of right; and it ſeems to have the power of doing ſo, provided it alters not principles,

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which are fixed either by the ſtatutory or by the common law of Scotland: For it has not a ſupreme legiſlative power, and cannot repeal ſtanding Laws. But it can lay down rules concerning points, which have remained, ſo to ſpeak, moot; for by doing ſo it does no more than declare the *opinion* which it holds concerning them, and *notifies* to the people the judgment, which they may expect will be given in every particular caſe. Theſe public *notifications* muſt contribute greatly to the quick diſtribution of juſtice; they determine by one general deciſion a great number of cauſes, ſave the time of the court, and prevent law-ſuits. Therefore, the Lords of ſeſſion muſt have power to make them. At any rate, they may afford good ground, on which a Lawyer may found his private opinion, or may form a conjecture concerning the event of a law-ſuit. But they do not, on that account, fall under the definition of Laws properly ſo called; elſe the reſponſes of private lawyers would, in ſome caſes, be alſo entitled to the ſame denomination. I have heard of private lawyers, whoſe genius, abilities, and knowledge of the Law, were ſo far ſuperior to thoſe of all their contemporaries, that one needed ſeldom to have been afraid to pronounce or to conjecture deciſively, agreeably to their opinions.

Beſides, they deſerve not to be, therefore, called Laws, becauſe the people will regulate their conduct by them: for this ariſes from prudential conſiderations. All their actions may give occaſion to law-ſuits before the court of ſeſſion; theſe the court of ſeſſion has the power of deciding. Therefore, he would be an imprudent man, who ſhould not attend to its acts of ſederunt; for ſuch as ſhould not, would be made to ſuffer for their folly.

The court of ſeſſion hath the ſame power of making, altering and repealing its acts of ſederunt, which, it has been ſaid (§ 79.), the ſupreme Legiſlature has of making, altering and repealing its Laws. Therefore, poſterior acts of ſederunt muſt derogate from the authority of thoſe, which were made before them.

§ 111. If the acts of ſederunt are not, much leſs are the judgments of the court of ſeſſion entitled to be held part of the written Law of Scotland; for the court intends no more by them than to determine thoſe particular caſes, which are brought before it. It means not to eſtabliſh *general* rules to be obſerved by the people, (§ 78.) Indeed, little regard is due to the judgments of judges, merely becauſe they are judgments: for they either are, or are not agreeable to the principles of law. If they are agreeable to them, the judges, by attending to theſe principles, and by adhering conſtantly to them, will give judgments, which ſhall be both right in themſelves, and agreeable to thoſe pronounced formerly by the court in ſimilar caſes. If they are not agreeable to law, they muſt be wrong, and *ought* not to be regarded. *Non tam ſpectandum eſt quid factum eſt, quam quid fieri debeat, l.* 12. *ff. de Off. Præſ.* 'Tis, ſurely, a ſilly excuſe for giving a wrong judgment, that my predeceſſors did ſo before me. *Non exemplis, ſed legibus judicandum, l.* 13. *C. de ſent. et interloc. omn. jud.*

Indeed, if the judgments of a ſupreme court, ſuch as the court of ſeſſion, have been uniform, conſtant, and always the ſame concerning any particular point, they prove, that the principle, which governs them, and is determined by them, is undoubtedly a principle fixed in Law. Thus, by *proving* it to be deeply rooted in the law, they eſtabliſh its authority. Hence it is ſaid, *Rerum perpetuo ſimiliter judicatarum auctoritatem vim legis obtinere debere, l.* 38. *ff. de leg.* They become rules, which ought to be conſtantly obſerved by the judges. After the judgments of judges have been uniform, regular and harmonious, and have thereby fixed a point of law, it would be extremely wrong for them to begin to grow irregular and repugnant to one another. For, thus the people would live in ſociety without knowing with preciſion the engagements, which they contracted in it. *Minime ſunt mutanda, quæ interpretationem certam ſemper habuerunt, l.* 23. *ff. de leg.* The ſame doctrine is to be held concerning the judgments of other courts.

TITLE V.

Of Cuſtomary Law.

§ 112. UNWRITTEN, conſuetudinary, or Cuſtomary Law, is oppoſite to written Law. It is 'the ſum of thoſe rules, to which the Legiſla-'ture has never given expreſsly, but is *preſumed* to give its ſanction, becauſe they 'are conſtantly obſerved by the people, and are eſtabliſhed by cuſtom.' From hence it follows, I. That cuſtomary Law has never got the expreſs ſanction of the Legiſlature. II. That it is *preſumed* to have got it. III. That the reaſon, for which it is preſumed to have got it, is, becauſe the Legiſlature is held either to approve of the rules obſerved by the people, or at leaſt to connive at them, ſince, knowing that they are obſerved, it does not forbid the obſervance of them. IV. That Cuſtomary Law is fixed and aſcertained by the actual obſervances of the people, and by them alone. V. That, after it is introduced and eſtabliſhed, it has the force of Law.

§ 113. The faculties of man are not infinite; of courſe, his imaginations muſt be limited; he cannot comprehend all the contingencies, which are poſſible. Therefore, he is incapable of laying down general rules, by which he may be enabled to determine his Conduct in all the variety of Caſes, which may really happen. Hence all civil Laws muſt be imperfect. But man is endowed with reaſon; he is conſcious, that he is bound conſtantly to obſerve the Law of Nature (§ 20. *ſqq.*); and he has an inward conviction of the part, which he ought to act, of the conduct which it is his duty to hold on every particular occaſion. Thus, he becomes a Law unto himſelf, and is able to regulate his conduct: he muſt do it by exerciſing his reaſon, for he cannot do it otherwiſe. But reaſon is ever the ſame. Therefore, conduct which is directed by it, muſt be uniform. Thus, ſimilar actions are acted over and over and over again; and, mankind having a ſtrong propenſity to follow the example of others, a general cuſtom is introduced.

Few people have either time or opportunity to acquire an accurate knowledge of the Law of their Country; they are, therefore, neceſſitated to regulate their conduct by thoſe firſt principles, on which all Law ought to be founded, and to form their conjectures concerning the dictates of that of their own country from them, and from the actions which they ſee tolerated in it. One who ſees certain actions conſtantly done, certain rules conſtantly obſerved by others, has reaſon from thence to conclude, that they are approved by the ſupreme legiſlative power, or are at leaſt not diſagreeable to its will. Beſides, that which is obſerved by a whole people, may well be preſumed, by every individual, to be right in itſelf, and to be founded on juſtice. From thence he has good reaſon to preſume, that the legiſlature gives its ſanction to thoſe rules; that they make a part of the Law of his country; and that, if he ſhall regulate his conduct by them, he will be held to act agreeably to it. The neceſſity, therefore, of human affairs requires, that Cuſtom be held to have the authority of Law, *l.* 32. § 1. *l.* 33. 35. 36. *ff. de leg.*

§ 114. Since cuſtomary Law is fixed and aſcertained by the actual obſervance of the people, (§ 112. *ax.* 4.) it is plain, that, in order to give it the authority of Law, two things are requiſite, 1) uniformity, 2) frequency in the acts, by which it is eſtabliſhed.

Firſt. The acts, by which it is eſtabliſhed, muſt be uniform; for it is implied in the very nature of cuſtom, and is eſſential to the Idea of it, that the acts, by

by which it is eſtabliſhed, be done after the ſame manner, that is, that they be uniform. If there is no ſameneſs, no ſimilarity, no uniformity in them, there can be no cuſtom. Thus, if ſometimes one, ſometimes another meaſure is uſed in a country, it cannot be ſaid that any certain ſtandard is eſtabliſhed in it by cuſtom.

But the acts by which cuſtom is eſtabliſhed, muſt not only be uniform; they muſt alſo be *frequently repeated*; for one or two uniform acts do not conſtitute a cuſtom. They muſt be frequent. 'Tis true, the number of times, which they muſt be repeated in order to eſtabliſh them into a rule, is no where preciſely determined; for it cannot be determined. Much muſt be left to the deciſion of the Judge, who ought to form his opinion according to Circumſtances. In general, it may be affirmed, that a ſmaller number of acts is required to eſtabliſh a cuſtom, which, it is clear, is agreeable to the dictates of the Law of nature, than is required to eſtabliſh either one which is indifferent, or one which ſeems to be diſagreeable to them. If a cuſtom is conducive to the good of Society, it may be held to acquire authority upon the repetition of a few uniform acts; but it requires a great frequency to eſtabliſh one, which is hurtful.

Since the frequent repetition of uniform obſervances is requiſite, it muſt neceſſarily require ſome length of time to eſtabliſh Cuſtomary Law. But the length of time, cannot, any more than the number of acts, requiſite for eſtabliſhing it, be determined with preciſion. It muſt be left to be determined by the wiſdom of the Judge according to the circumſtances, which diſtinguiſh every Caſe. In general it may be remarked, that it muſt be proportionable to the frequency of the acts, by which it is eſtabliſhed. If the intervals between the repeated acts be ſhort, that is, if the repetition of them is very frequent, no more than a ſhort time is neceſſary to eſtabliſh it: if the intervals are longer, or if the repetition is infrequent, a longer time is neceſſary.

§ 115. Since the authority of Cuſtomary Law ariſes from the *preſumed* will of the Legiſlature; and the Legiſlature is preſumed to give its authority to it, *becauſe*, *knowing* that it is obſerved by the people, it does not forbid, but tolerates the obſervance of it (§ 112. *ax.* 3.); it follows, that it matters not of what ſort the Cuſtom be; whether it be rational or irrational, good or bad, agreeable or contrary to the Law of nature: for the preſumption ariſes from the toleration, which is actually given to the obſervances of the people. Of courſe, cuſtomary Law is fixed by thoſe obſervances, and by them alone, (§ 112. *ax.* 4.) In every caſe, therefore, in which the uniform and frequently repeated obſervances of the people are not forbidden, but tolerated, a ſanction is given to the cuſtom, which is thereby eſtabliſhed into a Law.

I know, it is commonly ſaid, that cuſtoms, which are irrational, or which are contrary to the law of nature, have not the authority of Law; becauſe, 'tis ſaid, all Cuſtomary Law derives its authority from the preſumed will of the Legiſlature; but the Legiſlature cannot be *preſumed* to have given its ſanction to a cuſtom, which is irrational, or contrary to the Law of nature; an argument, which is entirely fallacious. For it is abſurd to argue againſt fact. The preſumption, which is made, is made from *facts*; it is founded upon them; for the very ground, upon which the preſumption is founded, is, that certain obſervances have uniformly and long prevailed among the People. Therefore, the Legiſlature is preſumed either to approve of thoſe obſervances, or at leaſt to connive at them; ſince, knowing that they prevail, it permits them, (§ 112. *ax.* 3.). Of courſe, in every caſe, in which uniform obſervances have for a long time and on repeated occaſions actually taken place, a cuſtomary Law is enacted, no matter, whether the Cuſtom be rational or irrational; for it would be abſurd, I mean not for the Legiſlature, but for a Judge to enquire into the rationality of it, after it has been uniformly and frequently obſerved, and has thereby actually acquired a ſanction; ſince it has been *actually* tolerated.

Indeed,

Indeed, it would be extremely abſurd to maintain, that a cuſtom had not acquired a ſanction, becauſe it was, or might be imagined to be irrational. Men have reaſon to preſume that, which they find has been done by others, to be lawful. They are, therefore, *in optima fide* to do it; and to believe it to be *permitted*. Of courſe, they ought not to be puniſhed for doing it. Beſides, it would be extremely dangerous to ſay, that no irrational cuſtom can be preſumed to have the authority of Law. It would ſap the foundations of many maxims, which are rooted in the Law of Scotland, and depend for their authority on Cuſtom alone. I know no Law more abſurd than that, which eſtabliſhes the right of primogeniture, and, by beſtowing an opulent fortune on the Eldeſt ſon of a family, leaves all his brothers and ſiſters dependent on him. It has introduced a multitude of pernicious maxims, and has eſtabliſhed a moſt iniquitous diſtribution of the eſtates of mankind. It would therefore be dangerous for the judicative power, but it is the duty of the legiſlative, to enquire into the reaſons of Laws, in order to detract from their authority, in caſe they ſhall be found to be contrary to the Law of nature. *Non omnium, quæ a majoribus conſtituta ſunt, ratio reddi poteſt. Et ideo rationes eorum, quæ conſtituuntur, inquiri non oportet: alioquin multa ex his, quæ certa ſunt, ſubvertuntur, l.* 20, 21. *ff. de legib.* If every one was to indulge himſelf in the humour of derogating from the ſanctity of every Law, which he might think irrational, it would be impoſſible to know, how far the world might go. Several people think it abſurd to reſtrain the rational diſquiſitions of mankind, and to hinder philoſophers from publiſhing their tenets *. Others think it as ridiculous to eſtabliſh by Law a ſyſtem of Opinions, and to force men to ſubſcribe to them, as it is to believe the doctrine of tranſubſtantiation. Thus, If once enquiries begin to be made by Judges into the rationality of Laws, and judgments to be founded on the reſult of thoſe enquiries, every thing muſt ſoon be thrown looſe, and the deciſions of Judges become arbitrary. The world has, in ſome whimſical people, already ſeen enough of this humour; and would wiſh to ſee no more of it. Cuſtom, therefore, ought to be held by Judges the moſt ſacred of all Laws.

§ 116. Since it is fixed and aſcertained by the actual obſervances of the people, and by them alone (§ 112. *ax.* 4.) it is plain that it muſt be local; its authority extends no farther than the limits, within which it is obſerved; for the Legiſlature is preſumed to confine its authority within thoſe limits, ſince it cannot be preſumed to extend it beyond them.

§ 117. From the ſame axiom it follows, that it is a queſtion of fact, whether any cuſtom has, or has not been obſerved ſo conſtantly, as to give it the authority of Law; for it is a queſtion of fact, whether the obſervances, which conſtitute it, have or have not taken place. Proof, therefore, muſt be made of this as of other facts, affirmed to the Judge, by proper evidence; *unleſs it is notorious*. I ſay, unleſs it is notorious; for in ſome caſes it is, in others it is not notorious, that a cuſtom takes place. In caſe it is notorious, it needs not to be proved; for it is held to make a part of the public Law, and to be, therefore, known to the Judge, (§ 102.) It would, therefore, be abſurd for him to require proof to be made of it. For inſtance, the rules of ſucceſſion, particularly the right of primogeniture, are, in Scotland, founded on cuſtomary Law alone; they have been obſerved in this Country time out of memory; they are, therefore, held to be notorious; it is unneceſſary to prove, that they prevail; the Courts of Law are held to know them as much as any other part of the Law of their country. In caſe it is not notorious, that a cuſtom prevails, proof muſt be made of the fact by proper evidence.

The Doctors, who have written on the Civil Law, have ſaid much on the evidence, which is requiſite to prove the obſervance of a cuſtom. It is needleſs to follow them thro' all their doctrines; for evidence is that, which convinces a Judge

* See Mr. HUME's xi. Philoſophical Eſſay.

Judge of the truth of a fact affirmed to him. Therefore, a fact is then ſaid to be proved, when the Judge is *convinced*, by the evidence brought to prove, that it is true. Of courſe, much muſt, in this matter, as in all caſes of evidence, depend upon the ſagacity of the Judge. He muſt form his opinion from all the circumſtances of the caſe before him.

§ 118. Since cuſtom, after it is introduced and eſtabliſhed, has the force of Law, (§ 112. *ax.* 5.) it is plain, 1) That the people are bound to obſerve it; for all Laws are obligatory upon them (§ 80.): 2) That it may either repeal or alter a former Law, no matter, whether written or unwritten; for poſterior Laws derogate from thoſe which are prior to them. (§ 79.) Therefore, if a Cuſtom has been expreſsly forbidden by a written Law, and has, notwithſtanding, continued to prevail, it muſt be held to have repealed the written Law; for the Legiſlature has connived at it, has allowed it to continue, has permitted it, and muſt, therefore, be preſumed again to have given its ſanction to it. 'Tis true, that it may itſelf, like every other, be repealed or altered by a poſterior ſtatute: but that poſterior Law may alſo be repealed by it; and, in caſe the Legiſlature allows the people to *continue their obſervance* of the antient cuſtom, it muſt be preſumed, by this toleration, to have repealed the written Law. The Legiſlature, therefore, if it would aboliſh a bad cuſtom, ſhould not, after it has forbidden it by ſtatute, connive at it, but carry the Law into execution by executing its ſanctions upon thoſe, who tranſgreſs it. If it does not do ſo, but tolerates the antient cuſtom, the toleration, if it is long continued (§ 114), muſt exempt the people from the ſanction of a Law, which the Legiſlature muſt be preſumed to have allowed to go into deſuetude. 3) The Judges of the Law ought to regulate their judgments by it: indeed, the greateſt regard ought always to be had to it; for People uſually regulate their affairs by it. Beſides, ſuch is the nature of man, that, tho' *capricious* and *whimſical* cuſtoms may take place in ſome countries and on ſome occaſions, cuſtoms, eſſentially deſtructive of the ſubſiſtence or happineſs of Society, are ſeldom or never eſtabliſhed. So that human affairs may always be on a tolerable footing, if thoſe cuſtoms, to which mankind are diſpoſed to give their ſanction, are ſteadily obſerved. Beſides, Cuſtom is the beſt interpreter of Laws; and the ſenſe, which the people appear from it to have put upon them, is, in doubtful caſes, perhaps the beſt rule, by which Judges can form their opinions. *Si de interpretatione legis quæratur; imprimis inſpiciendum eſt, quo jure civitas retro in ejuſmodi caſibus* uſa *fuiſſet: optima enim eſt legum interpres* conſuetudo. *Nam Imperator noſter Severus reſcripſit, in ambiguitatibus, quæ ex legibus proficiſcuntur*, conſuetudinem, *aut rerum perpetuo ſimiliter judicatarum auctoritatem, vim legis obtinere debere, l.* 37. 38. *ff. de leg.*

§ 119. It remains to be remarked on this title, that the authority, which the Civil and Canon Laws have acquired in Scotland, is derived from Cuſtom alone, and is, therefore, a part of the Cuſtomary Law of Scotland.

The Civil Law cannot be reckoned a part of the written Law of Scotland; for it was never ratified *expreſsly* by any of the ſtatutes enacted by the Scotch Legiſlature. But it is a complete Syſtem; it comprizes and determines almoſt all the caſes which can poſſibly happen; and it is remarkably agreeable to the Law of nature *. Therefore, the Scotch Judges, the Scotch Lawyers, and the Scotch Nation uſually had recourſe to it in thoſe caſes, concerning which their own Law was ſilent; they conſulted it, and appealed to it; by degrees, it acquired great authority, and became a rule, by which judgments were given in all thoſe caſes, to which it could be applied.

* It is ſometimes called the common Law; for it is founded on thoſe general principles, which are rooted in human nature, and are common to all human kind. Hence, it acquired an extenſive authority, and became common to all nations. But this name is frequently given to 'the ſum of thoſe maxims, principles and rules, which have not been eſtabliſhed by ſtatute, but are founded on antient notorious cuſtoms.'

It is not, however, poſſeſſed of abſolute dictatorial authority in Scotland; for it owes its authority to its equity. But the beſt, the wiſeſt, the greateſt of men may err; the compilers of the ſyſtem of the Roman Law may have erred; their judgments may, in ſome caſes, be iniquitous. Hence, the Judges of the Law in Scotland have receded from it in ſome caſes, in which its deciſions appeared to be either contrary to equity or inapplicable in the Law of Scotland.

The Canon Law is alſo of great authority in this country; for it is, in many reſpects, a tranſcript of the Civil Law. Beſides, it eſtabliſhed many doctrines peculiar to itſelf, and had acquired great authority in Scotland before the Reformation. Of courſe, many uſages have been introduced by it into Scotland. Theſe have taken deep root in the Law, in ſo much that there are not any other rules, than thoſe of the Canon Law, by which it is poſſible to judge concerning them. The things, the inſtitutions, the principles are derived from it. Of courſe, the rules, eſtabliſhed by it, can alone be applied to them.

§ 120. But the ſame authority is not due to thoſe books, which are called *Libri Feudorum*; for they were compoſed by two private Lawyers, and contain no more than the feudal cuſtoms of Lombardy. But the feudal Law is local; it is a different Law in all the countries of Europe. Therefore, the feudal Law and cuſtoms of the Lombards are not the feudal Law and cuſtoms of Scotland. Of courſe, they have no authority in it.

TITLE VI.

Of the Objects of Law.

§ 121. THE end of all Civil Law is to oblige men to do their duty, or to obſerve the Law of nature, (§ 70.) The duties of life concern either the *perſons* of men, or the *eſtates* which belong to them: Therefore, the *objects* of Law, that is, "The things of which juriſprudence treats," muſt be three; *firſt*, The perſons, to whom eſtates belong, and upon whom duties are incumbent; *ſecondly*, The things of which the eſtates, belonging to theſe perſons, conſiſt; *thirdly*, Actions, that is legal remedies, by which the perſons and the properties of men are ſecured, or wrongs done them are redreſſed. § 12. *J. de jure nat. l.* 1. *ff. de ſtat. hom.* It will, therefore, be neceſſary to treat of each of theſe objects in their order.

A SYS-

A

SYSTEM

OF THE

PRINCIPLES of the LAW of *SCOTLAND.*

PART I.

BOOK III.

TITLE I.

Of Perſons.

§ 122. THE firſt object of law is Perſons, (§ 121.).

A Perſon is 'every one of human kind.'

It is, perhaps, difficult to define with preciſion the characteriſtics, which diſtinguiſh the human kind; for no individual is perfectly like to any other; the variety of nature is infinite. I would ſay, therefore, that all thoſe, who have *the bulk* of the parts, which mankind commonly have, belong to the human ſpecies; for it would be improper to ſay, that all thoſe, who are born of women, belong to it. Women are ſometimes ſo unfortunate * as to bear monſters; creatures, as the law ſays, *qui contra formam humani generis converſo more procreantur, l.* 14. *ff. de ſtatu hom.* Theſe are not perſons, for they are not men.

Different from them are all thoſe, who have *the bulk* of the parts, which men *uſually* have, but at the ſame time either have ſome which men uſually want, or want ſome which men uſually have; theſe are admitted to be of the human kind, and are, therefore, perſons, *l.* 14. *ff. de ſtatu hom.* For inſtance, ſome people

* See *Venus phyſique*, Part. 1. ch. 17.——Lucret. lib. 5. v. 876, ſeqq.

people are born with more than five fingers on each hand; M. de MAUPERTUIS * tells us, that in Berlin he lighted on two perſons, who had ſix. Yet theſe with their ſix, are men as much as we, who have no more than five fingers.

In the Iſthmus of America, travellers have found men, whoſe colour, different from that of all other mortals, reſembles the peculiar whiteneſs of the horſe; their skin is covered all over with down; their hair is like wool, whiter than the driven ſnow; their eye-lids are formed pointed like creſcents; and their eyes, unable to behold the light of the ſun, are open during the night alone; they are the Bats of the human kind, ſleep in the day-time, and, like them, go abroad to their labours, or to enjoy the darkneſs of the night †. Our own hiſtorians inform us of an extraordinary *phænomenon*, which made its appearance during the reign of JAMES IV. It had every part above its *umbilicus* double, but every thing below no more than ſingle. One pair of legs ſupported two bodies, each of them having its proper arms, neck and head. The conſequence was, that it poſſeſſed the rational faculties of two men; each of the bodies had its own underſtanding, its own will, and its own affections; but its inferior parts being common to both, conteſts uſed ſometimes to ariſe between them about the direction of theſe, and every thing, which affected them, was felt by them both. But ſuperior parts being proper to each of them, every thing, which affected theſe, was felt by that perſon alone, whoſe body was touched. So ſingular a creature excited, in an illiterate age, the wonder of mankind; the king cauſed care to be taken of its education; it acquired the knowledge of ſeveral tongues, made progreſs in different ſciences, became remarkable for its muſical talents; and, which is curious, each of them both could, and did learn different things ‡. This creature, extraordinary as it was, muſt not, however, be refuſed a place among the human kind. But nature, full of curioſities, hath, if travellers deceive us not, diſtinguiſhed whole races of men by parts peculiar to themſelves. In the iſlands ſituated eaſtwards from the Aſiatic Coaſt, a race has been diſcovered of creatures, whoſe bodies, beſides being covered with hair, and differing in other reſpects from the ordinary breed of men, carry an ornament peculiar to themſelves, that is, a Tail. GEMELLI CARRERI ‖ was aſſured by ſome Jeſuits, who, he ſays, were perſons worthy of credit, that in Mindoro there was a race of theſe men with tails, diſtinguiſhed by the name of Manghians, ſome of whom had embraced the Catholic faith. STRUYS ‡‡ tells us, that in Formoſa he ſaw with his own eyes a man, who had one of theſe tails more than a foot long, and who informed him, that the defect, if it was one, was owing to the climate, and that all the inhabitants of the Southern parts of the iſland had tails like himſelf. M. de MAUPERTUIS ſays, he would rather have an hour's converſation with one of them than with the fineſt genius in Europe. Such men, if ſuch men there are **, could not be denied to have all the rights of human kind;

* Lettre 13. Sur la generation des animaux.

† An accurate deſcription of theſe Dariens is given by M. de BUFFON in his *Hiſtoire naturelle, de l'homme, ch.* variétés dans l'eſpèce humaine; —— and by MAUPERTUIS, in *Venus phyſique*, part. 2. ch. 1.

‡ See an account of it in BUCHANAN, *lib.* 13. *c.* 7.

A deſcription of another curioſity of the ſame kind is to be found in the *Philoſophical tranſactions*, Vol. 50. Art. 39.

‖ See his travels.

‡‡ See Les voyages de JEAN STRUYS, *tom.* I. *p.* 100.

** See Lettre ſur le progres des ſciences.——*Venus phyſique*, p. 2. ch. 1. par M. de MAUPERTUIS.——See alſo *Hiſtoire naturelle* de l'homme, par M. de BUFFON.——Lucret. lib. 5. v. 838—854.

It would be bold to ſay poſitively, that there are no ſuch men. But M. de BUFFON ſeems to doubt concerning the reality of their exiſtence. He is not only one of the fineſt writers, but one of the moſt learned naturaliſts, as well as greateſt philoſophers of this, or of any age. Attentive and penetrating, he has laid open the original conſtitution of things, and ſeems to have accounted, in the moſt probable and ſatisfactory manner, for the preſent appearances of nature; and, conducted by a recollection peculiar to himſelf, his ſagacity has extended itſelf to futurity, and has revealed the continual and ſucceſſive mutations, which may be expected from the operation of thoſe ordinary cauſes, that are appointed by the Sovereign of the world to act at preſent in the univerſe. He is not like thoſe vulgar ones, who pronounce deciſively every thing incredible, which they have not ſeen. But he has ſurveyed nature with the moſt attentive eyes, and is minutely acquainted with every part of its hiſtory. His authority muſt, therefore have the greateſt weight; and one would not raſhly beſtow on any thing a reality, which he ſeems inclinable to deny it.

kind; their tails would not bar them from acquiring, holding, enjoying and diſpoſing of property, from being perſonable *in judicio*, or from the other privileges of the ſpecies, any more than Gottrils, an ornament peculiar to thoſe who live at the foot of the Alps, and which is held by them to be eſſential to beauty.

Every man, therefore, woman, and child, is a Perſon.

§ 123. Mankind are diſtinguiſhed from one another either by nature, or by political inſtitutions. The natural diſtinctions, which are found among them, are independent on them; people have it not in their power to remove them. But the political ones being derived from political inſtitutions, it is, therefore, poſſible for them to be different in different countries.

§ 124. By nature men are diſtinguiſhed, 1) Into thoſe who are not, and thoſe who are born, *naſcituri et nati*.

It would be inhuman to injure or to kill thoſe, who are young, merely becauſe they are not old; for thoſe, who are young, may grow old. It would be inhuman to injure or to kill thoſe, whoſe faculties are not arrived at maturity, becauſe they are not arrived at it; for they may arrive at it. In the ſame manner, it would be inhuman to injure or to kill thoſe, who are not born, becauſe they are not born; for they *may* be born. Therefore, one has no better right to injure or to kill them, than he has to injure or to kill thoſe, who are young, or thoſe whoſe faculties are not arrived at their maturity. 'Tis true, they are not able to defend themſelves, and are not ſo uſeful as they may afterwards happen to be in ſociety. But it does not from thence follow, that it is lawful to injure or to kill them: Nothing leſs; for humanity ſhrinks at nothing more. Every one ought to be mindful of his own condition, and to think himſelf bound to do by others as he would have wiſhed them to have done by him.

Hence the maxim of the Roman Law, which is ſo agreeable to the dictates of humanity, has been adopted into the *common* Law of Scotland, 'That thoſe, 'who are not born, the *naſcituri*, are held in all caſes, in which it is their intereſt to be held, to be already born.' *L.* 7. 18. 26. *ff. de ſtat. hom. l.* 231. *ff. de verb. ſign.*

From hence it follows, that they 1) have rights; and 2) May both have and acquire property; for it is their intereſt to have them.

The rights of children unborn reſpect either their perſons, or the eſtates which they may happen to have.

For every child, which is unborn, has a right to get every thing, which may deprive it of its chance of being born, hindered from being done; therefore, it is unlawful 1) to kill it during its impriſonment in the womb, or to do any thing, by which it may be miſcarried.

Hence thoſe mothers, who procure abortions by doing violence to their own bowels, and kill the hope of their own offspring, are guilty of an execrable crime, and deſerve, therefore, to be ſeverely puniſhed. *Spem parentis, memoriam nominis, ſubſidium generis, heredem familiæ, deſignatum reipublicæ civem tollunt* *. Beſides that the vaſt inhumanity of their hearts affords the ſtrongeſt reaſons to ſuſpect ſuch wicked creatures of being capable of committing the moſt atrocious crimes; they hurt ſociety by murdering a human creature, and do an irreparable injury to their own offspring, by preventing it from ever ſeeing the light. The preciſe puniſhment of this crime is nowhere defined; it is uſually ſaid to be arbitrary †; but it is perhaps more conſonant to the principles of Law to ſay, that it is capital in all caſes: For it is murder either to kill a child living in the womb, or to hinder it from becoming alive, as much as to kill one a few days after its birth. The difference, if there is any between the caſes, is hardly perceptible; and a child in the womb deſerves as much reſpect as a new born babe. Indeed, the one crime ſeems to deſerve to be more ſeverely puniſhed, becauſe it may be committed

* Cic. pro A. Cluentio.

† See MACKENZIE's Criminals.

mitted more ſecretly than the other. 'Tis true, by being more difficult to be diſcovered, an innocent perſon may ſometimes happen to be made to ſuffer for an accidental abortion, in caſe a number of ſuſpicious circumſtances concur againſt her. But it would be abſurd from thence to argue, that this crime ought not, becauſe from the ſame principle it would follow, that none ought to be puniſhed either by death or by any other puniſhment. For ſuch is the imperfection and the fatality of human affairs, that innocent people may ſometimes happen to be believed to be guilty, and to be puniſhed.

For the ſame reaſon, not the mothers alone, but thoſe, who either are acceſſary to the commiſſion of the crime, or, without the privity of the mothers, procure by poiſon or otherwiſe the abortion or the death of the fœtus, are guilty of a capital crime, *l.* 38. § 5. *l.* 39. *ff. de pœn.*

Since it is unlawful to kill a child in the womb, it muſt 2) Have a right to get every thing hindered from being done, by which it may be brought into the danger of being miſcarried. Hence it is eſtabliſhed by Law, that a woman with child cannot be puniſhed either by death, or by torture, or by any other corporal puniſhment, which may endanger a miſcarriage. The infliction of the puniſhment muſt be delayed, till ſhe be delivered, *l.* 3. *ff. de pœn. l.* 18. *ff. de ſtat. hom.*——*Paul. recept. ſent. lib.* 1. *tit.* 12. For it would be cruel to involve the innocent babe in the guilt of its mother; it is not acceſſary to her crimes; and the time of its birth does not depend upon itſelf. Hence, it has a right to have the belly of its mother *inſpected* by perſons of ſkill, in order to diſcover, whether ſhe be with child, *ſ. ſt. R.* I. *c.* 26. and that, whether the mother does or does not plead it, *Fo.* 26. *Auguſt* 1679. *Hamilton.*

From the ſame principle it follows, 3) That a child in the womb has a right to be maintained either out of its own eſtate, or by thoſe, who would be bound to maintain it after its birth. But it cannot be maintained, if its mother is not maintained; it muſt die, if ſhe is allowed to periſh for want. Hence, it has a right to get a maintenance allowed to its mother during her pregnancy by thoſe, who are bound to maintain her; for the obligation is primarily incumbent on them. But, if either they are not *in facultatibus*, or ſhe is not ſupplied with things proper for one in her condition, ſhe is entitled on its account either to get a maintenance out of its own eſtate, or from thoſe bound to maintain it, *l.* 1. *&c. ff. de ventre in poſſeſ. mittendo.*

4) A child unborn has all the rights dependant on the eſtate which belongs to it.

For it both may have and may acquire property. Every right is reſerved entire to it, till the time of its birth. If it is called by the Law to ſucceed to an inheritance, the right, which it has to ſucceed, remains entire to it, and cannot be hurt by any accident which may happen before it is born. Hence, if thoſe, who were the viſible lawful heirs to the eſtate at that time, at which the ſucceſſion opened to it, ſhall have got themſelves ſerved heirs, and ſhall have entered upon the inheritance, their ſervice is voidable; and may be ſet aſide, at the ſuit of the heir, who was *in utero*, as ſoon as he ſhall be born. In the ſame manner, eſtates may be ſettled on children unborn; rights may be granted in their favor; and that, not only in caſe they are actually known to be *in utero*, but alſo tho it ſhould be uncertain whether they will ever be born.

§ 125. By thoſe, who are born, I mean all thoſe, who are brought into the world either by birth or by exection. For women ſometimes happen to die during their pregnancy. In that caſe, it is uſual to open their bellies, and to exect the fœtus, if it has become quick in the womb: For a child ought not to be allowed to periſh, if it can be preſerved. Children brought into the world in this extraordinary manner, cannot properly be ſaid to be born. They were, by the Romans, ſaid to be *editi* or *execti*, not *nati*, *l.* 132. § 1. *l.* 141. *ff. de verb. ſignif.* But it is neceſſary to number them among thoſe, who are born; for I know

know not, whether the phyſicians have, I am ſure the Scotch Lawyers have not a proper technical term, by which they diſtinguiſh them.

§ 126. Thoſe, who are born, nature has diſtinguiſhed from one another, 1) By ſex; they are all of them either male or female. 'Tis true, natural hiſtorians aſſure us, that there have been Hermaphrodites, poſſeſſed of the characteriſtical parts of both ſexes, or rather of ſomething like them; for it ſeems not to be certain, that any *human* creature was ever fully marked by them all. No doubt, there are among the brutes *perfect* hermaphrodites, becauſe they are hermaphrodites according to the ordinary courſe of nature. Every ſnail poſſeſſeth all the parts, and performs all the functions both of the male and of the female. 'Tis true, the copulation of two of them is neceſſary to the propagation of the kind. But the *Puceron*, or Vine-fretter, an animal remarkable for being deſtructive to the Vines, is an Hermaphrodite yet more complete in itſelf; for it can either ſingly and alone, without copulation, or with it, propagate its kind: A fact, which however extraordinary it may appear, is incontrovertibly proved by the experiments of the obſerving M. de REAUMUR, and of the beſt natural hiſtorians. But it deſerves hardly to be minded, after one hears of the method in which the Polypus propagates its kind. It does not copulate; the new generation *grows* out of the body of its parent, as branches grow out of the trunk of a tree; and, out of every one, perhaps, of the new race, another like itſelf grows, before it is ſeparated from the original and common ſtock; in the ſame manner, as ſmaller branches grow continually out of the larger branches of trees. But this is not the only way, in which it can propagate its kind. Cut a polypus into as many pieces as you will, every piece will become a perfect polypus *. But in thoſe, who are called Hermaphrodites among the human kind, all the parts, by which the ſexes are diſtinguiſhed, are not to be found in the ſame perfection, in which they are found in one complete individual of either ſex. They are not able to perform the functions of both ſexes, and in a double capacity to propagate their kind. Lawyers, therefore, have been at a loſs to determine the ſex, to which they ought to be referred. It uſually happens, that one of the ſexes prevails in them more than the other; they are rather men than women, or women than men. Therefore, the Law holds them to be of that ſex, which prevails in them: If they ſeem rather to be male than female, it holds them to be men; if they are rather female than male, it holds them to be women; *l.* 10. *ff. de ſtat. hom.*

§ 127. Women have faculties and powers and paſſions and appetites ſimilar to thoſe of the men, and are equally capable of being made happy or miſerable. Hence, the Law grants them the ſame rights, which it grants the men in all caſes, in which it has not provided otherwiſe. They may hold, may acquire, and may diſpoſe of property, and of every thing which is annexed to it.

But their ſex is more delicate; their bodies are leſs nervous; and, during their pregnancy, when they carry about them a burden, which, tho troubleſome, nature has taken care to make agreeable, they are uſually unable to endure fatigue. Hence they have, in almoſt all countries, except Ægypt, in which this and others of the cuſtoms of men were reverſed †, been kept at home, and confined to the management

* See Venus phyſique, p. 1. ch. 11.

† HERODOTUS lib. 2. The account, which HERODOTUS gives of the manners of the Ægyptians, is curious: Αἰγύπτιοι, ἅμα τῷ ἀρανῷ τῷ κάτα σφέας ἐόντι ἑτεροίῳ, καὶ τῷ ποταμῷ φύσιν ἀλλοίην παρεχομένῳ ἢ οἱ ἄλλοι ποταμοί, τὰ πολλὰ πάντα ἔμπαλιν τοῖσι ἄλλοισι ἀνθρώποισι ἐσήσαντο ἤθεά τε καὶ νόμους. ἐν τοῖσι, αἱ μὲν γυναῖκες ἀγοράζουσι καὶ καπηλεύουσι. οἱ δὲ ἄνδρες, κατ' οἴκους ἑόντες, ὑφαίνουσι; ὑφαίνουσι οἱ μέν ἄλλοι, ἄνω τὴν κρόκην ὠθέοντες, Αἰγύπτιοι δὲ, κάτω. τὰ ἄχθεα, οἱ μὲν ἄνδρες ἐπὶ των κεφαλέων φορέουσι. αἱ δὲ γυναῖκες, ἐπὶ των ὤμων. οὐρέουσι, αἱ μὲν γυναῖκες, ορθαὶ, οἱ δὲ ἄνδρες, κατήμενοι. ἐυμαρίη χρέωνται ἐν τοῖσι οἰκοισι, ἐσθίουσι δὲ, ἔξω ἐν τῆσι ὁδοῖσι. ἐπιλέγοντες, ὡς τὰ μὲν αἰσχρὰ, ἀναγκαῖα δὲ ἐν ἀποκρυφῳ ἐσὶ ποιέειν χρεών. τὰ δὲ μὴ αἰσχρα, ἀναφανδὸν.

management of domeſtic affairs. *Major dignitas eſt in ſexu virili l.* 1. *p. ff. de ſenator.* The men, whoſe bodies are more robuſt, have aſſumed to themſelves the burden of all civil, public, and out-houſe affairs.

From hence it follows, 1) that women cannot *exerciſe* any public or civil Office. They cannot be either Magiſtrates, or Judges, or officers of the Law, or members of Parliament. *l.* 2. *p. ff. d. r. j.* But there is one exception to this rule; for females may ſucceed to the Crown of Great Britain, and exerciſe all the powers belonging to it.

Beſides, they can hold property. Of courſe, they can hold every thing, be it right, honour, privilege, or juriſdiction, which is annexed to it. Hence, in caſe a juriſdiction is either hereditary, or annexed to the eſtate which they hold, they are entitled to *hold* it, and to transfer it either to univerſal or to ſingular ſucceſſors.

I ſay, they are entitled to *hold* it; for they are not entitled themſelves to *exerciſe* it. In caſe it is ſo perſonal, that it cannot be exerciſed by a deputy, it remains abſorbed in the perſon of the Lady to whom it pertains, and all which it avails her, is to tranſmit it to another. But, if it may be exerciſed by a deputy, ſhe may appoint one, who will have power to exerciſe it.

2) Women may hold honours, and may tranſmit them to their poſterity. Thus, they may be peereſſes, and may thereby have all the rank, privileges, and dignity, which peers have, and women can lawfully exerciſe. I ſay, which women can *exerciſe*; for there are ſome of the privileges of peers, which women cannot exerciſe; for inſtance, they cannot be members of Parliament, they have not either a ſeat or a vote in the houſe of Lords. Indeed, women are, in all caſes, incapacitated from exerciſing the judicative power, or from having a vote in any corporation, meeting, or court.

Other rights, which are *merely patrimonial*, they may have: but they can have no public ſhare in the adminiſtration of the affairs of any incorporated ſociety or body. For inſtance, they may be admitted Burgeſſes of boroughs, and members of corporations; and may exerciſe the *trades*, which the burgeſſes of thoſe boroughs, or the members of thoſe corporations are entitled to exerciſe. But they can have no vote in the adminiſtration of the affairs of the borough or of the corporation, becauſe that is a public and a civil office, therefore they cannot interfere in it.

§ 128. The individuals of human kind are diſtinguiſhed by nature from one another not only by ſex, but 2) by age, (§ 123.). And the Law, attending to this natural diſtinction and to the conſequences of it, hath divided human life into different Periods, and hath invented names, by which it diſtinguiſhes them from one another. Of theſe I ſhall have occaſion to treat in the fifth book.

§ 129. To thoſe and the other natural diſtinctions of mankind the Civil Law of every Country has found it neceſſary to add many political ones, (§ 123.), which will, all in their order, fall to be explained afterwards. But there is one of them, to wit, that by which they are divided into freemen and ſlaves, of which it is proper to treat in this Place.

TITLE II.

Of Slavery.

§ 130. 'TIS not to explain the doctrine of ſlavery, the condition of ſlaves, or the powers of their maſters, but to prove that ſlavery is baniſhed by the Law out of Scotland, and that every man, who is in this country, is free, that I have compoſed this title; for the doctrine of ſlavery, ſuch as was tolerated by the

the Roman Law, or prevailed in the antient world, or is at preſent exerciſed in America, appears to be ſo horrid, and ſo contrary to the feelings of humanity, that it cannot be agreeable to the Law of Scotland.

I know well that the *Regiam Majeſtatem*, the *Quoniam Attachiamenta* and ſome other parts of our antient Law make particular mention of thoſe who are called *nativi*, deſcribe the actions by which a ſlave or liberty may be vindicated, particularize ſome things relating to the condition of ſlaves, and ſpecify the powers of their Maſters and the limitations of theſe powers. But it is not from thence to be inferred, that ſlavery was ever actually tolerated among us. Many doctrines, inſtitutions, and principles, which are confeſſed by every body to be diſagreeable to the Law of Scotland, are delivered in thoſe antient books. I own they cannot be denied to make a part of the written Law of Scotland, (§ 106.); they were not, however, digeſted with that accuracy, with which they ought to have been; they are admitted by the Legiſlature to have needed amendment; Committees were, at different times, appointed by Parliament to reviſe and to amend them. It would be raſh, therefore, to take for Sterling every thing, which is to be found in them. It may have been the caſe, that any thing like ſlavery, ſuch as it is deſcribed in theſe antient books, never took place in Scotland.

But grant it did, it cannot be from thence concluded, that it either is lawful, or ought to be permitted at preſent. Laws, it has been ſaid, (§ 118.) may be repealed by Cuſtom; they may go into deſuetude, and may, by diſuſe, loſe their obligatory force. Every abſurd, every barbarous, every cruel uſage, which prevailed among our anceſtors, and was authoriſed by Statute, cannot be held to be permitted now. The ſuperior wiſdom and civility of the preſent age have made us by degrees abandon many of thoſe fooliſh notions and inhuman Cuſtoms, which prevailed among them. Pride, cruelty, and indolence governed their conduct: we are now ſo happy as to be *beginning* to laugh at their Pride; Their cruelty is become ſhocking to moſt of us; and a Spirit of induſtry is growing in Scotland. The ſame principles, which ſeem to have determined us to aboliſh ſervile tenures, oppreſſive juriſdictions, and lawleſs attachments, have induced us totally to aboliſh the inhuman uſage of ſlavery: for we ſeem, by degrees, to have become ſenſible of the inhumanity of it, to have departed from it, and by departing from it, *tacitly to have aboliſhed* it. So far as I have been able to learn, no veſtige of it remains in Scotland. Indeed, it has been diſuſed, and has been unknown for ſeveral generations paſt. So that there is not any remembrance of the eſtabliſhment of it now remaining among us.

§ 131. But, in order to prove, that it is totally aboliſhed by the Law of Scotland, and that the Judges of it ought, in *no caſe*, to adjudge one to be the ſlave of another, it may not be improper to beſtow a few paragraphs on conſidering the foundation on which it is commonly built, and enquiring, whether the firſt and eternal Laws of nature do not bear teſtimony againſt it. The queſtion is important in itſelf; is intereſting to humanity; and has been the ſubject of much debate both among politicians and among philoſophers. Slavery was tolerated by the Laws of the moſt civilized nations of the antient world; it is at preſent eſtabliſhed in all our Colonies, and is pretended to be eſſential to their ſubſiſtance. Caſes, therefore, may happen, in which it may be neceſſary to determine queſtions concerning the liberty of thoſe, who ſhall be imported into Britain.

I take it to be undeniable, that every man is born equal to every other; for every one, who lays his hand upon his heart, muſt be conſcious, that he cannot help thinking ſo of himſelf. Hence Liberty is ſaid to be a *natural* faculty, *naturalis facultas*; and ſlavery is ſaid not only to owe its original to the arbitrary conſtitutions of men but to be *contrary to nature*. *Servitus eſt conſtitutio* juris gentium, *quâ quis dominio alieno* contra naturam *ſubjicitur*, *l.* 4. *p.* § 1. *ff. de Statu hom.* The reaſon is, *quia, quod ad jus naturale attinet, omnes homines æquales ſunt*, *l.* 32. *ff. d. r. j.* No man has

has naturally dominion over another. Of courſe, no man is by nature ſubject to any other. All men have the ſame faculties, the ſame paſſions, the ſame deſires, the ſame nature; and all that inequality, which is to be found among the individuals of human race, is derived from political and arbitrary inſtitutions alone.

Beſides, every man muſt be conſcious to himſelf, that he hates to be dependant on others, and to be obliged to regulate his conduct by their will; becauſe every man is endowed with liberty, has abilities to direct himſelf, and is naturally fond of exerting them. To be, therefore, reſtrained from exerciſing thoſe faculties, with which he finds himſelf endowed, and which he has a ſtrong deſire of exerciſing, and to be ſubjected to the imperious dictates of another, muſt be a very uneaſy condition. Every one muſt be conſcious to himſelf, that he would not like to be in it. Let us therefore think concerning others, as we think concerning ourſelves; let us judge concerning their rights, as we would ourſelves judge, or would wiſh them to judge concerning our own; and let us grant, that they have a right to be uſed in the ſame manner, in which we would think ourſelves entitled to be uſed in the ſame circumſtances.

From theſe principles it follows, that all inequality, all dependence, all ſervility, all ſuperiority, all ſubjection, all pre-eminence, which is not *neceſſary* to the welfare of Society, is unnatural; and that, if it could, it ought to be deſtroyed. Men ought to be reduced to a level as much, that is, they ought to be as free, and as independant of one another, as is conſiſtent with the good of Society.

I will not ſay, that a ſtate, ſuch as that deſcribed by Sir THOMAS MORE, in which every Citizen is equal to every other, is poſſible. But I will be far from ſaying poſitively, that it is impoſſible. The hiſtory of mankind ſhews, that many unexpected revolutions have happened, and that things have exiſted ſo contrary to all expectation, that he would, indeed, be a raſh man, who ſhould pronounce deciſively, any thing, which is not naturally to be abſolutely impoſſible. Something like equality, we all know, was eſtabliſhed in the antient world. But thus much may be ſaid, that it is not probable it will ever be actually eſtabliſhed. Property, that bane of human felicity, is too deeply rooted in Society, and is thought to be too eſſential to the ſubſiſtence of it, eaſily to be aboliſhed. But it muſt neceſſarily be baniſhed out of the world, before an Utopia can be eſtabliſhed. For, as long as it remains, the methods of acquiring it muſt remain, and ſome people muſt acquire and muſt, therefore, be entitled to hold more of it than others. But if ſome acquire more of it than others, men cannot be equal. 'Tis true, Agrarian Laws may be enacted: but they muſt be founded on inequality; for they are intended to limit the quantity, above which no man ſhall be allowed to poſſeſs. Beſides, they muſt loſe their force; for every man will think, that he has, ſurely, a natural, indeed, the beſt title to the fruits of his own labor; and the diſtinctions, admitted by them, will gradually give riſe to others. Thus, property and equality ſeem to be abſolutely incompatible. But it would be difficult, if it is not impoſſible, to baniſh the former out of the world, and to bring thoſe, who have it and are *diſtinguiſhed* by it, to part with it. Beſides, the diſtinctions, which have been introduced among men, have given a certain bent to their way of thinking, and have made ſuch deep impreſſions upon them, that it will not be eaſy to give them an inclination contrary to their preſent one. From whence it may be affirmed to be hardly probable, that a perfect, abſolute, and univerſal equality will ever be eſtabliſhed in human Society.

But, tho the condition of human affairs may never arrive at ideal perfection, we ought not to abandon them out of peeviſhneſs or out of deſpair, becauſe we cannot get them brought to that point of perfection, to which we wiſh to bring them. We ought to uſe our endeavours to make them approach as near it, as

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poſſible. In the ſame manner, we ought not, becauſe we cannot reduce mankind to an *abſolute* equality, therefore, to abandon them; but ought to do all, which we can do, to reduce them as near it, and to make them as independent of one another, as may be. From hence it follows, that an inſtitution, ſo unnatural and ſo inhuman as that of Slavery, ought to be aboliſhed. It is not eſſential to the *ſubſiſtence* of Society; for many ſtates *ſubſiſt* without it, and it is now almoſt totally baniſhed out of Europe. It is not *conducive* to the *happineſs* or *well-being* of Society; for ſociety is then happieſt, when moſt of the individuals, of whom it conſiſts, are happy. But ſlavery introduces the greateſt poſſible inequality among mankind; it ſtrips many of the members of Society of all property, and of every thing which they can call their own. Nay, not only does it ſtrip them of property, which, at the ſame time, it beſtows upon a few, but it adds to the misfortunes of theſe unfortunate men, by holding them to be the property of others, and like the brutes which they have, to make no more than a part of their eſtates. It ſubjects them entirely to the dominion of their maſters; it expoſes them to all the inſults, torture, cruelty, and hard uſage, which inhumanity, avarice, pride and caprice can ſuggeſt: It makes the bulk of mankind dependent on the few; and that not only for their bread and for life, but for the enjoyment of it, for eaſe, for tranquillity, and for a momentary felicity; for a wanton or a cruel maſter may, every moment, ſport himſelf with the happineſs of his ſlave. Beſides, it entails the ſame miſery on the poſterity of the ſlaves; it deprives them of the hopes of ever arriving at a better fortune; at leaſt, it makes the proſpect of it always obſcure, and diſtant, and precarious, and uncertain, and dependent. For theſe reaſons, it ſeems, that every man has a natural right to his liberty, is born free, and is independent of every other. Slavery is therefore, a cruel, an inhuman, an unlawful inſtitution. Perhaps, it may be attended with ſome accidental advantages: every inſtitution, even the worſt one, is attended with ſome. But are theſe accidental advantages to be put into the balance with the happineſs of ſo many human creatures? Was any man born for no other end than to be uſed like a beaſt of burden, and to be made ſubſervient to the grandeur of another? Ought great numbers of human kind to be rendered miſerable, that a few may live at their eaſe, wallowing in luxury and in opulence, purchaſed by the labor of others? Every man is equally capable of being made happy or miſerable with every other; the ſame cauſes muſt produce the ſame ideas, the ſame effects upon them. Does not, therefore, humanity recoil at an inſtitution manifeſtly ſo horrid! Are not ſlaves, as well as others, men? Have they not human ſouls, human faculties, and human paſſions? Have not they ſenſibility to the wretchedneſs of their own condition? Do not they feel as well as others? Can any man, therefore, lay his hand upon his heart, and ſay, that he would not think himſelf entitled to be free, or to be ſet at liberty, in caſe he ſhould, by any misfortune, have happened to loſe it? Let us, therefore, do by others, as we would that they ſhould do by us. Indeed, a ſtate of ſlavery appears to me to be ſo unnatural, ſo ſhocking, and ſo contrary to any humane feelings, that I cannot think of it without deteſtation. I abhor the principles, upon which it is either juſtified or founded; and, if we ſhall take a particular view of each of them, I apprehend, they will appear to be irrational and cruel.

§ 132. Thoſe, upon which the civilians and the writers on the law of nature have founded it, are three, 1) Captivity, 2) Sale, 3) Birth; for men may either be *born* ſlaves, or, being born free, *become* ſlaves. Thoſe, who are born free, may be reduced into ſlavery, either by their own conſent, or without it. By their own conſent they become ſlaves, if they make themſelves and their liberty over to another. They are made ſlaves without their own conſent, in caſe they are taken priſoners in a lawful war. Men are born ſlaves, if their mother is a ſlave. Each of theſe reaſons is equally abſurd.

§ 133. One would hardly believe, that it could be pity, upon which ſlavery was pretended to be founded. An inhuman inſtitution founded on humanity!

A ruthleſs

A ruthleſs uſage erected on compaſſion! But it is ſo; compaſſion is the principle to which the Roman Lawyers, and all thoſe who have after them juſtified their doctrine, refer its original. Thoſe captives, whom we take from our enemies in a lawful war, it is pretended, we *may lawfully* put to death. But it would be cruel rigorouſly to exerciſe our right; humanity forbids us to do it; out of pity we will ſave their lives, and will make them our ſlaves. Every thing may lawfully be done to an enemy, for he has hoſtile intentions againſt us. Therefore, we have a right to put them to death; *a fortiori* we are entitled to uſe them as we pleaſe, and to ſubject them to the moſt direful ſlavery, § 3. 4. *J. de jure perſon.*—*l.* 4. § 2. 3. *l.* 5. § 1. *ff. de ſtat. hom.* Such are the principles, on which ſlavery and captivity are connected with one another. But they are not juſt;

For it is falſe, that it is lawful to kill thoſe, whom we make priſoners in war. War, the delirium, the ſhame, and the ſcourge of human race, ought, in all caſes, to be made, in order either to obtain reparation of wrongs which have been done us, and which we cannot otherwiſe get repaired, or to prevent ourſelves from being overwhelmed by an ambitious foe. It cannot lawfully be made on any other pretext. 'Tis cruel to enter into it either out of ambitious views, or in caſes in which it is not abſolutely neceſſary; for it makes havock among human kind. 'Tis true, men uſe to engage in it raſhly, as if they had been created for no other purpoſe than to butcher one another. But cuſtom cannot give ſanction to cruel uſages; and we ought not to determine concerning the lawfulneſs or unlawfulneſs, the juſtice or injuſtice of actions from the frequency alone, with which they are done. We ought to form our judgments from the dictates of nature, and from the obvious ſuggeſtions of humanity. Men, therefore, are, in no caſe, neither in peace nor in war, entitled to do one another more harm, than is abſolutely neceſſary for their defence, and to ſecure themſelves from wrong. Of courſe, war ought to be conducted with all that humanity, which is not inconſiſtent with the end, for which it is intended. It ought to be regarded as an evil, which is ſometimes neceſſary, but which ought not, upon any account, to be made a greater one than neceſſity requires. Therefore, however vigorous our efforts againſt *the ſtate*, which is at enmity with us, may be, we ought not to abuſe the individuals, of whom it conſiſts. The bulk of them may be very innocent good people, and may be far from bearing any ill-will towards us. Damage, done to them, may ruin them, or render them miſerable, without doing much ill to the ſtate, or reducing it to the neceſſity of ſuing for peace.

From hence it follows, that it is unlawful to kill thoſe, whom we ſhall happen to take priſoners in war; for no man has a right to put another to death, unleſs it is *abſolutely neceſſary* for his own ſafety to do it. But it cannot be pretended, that it is abſolutely neceſſary for our ſafety to kill one, whom we have not killed, but have taken priſoner, and, by uſing proper precautions, may effectually diſable from doing more harm. It is unlawful to give priſoners any harder uſage, than is neceſſary to incapacitate them from doing us more ill: for all priſoners are men; but every man is bound to uſe every other humanely; no man can lawfully abuſe, or give uneaſineſs to another, except neceſſity requires it. Therefore, Priſoners cannot lawfully be abuſed; tho they may be *confined*, in caſe they cannot otherwiſe be reſtrained from hurting us; becauſe by being confined they may be reſtrained from it. 'Tis true, ſome nations eat their priſoners alive. But ought civilized nations to imitate the inhuman Cuſtoms of barbarians! Ought a good man to do ill, becauſe another does it? No; civilized nations ought to value themſelves on account of their Civility, and ought not to juſtify cruelty by the example of others. It is not, therefore, lawful either to kill or to make ſlaves of thoſe, whom we take priſoners in war; for juſtice allows and neceſſity requires us to do them no more ill, than is abſolutely neceſſary, in order to incapacitate them from hurting us, and from being ſerviceable to our enemies during the continuance of the war. 'Tis true, horrid actions ſometimes

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ſtrike an enemy with terror, and bring them ſooner to ſubmit to terms. But it is no leſs true, that they always inſpire the injured with a ſtrong ſenſe of their wrongs, with a keen thirſt of revenge, with an invincible hatred of their enemies, with a determined reſolution of getting ſatisfaction, and ſometimes with deſpair. Thus, both parties are rendered more obſtinate and more fierce; their rage is more inflamed; and, inſtead of being more diſpoſed to accommodate their differences, they grow fonder of war, and of ſatiating their revenge; they ſpread miſery and deſolation over the territories of their enemies; And, upon the whole, more miſchief is done, more uneaſineſs is created, and more deſperate reſolutions are taken in thoſe barbarous wars, than in ſuch, as are managed with the civility, politeneſs, and reſpect which diſtinguiſh modern times. Beſides, thoſe, which are carried on with politeneſs, are as uſeful to accompliſh the end, for which they ought to be commenced; they bring men to accommodate their affairs and to terms as ſoon as the others; and they effectuate it without making ſuch deſtruction of human kind. Hence, all civilized nations have abandoned thoſe cruel and barbarous methods of making war, and have betaken themſelves to more humane ones, which mark the reſpect every man and every nation ought to ſhew to every other.

The doctrine, which I have been maintaining, is held by many, to whoſe authority great reſpect is due. In particular, the late Preſident MONTESQUIEU, whoſe judgments were, in all caſes, determined by an extenſive view of human affairs, and who never loſt ſight of the dictates of humanity, ſenſible of the regard which is due to every even the meaneſt of human kind, is at great pains, in his treatiſe 'Of the Spirit of Laws,' to inculcate and to prove the doctrine, which I have been maintaining. It may be not improper to conclude this part of the title with his words; for from them it will appear, that every ſentiment, which I have delivered, is agreeable to thoſe of this great man. 'On ne croiroit jamais que c'eût été la pitié qui eût établi l'eſclavage, et que pour cela elle s'y fût priſe de trois manieres.

'Le droit de gens a voulu que les priſonniers fuſſent eſclaves, pour qu'on ne les tuât pas. Le droit Civil des Romains permit à des débiteurs, que leurs créanciers pouvoient maltraiter, de ſe vendre eux-mêmes. Et le droit naturel a voulu que des enfans, qu'un pere eſclave ne pouvoit plus nourrir, fuſſent dans l'eſclavage comme leur pere.'

'Ces raiſons des juriſconſultes ne ſont point ſenſées. Il eſt faux qu'il ſoit permit de tuer dans la guerre, autrement que dans le cas de néceſſité; mais dès qu'un homme en a fait un autre, eſclave, on ne peut pas dire qu'il ait été dans la néceſſité de le tuer, puiſqu'il ne l'a pas fait. Tout le droit, que la guerre peut donner ſur les captifs, eſt de s'aſſurer tellement de leur perſonne, qu'ils ne puiſſent plus nuire. Les homicides faits de ſang froid par les ſoldats, et après la chaleur de l'action, ſont rejettés de toutes les nations du monde.'

§ 134. Secondly, It is ſaid, that men, who are born free, may become ſlaves with their own conſent, (§ 132.); in caſe they make themſelves and their liberty over to another. This of all the reaſons, upon which ſlavery is uſually founded, is the moſt plauſible, and the moſt defenſible. For every man, it is ſuppoſed, has a right to diſpoſe of himſelf according to his own pleaſure: *Volenti non fit injuria.* If one is contented with his own condition, and is willing to ſubmit to it, no other has a right to interfere, or to complain of the wrong. Of courſe, if one is willing to become the ſlave of another, and makes a ſurrender of himſelf and of his liberty to him, no other can complain, or is entitled to ſay, that it was not lawful for him to do it. But theſe principles, tho they may be ſpecious, are, however, inhuman, for they are made the foundation, on which an inhuman inſtitution is erected. Beſides, they are not rational.

'Tis agreed among all philoſophers, that no man has a right to do an unneceſſary injury to himſelf; for the public has a ſuperior intereſt in all the individuals, of whom it conſiſts. It is intereſted in their welfare; for its proſperity

depends upon theirs. That ſtate is moſt proſperous, which contains the greateſt number of proſperous members. *Expedit reipublicæ, ne quis re ſuâ male utatur*; the public is intereſted, that no body make a bad uſe of his property; § 2. *J. de his qui ſui vel alieni.* *A fortiori*, it muſt be intereſted, that no man abuſe or do ill to himſelf. Beſides, life and all the intereſts dependent upon it, are truſts repoſed in thoſe who poſſeſs them. Nobody ought, therefore, to abuſe them; he has not a right to do it. Hence it follows, that no man has a right to diſpoſe of the members of his body, of his life, or of his happineſs. *Dominus membrorum ſuorum nemo videtur, l.* 13. *p. ff. ad leg. Aquil.* Nobody is proprietor of the members of his body; for the property of them belongs not to any private perſon, it is veſted in the public. Therefore, no man has a right to mutilate himſelf; it is wrong for him to do it. *A fortiori*, he has not power to diſpoſe of his life, or to put himſelf to death; for by putting himſelf to death he diſpoſes not only of one, but of all his members. Of courſe, he has no power to diſpoſe of his liberty, and to make himſelf over to be the ſlave of another; for by doing ſo, he makes the members of his body become the *property* of another, puts his life in the power of another, and does an irreparable injury to himſelf. *Nemo plus juris ad alium transferre poteſt, quam ipſe haberet, l.* 54. *ff. d. r. j. l.* 20. *p. ff. de acquir. rer. dom.* No man has the *property* of his own members: Therefore, he cannot transfer it to another. No man has a right to put himſelf to death: Therefore, he cannot convey it to another. No man has a right to do an unneceſſary ill to himſelf: Therefore, he cannot make himſelf the ſlave of another; for, by doing ſo, he makes his happineſs dependent on the caprice of another, and does an irreparable injury to himſelf. *Servitus morti adſimilatur, l.* 59. *ff. de condit. et dem. l.* 209. *ff. d. r. j.* There are many things more to be dreaded than death. 'A day, an hour of virtuous li-'berty,' ſays CATO, 'is worth a whole eternity in bondage.' Therefore, if one has not power to put himſelf to death, he cannot have power to diſpoſe of that, without which life is ſcarce worth the having. *Optanda mors eſt, quæ civibus Romanis ſemper fuit ſervitute potior.—Omnis eſt miſera ſervitus.—Non enim in ſpiritu vita eſt, ſed ea nulla eſt omnino ſervienti* *. *Libertas inæſtimabilis res eſt, l.* 106. *ff. d. r. j.* Liberty is an ineſtimable poſſeſſion. The value of it is infinite; *infinita æſtimatio eſt libertatis, l.* 176. § 1. *ff. d. r. j.* It is not eſtimable by money, *pecuniâ lui non poteſt, l.* 9. § 2. *ff. de ſtatu liberis.* Money and it are incommenſurable. It is one of thoſe things, which nature has exempted from commerce: *Quas vero* natura, *vel gentium jus, vel* mores civitatis *commercio exuerunt, earum nulla venditio eſt, l.* 34. § 1. *ff. de contrah. emp.* Therefore, it is inalienable. The cuſtom, that is, the Law of Scotland, diſables every man both from aliening and from purchaſing it. Indeed, if one were to alien his liberty, and to addict himſelf to the Slavery of another, would not the Law, which reſtores men againſt pecuniary tranſactions, reſtore him againſt a deed, by which he ſuſtains an irreparable loſs? It would preſume, *præſumptione juris et de jure*, that he, who had alienated ſuch an invaluable poſſeſſion, either was deprived of the uſe of his reaſon, or had been circumvented, and, for one or other of theſe reaſons, would reſtore him againſt the alienation.

Beſides, by diſpoſing of his liberty, one does an injury not only to himſelf, but to his poſterity; he diſpoſes not only of his own liberty, but of theirs. But if one has not a right to diſpoſe of his own liberty, much leſs has he a right to diſpoſe of that of his children; they are perſons entirely different from him. Of courſe, he has no more right to diſpoſe of their liberty, than of that of perſons who are nowiſe connected with him.

§ 135. Indeed, it is of all things the moſt abſurd to ſay, that any man is *born* a ſlave, that is, he is a ſlave, becauſe his mother is one. (§ 132.) I take it, that every man is born equal to every other, and that, therefore, every man is born free, (§ 131.) All things are divided by the Law among human kind; can, therefore, thoſe, who are intended to be the proprietors of every thing, be themſelves

* Cic. Philip. 10.

themſelves the property of one another? A man is not the *proprietor* of himſelf; can he, therefore, be the proprietor of another? A man has not a right to diſpoſe of his own liberty; can he be entitled to diſpoſe of that of his children? A man, who is made priſoner in war, cannot be reduced into ſlavery; can, therefore, his children be held to become ſlaves by the capture of their father? Children unborn have all the rights, which nature gives them, preſerved to them entire; the deed of another cannot hurt them; of courſe, no other can, by any his deed, deprive them of their liberty, or of that right, which nature gives them to be free. Indeed, it is monſtrous to look upon human creatures as parts of our eſtates, and to maintain, that men become like the brutes, the property of thoſe, who are the proprietors of their mothers.

§ 136. I know, that there are other principles, on which the lawfulneſs of ſlavery is pretended to be built. But, if thoſe, which have been particularized, are proved to be contrary to juſtice, it will be needleſs to ſay much upon any others. Indeed, no reaſon, upon which the lawfulneſs of ſlavery can be founded, is more ſolid than thoſe, upon which the Spaniards founded their right to make ſlaves of the Americans. They ſmoaked tobacco; they did not trim their beards after the Spaniſh faſhion; they were not chriſtians, and ought to be made ſlaves, that they might be converted. Such were the pretexts, for which the poor innocent Americans were rendered miſerable *.

§ 137. Ere I take my leave of this melancholy theme, it will be neceſſary to conſider the ſtate of Slavery in our American colonies, and to ſhew, that the principles, on which it is eſtabliſhed, are inhuman, and that therefore, every one of thoſe unfortunate men, who ſhall happen to get into Scotland, is, and is entitled to be declared to be a free man. Upon enquiry, I believe we ſhall find, that every one of the propoſitions, which have been maintained, applies with peculiar force to them.

For the principle on which their ſlavery generally depends, is not even ſo ſtrong as any of thoſe three, on which alone it can be pretended to have any plauſible foundation. They are not made ſlaves by being made priſoners in a lawful war; they do not voluntarily diſpoſe of themſelves and of their liberty; of courſe, their children cannot be born ſlaves.

We all know, that they are purchaſed from their princes, who pretend to have a right to diſpoſe of them, and that they are, like other commodities, tranſported by the merchants, who have bought them, into America, in order to be expoſed to ſale. If this trade admits of a moral or a rational juſtification, every crime, even the moſt atrocious, may be juſtified. Government was inſtituted for the good of mankind: Kings, princes, governors are not proprietors of thoſe, who are ſubject to their authority; they have not a right to make them miſerable. On the contrary, their authority is veſted in them, that they may, by the juſt exerciſe of it, promote the happineſs of their people. Of courſe, they have not a right to diſpoſe of their liberty, and to ſell them for ſlaves. Beſides, no man has a right to acquire or to purchaſe them; men and their liberty are not *in commercio;* they are not either ſaleable or purchaſeable. One, therefore, has nobody but himſelf to blame, in caſe he ſhall find himſelf deprived of a man, whom he thought he had, by buying for a price, made his own; for he dealt in a trade, which was illicit, and was prohibited by the moſt obvious dictates of humanity. For theſe reaſons, every one of thoſe unfortunate men, who are pretended to be ſlaves, has a right to be declared to be free, for he never loſt his liberty; he could not loſe it; his prince had no power to diſpoſe of him. Of courſe, the ſale was *ipſo jure* void. This right he carries about with him, and is entitled every where to get it declared. As ſoon, therefore, as he comes into a country, in which the judges are not forgetful of their own

* L'Eſprit des Loix, *liv.* 15. *ch.* 3. 4.

own humanity, it is their duty to remember that he is a man, and to declare him to be free.

I know it has been ſaid, that queſtions, concerning the ſtates of perſons ought to be determined by the Law of the country, to which they belong; and that, therefore, one, who would be declared to be a ſlave in America, ought, in caſe he ſhould happen to be imported into Britain, to be adjudged, according to the Law of America, to be a ſlave: A doctrine, than which nothing can be more barbarous. Ought the judges of any country, out of reſpect to the Law of another, ſhew no reſpect to their kind and to humanity? Out of reſpect to a law, which is in no ſort obligatory upon them, ought they to diſregard the Law of Nature, which is obligatory on all men, at all times, and in all places? Are any laws ſo binding as the eternal laws of juſtice? Is it doubtful, whether a judge ought to pay greater regard to them, than to thoſe arbitrary and inhuman uſages, which prevail in a diſtant land?

Ay, but our colonies would be ruined, if ſlavery was aboliſhed. Be it ſo; would it from thence follow, that the bulk of mankind ought to be abuſed, that our pockets may be filled with money, or our mouths with delicates? The purſes of highwaymen would be empty, in caſe robbery were totally aboliſhed; but have men a right to acquire riches by ſuch cruel, ſuch flagitious means? Has a robber a right to acquire money by going out to the highway? Have men a right to acquire it by rendering their fellow-creatures miſerable? Is it lawful to abuſe mankind, that the avarice, the vanity, or the paſſions of a few may be gratified? No; there is ſuch a thing as juſtice, to which the moſt ſacred regard is due. It ought to be inviolably obſerved. Have not theſe unhappy men a better right to their liberty and to their happineſs, than our American merchants have to the profits, which they make by torturing their kind? Let, therefore, our colonies be ruined, but let us not render ſo many men miſerable. Would not any of us, who ſhould, like CLYTOPHON *, be ſnatched by pirates from his native land, think himſelf cruelly abuſed, and at all times entitled to be free? Have not theſe unfortunate Africans, who meet with the ſame cruel fate, the ſame right? Are not they men as well as we? And have they not the ſame ſenſibility? Let us not, therefore, defend, or ſupport a uſage, which is contrary to all the Laws of humanity.

But it is falſe, that either we or our colonies would be ruined by the abolition of Slavery. It might occaſion a ſtagnation of buſineſs for a ſhort time. Every great alteration produces that effect; becauſe mankind cannot, on a ſudden, find ways of diſpoſing of themſelves and of their affairs. But it would produce many happy effects. 'Tis the Slavery, which is permitted in America, that has hindered it from becoming ſo ſoon populous, as it would otherwiſe have done. Set the Nigers free, and, in a few generations, this vaſt and fertile continent would be crowded with inhabitants; learning, arts, and every thing would flouriſh among them; inſtead of being inhabited by wild beaſts and by ſavages, it would be peopled by philoſophers and by men. It might perhaps do harm to the trade of Britain: but it has been demonſtrated by the learned, the ingenious, and the virtuous Author of a 'DISSERTATION ON THE NUMBERS OF MANKIND,' that a nation may be more populous, more wealthy, more virtuous, and more happy without than with an extenſive foreign trade. Beſides, the trade of Britain would not ſuffer ſo much as people are apt to imagine. 'Tis induſtry, which is the real ſource of wealth. As long as a nation continues to be induſtrious, it need not be afraid of poverty †. Induſtry, like neceſſity, is inventive, and falls on a thouſand ways of employing itſelf to the profit of the induſtrious. If one channel is damm'd up, it will ſoon open another for itſelf.

But I am aſhamed to have beſtowed ſo many words on ſo plain a theme. I would not have done it, had I not found, that ſome, who pretend to

* Epigoniad, book 4.

† See Mr. HUME's Diſcourſe on the balance of Trade.

to have taken the moſt extenſive views of human affairs, have defended the inhuman ſyſtem *. To them I ſhall oppoſe the authority of the greateſt and the moſt humane politician of this, or perhaps of any age, who, in his treatiſe *De L'Eſprit des Loix*, hardly deigns to reaſon upon this ſubject. I cannot conclude this title better than by inſerting at length the third, fourth and fifth chapters of the fifteenth book, from which the opinion of this great man, and his way of thinking upon this matter, will appear. *Chapitre III. Autre origine du droit de l'eſclavage.* He had been proving the futility of thoſe principles, on which the lawfulneſs of ſlavery is uſually founded by the Civilians; and he proceeds, ' J'aimerois autant dire, que le droit de l'eſclavage vient du mépris qu'une nation conçoit pour une autre, fondé ſur la différence des coûtumes.

' *Lopez de Gamar* dit, Que les Eſpagnols trouverent près de St. Marthe des paniers, où les habitans avoient des denrées; c'étoient des cancres, des limaçons, des cigales, des ſauterelles. Les vainqueurs en firent un crime aux vaincus. L'auteur avoue, que c' eſt là deſſus qu'on fonda le droit, qui rendoit les Américains eſclaves des Eſpagnols; outre qu'ils fumoient du tabac, et qu' ils ne ſe faiſoient pas la barbe à l' Eſpagnole.

' Les connoiſſances rendent les hommes doux. La raiſon porte à l' humanité. Il n' y a que les préjugés qu'y faſſent renoncer.' *Chap. IV. Autre origine du droit de l'eſclavage.* ' J'aimerois autant dire, que la religion donne à ceux qui la profeſſent, un droit de réduire en ſervitude ceux qui ne la profeſſent pas, pour travailler plus aiſément à ſa propagation.

' Ce fut cette maniere de penſer qui encouragea les deſtructeurs de l'Amérique dans leurs crimes. C'eſt ſur cette Idée qu' ils fonderent le droit de rendre tant de peuples eſclaves; car ces brigands, qui vouloient abſolument être brigands et Chrêtiens, étoient très dévots.

' Louis XIII. ſe fit une peine extrême de la loi, qui rendoit eſclaves les negres de ſes colonies: mais quand on lui eut bien mis dans l' eſprit, que c' étoit la voye la plus ſure pour les convertir, il y conſentit.' *Chap. V. De l'eſclavage des negres.* ' Si j' avois à ſoutenir le droit que nous avons eu de rendre les negres eſclaves, voici ce que je dirois.

' Les peuples d' Europe ayant exterminé ceux de l'Amérique, ils ont dû mettre en eſclavage ceux de l' Afrique, pour s'en ſervir à défricher tant des terres.

' Le ſucre ſeroit trop cher, ſi l'on ne faiſoit travailler la plante, qui le produit, par des eſclaves.

' Ceux, dont il s' agit, ſont noirs depuis les pieds juſqu' à la tête; & ils ont le nez ſi écraſé qu' il eſt preſqu' impoſſible de les plaindre.

' On ne peut ſe mettre dans l'eſprit, que Dieu, qui eſt un Etre ſage, ait mis une ame, ſur-tout une ame bonne, dans un corps tout noir.

' Il eſt ſi naturel de penſer, que c'eſt la couleur qui conſtitue l'eſſence de l' humanité, que les peuples d' Aſie, qui font des eunuques, privent toujours les noirs du rapport qu' ils ont avec nous d'une façon plus marquée.

' On peut juger de la couleur de la peau par celle des cheveux, qui chez les Egyptiens, les meilleurs philoſophes du monde, étoit d' une ſi grande conſéquence, qu' ils faiſoient mourir tous les hommes roux, qui leur tomboient entre les mains.

* The queſtion concerning the lawfulneſs of ſlavery has been ſeldom debated in this country. But, if authority was ever, in a caſe like this, to be deciſive, it may be remarked, that D. II. 19. *Dec.* 1728, *Allan and Mearns, contra Skeen of that Ilk and Burnet of Mountboddo*, a contract, by which ſome people had, dering their nonage, bound themſelves to the ſervice of ſome fiſhing boats for thrice 19 years, and had ſo tied themſelves to their reſpective boats, that not one of them could, during all that time, remove from the village to which they belonged, or from one boat to another, was ſet aſide becauſe it was held to be *hurtful* to them. Another caſe came, I think in 1757, to be diſputed: one *Montgomery Shedden*, a niger boy, being in Edinburgh, refuſed to return to his maſter, becauſe he ſaid he was, like every other Britiſh ſubject, a free man in Britain Council were ordered to argue the point both in writing and *vivâ voce*. But during the very time when the Court of Seſſion was *hearing* them plead at the bar, notice came, that the boy was dead. So Judgment was not pronounced.

'Une preuve que les negres n'ont pas le ſens-commun, c'eſt qu' ils font plus de 'cas d' un collier de verre, que de l'or, qui chez des nations policées eſt d' une 'ſi grande conſéquence.

'Il eſt impoſſible que nous ſuppoſions que ces gens-la ſoient des hommes; 'parce que ſi nous les ſuppoſions des hommes, on commenceroient à croire que 'nous ne ſommes pas nous-mêmes Chrétiens.

'De petits eſprits exagerent trop l'injuſtice que l'on fait aux Africains. Car 'ſi elle étoit telle qu' ils le diſent, ne ſeroit-il pas venu dans la tête des princes 'd' Europe, qui font entre eux tant de conventions inutiles, d'en faire une géné- 'rale en faveur de la miſéricorde et de la pitié?'

Theſe are ſentiments dictated by humanity and by Indignation.

TITLE III.

Of Things.

§ 138. THE firſt object of juriſprudence, it has been ſaid, is *perſons*; for to them eſtates belong, and upon them duties are incumbent. The ſecond object of it is 'things,' *res*; for of them the eſtates, belonging to theſe perſons, conſiſt, (§ 121.). It will be neceſſary, therefore, to proceed to conſider them, to define the meaning of the word, and to ſpecify the different ſorts of things.

It is hardly poſſible to define the meaning of the word *thing*, without uſing, in the definition, either that very word itſelf, or words which, if they were themſelves ſought to be explained, could not be defined without the aſſiſtance of it: for it is a word of a moſt extenſive ſignification, and is itſelf implied in every ſentence definitive of it. I might define it by ſaying, that a thing is 'what- 'ever exiſts.' But the definition, it is plain, would not be logical: for the ſentence wants a noun ſubſtantive; ſo it does not contain a *genus*. Beſides, it is not clearer than that, which is intended to be defined by it. If one was deſired to explain the meaning, which he annexed to theſe words 'whatever exiſts,' he would explain himſelf by ſaying, that by 'whatever exiſts,' he meant 'every 'thing which exiſts.' Thus, the definition is plainly tautological. Without, therefore, attempting to give a logical one of a word, which is well underſtood by every body, I ſhall only obſerve, that the word *thing* is uſed to expreſs, and comprehends every thing which exiſts. Thus, the ſun, the moon, the ſtars, the Earth, the Air, a man, a houſe, a field, a tree, a horſe, a river are all of them things; for they exiſt.

§ 139. I. All things may be divided into ſuch as are, and ſuch as are not capable of becoming the property of mankind. Thoſe are appropriable, 'from the uſe and 'enjoyment of which one man can be excluded by another;' and thoſe are not appropriable, 'from the uſe and enjoyment of which one man cannot exclude ano- 'ther.' This diſtinction ariſes from nature itſelf; for celeſtial things are out of the reach, power, and dominion of man. Therefore they cannot be appropriated by him. Thus, one cannot acquire the property of the ſun, of the moon, or of the ſtars. Terreſtrial things are alone capable of being appropriated by us. Thus, a horſe, a hen, a houſe, a field, or money may become the property of a particular perſon.

§ 140. II. Things, are divided into ſuch, as are *common*, ſuch, as belong to the *public*, ſuch as belong to *Communities*, ſuch as belong to *private perſons*, and ſuch as belong to *nobody*. Theſe are the *res communes*, *res publicæ*, *res univerſitatis*, *res ſingulorum*, and *res nullius* of the civilians, *p. J. de rer. div. l.* 1. 2. *ff. eod.*

Thoſe things are ſaid to be common, 'the uſe of which, tho' they have not 'themſelves a proprietor, and, of courſe, belong to nobody, is common to 'all

'all human kind.' To this Claſs are referable all thoſe things, which either 1) are not at all appropriable, or 2) cannot be appropriated without ſo much difficulty, that they can hardly be ſaid to be in reality appropriable.

It is plain, that the former, to wit, all thoſe things which are incapable of being appropriated, muſt be common to all mankind; for, *ex hypotheſi*, no man either is, or can ſay he is proprietor of them. Of courſe, no man can, or, if he could, has a right to exclude another from the uſe of them.

The caſe is the ſame with thoſe, which cannot, without the utmoſt difficulty, be appropriated; for it is *ex hypotheſi* almoſt impoſſible to have dominion over them. Of courſe, it is next to impoſſible either to exclude others from the uſe, or to retain the property of them. For thoſe things, as has been ſaid, are alone appropriable, from the uſe, enjoyment, and benefit of which it is poſſible to exclude others. If the difficulty of excluding others is ſo great, that it may be held to be in reality impoſſible to exclude them, they may in truth be held to be incapable of being appropriated, and, of courſe, to be common.

From hence it is plain, that thoſe particular things, which ought to be held to be common, muſt be determined by attending to nature; for thoſe things, and thoſe things alone, from which it is not poſſible to exclude others, can be ſaid to be common. But it is a queſtion of fact, which can be determined only by attending to the real nature of things, whether it is or is not poſſible to exclude others from them.

The Roman Lawyers held 1) The air, 2) The ſea, 3) The ſea-ſhore; 4) Running water to be common. *Naturali jure omnium communia ſunt illa, aër, aqua profluens, et mare, et per hoc littora maris, l. 2. p. ff. de rer. div.* It may not be improper to conſider, whether all of them have juſt pretenſions to be held to be common.

It is plain, 1) That the air is naturally common to all mankind; for every one, who lives, muſt breathe the breath of life. 'Tis impoſſible, therefore, to deprive one of the enjoyment of it, without depriving him at the ſame time of his life. Reſpiration and life are neceſſary companions. Beſides, if it were poſſible to hinder one from the uſe of the Air, it would be unlawful to do it; becauſe nobody has a right to uſe his property merely *in æmulationem vicini*. But it would be uſing it after this manner to hinder one from the enjoyment of the air; ſince there is air in profuſion for every body, and no more than a certain quantity of it is neceſſary for the uſe and ſubſiſtence of one perſon, or can be poſſeſſed by him.

The ſea ſeems alſo entitled to be numbered among the *res communes;* for it is incapable of being appropriated; one cannot *retain* an excluſive dominion over it. 'Tis true, fleets ſo powerful, that none dare to oppoſe them, may ſail upon it. But it is widely extended, and it is impoſſible for any nation, at one time, to domineer ſo imperiouſly over every wave of it, as to hinder the ſhips of other nations from ſailing upon it. Its fleets may be riding triumphant in one latitude, and the ſhips of its enemies may be ſailing in a thouſand directions, and eſcape its utmoſt vigilance. Beſides, the ſea ſeems to be intended by nature for facilitating commerce, and maintaining correſpondence between diſtant nations. It would be abſurd, therefore, for any one nation to pretend to the excluſive property of it. It belongs to all the nations of the earth. 'Tis a beautiful obſervation, which SENECA makes, concerning the final cauſes of the variety of the points, from whence the wind blows. *Dedit ventos, ut commoda cujuſque regionis fierent communia.—Omnibus inter ſe populis commercium dedit, et gentes diſſipatas locis miſcuit. Ingens naturæ beneficium, ſi illud in injuriam ſuam non vertat hominum furor* *. The wind, blowing in every direction, and making it poſſible to viſit the moſt diſtant ſhores, intimates the intention of nature, and leads men to maintain a friendly intercourſe with the moſt remote corners of the globe. It would, therefore, be to counteract the plain intentions of nature, for men to pretend to an excluſive dominion

* Natural. quæſtion. lib. 5. c. 18.

dominion over the ſea. Nations ought, as well as individuals, to regulate their conduct by the clear dictates of the Law of nature, and of equity. They ought not to make pretenſions, which are contrary to it, and are repugnant to juſtice.

But parts of the ſea lie contiguous to the limits of the land, and may, in ſome ſort, be apprehended. Of courſe, a nation, poſſeſſed of power enough to enable it to command the ſeas, will uſually lay claim to the dominion of thoſe ſeas which it can command. Its pretenſions will be proportionable to its naval force, and will be limited by its impotence alone. If it has fleets ſuperior to thoſe of other nations, and is thereby enabled to aſſert its pretenſions by hurting thoſe, who will not ſubmit to them, it will at laſt extort an acknowledgement of them; becauſe, finding themſelves unable to defend themſelves againſt its violence, they will, by dint of arms, be conſtrained, in ſolemn treaties, to acknowledge it to have thoſe rights, which it aſſerts. Thus, Great Britain, being, by its extenſive trade, enabled to maintain a fleet ſuperior to the naval armaments of, I may ſay, all the world beſides, might well lay claim to the empire of the ſea. But, conducted by humanity, it hath limited its pretenſions to the ſovereignty of that tract of water, which it calls the Britiſh Seas *, and hath only inſiſted, that other nations ſhould, by doing homage to the Britiſh Flag, acknowledge its dominion. The nations have been obliged to ſubmit to the conditions impoſed upon them; becauſe they know well, that Great Britain makes not tyrannical uſes of its power, and that, without diſturbing its own repoſe, it can diſturb the repoſe of every commercial nation of Europe.

From the ſame principles it follows, that thoſe parts of the ſea, which lie ſo near the ſhore, as to be under the command either of forts which may be erected at land, or of ſhips which may ſpeedily put out to ſea, muſt be held to be parts of the dominions of that ſtate, which hath them, in this way, under its command; for it has, in reality, apprehended them. Both by ſea and from land it could annoy ſhips, which ſhould attempt to encroach upon them. Thus, it can exclude others from the uſe of them, and can thereby appropriate them. Beſides, the pains, which it takes, and the expence, which it lays out, to maintain its power, give it a better title than others can pretend to have to them. Hence all thoſe friths and narrow arms of the ſea, which run into the land, are held to be the property of that ſtate, by whoſe territories they are encompaſſed.

The third thing, enumerated among the *res communes*, is the *ſea-ſhore*. The ſhore is defined, § 3. *J. de rer. div.* to be ‘ *quatenus hybernus fluctus maximus* ‘ *excurrit* †.’ It is ‘ that ſpace of Ground, contained between the marks of high ‘ and low water, which the waters of the ſea by their continual and alternate ‘ ebbing and flowing, alternately cover and leave uncovered.’ The tides are in winter higher than they are in ſummer; for they are higheſt at thoſe times, at which the actions of both the ſun and the moon are greateſt; and conſpire to produce the greateſt effects. But the ſun is nearer the earth in winter than in ſummer. Therefore, the greateſt ſpring-tides muſt be after the autumnal and before the vernal equinox; that is, in winter. ’Tis for this reaſon, that the word ‘ *hybernus*’ is added in the imperial definition, that all may be comprehended under the ſhore, which is at any time covered by the flowing of the ſea.

The Roman Lawyers counted the ſhore to be common; becauſe they conſidered it as an acceſſory of the ſea. But it was a maxim of their Law, as indeed, it is adopted into the *common* Law of Scotland, that ‘ an acceſſory fol- ‘ lows its principal.’ *Acceſſorium ſequitur ſuum principale.* Hence the ſhore could not miſs to be thought by them to be, like the ſea itſelf, common to all mankind, § 1. 5. *J. l.* 2. § 1. *l.* 4. *p. ff. de rer. div.*

But

* See *Hugonis Grotii mare liberum*; and *Joannis Seldeni mare clauſum.*

† A definition, ſomething different from this one, is given in *l.* 96. 112. *ff. de verb. ſignif.* But they may be eaſily reduced to the ſame meaning.

But it is otherwiſe by the Law of Scotland: The ſea-ſhore cannot, according to it, be ſaid to be a *res communis*; it is a *res publica*, belongs to the public, and is ſubject to its dominion. 'Tis true, humanity may lead us to allow the uſe of our ſhores to all human kind. However, they are in reality a part of the dominions of that country, of whoſe territories they are, as it were, the boundaries, and to whoſe lands they adjoin. Beſides, they may be appropriated, and it is eaſy for thoſe living near the ſhore to exclude every nation from the uſe of it. Forts may be erected, garriſons eſtabliſhed, and troops quartered along the coaſt, ſo as to ſecure an excluſive poſſeſſion of it; and, tho neither forts be erected, nor garriſons eſtabliſhed, nor troops quartered along it, the people themſelves may effectually ſecure the property of their coaſts by threatening to puniſh ſuch, as encroach upon them, and by putting their threats, when occaſion requires them to be put, in execution. Beſides, the ſhore ſeems to be nothing elſe than a continuation of the land, and may, therefore, be regarded as an acceſſory rather of it, than of the ſea. Hence, it ſhould follow the nature of the former rather than that of the latter, and ſhould be held to be the property of the public; becauſe public utility requires that it do not become the property of private perſons.

The laſt thing numbered among the *res communes*, is *aqua profluens*, that is, ſpring or running water. The Law of Scotland conſiders it to be in ſo far common, as to hinder one, who uſes it, from being proſecuted either civilly or criminally by the owner either of the grounds, thro which it runs, or of the profluent ſtream itſelf, in caſe it lies open, and is expoſed to the uſe of every body; becauſe it can, in that caſe, do no harm to any mortal, that a little of it be either drunk, or carried away in order to be uſed. It would, therefore, be abſurd for the Law to allow action to lie againſt one for having done a thing, which is not hurtful to any mortal. Common humanity requires us to do to others all the good, which we can do them, without hurting ourſelves.

I ſay, in caſe it lies open, and is expoſed to the uſe of every body; for rivers, ſprings, and wells, may be the property of private perſons. Of courſe, it is not lawful to go thro either the fields or the incloſures of others, in order to get at the water. It is lawful for one to take of it in thoſe caſes alone, in which acceſs may be had to it by a patent road. One has not a right to make a road thro the ground of another, in order to get at it. Therefore, he may be hindered; and is liable to be proſecuted, in caſe he attempts to get at it. For one is bound to allow others to take of it, only becauſe it does him no harm to allow them; it is an *innoxia utilitas*. Therefore, in caſe it actually does him harm, he is not bound to allow it; he is entitled to refuſe it. But it is in all caſes dangerous, and in moſt it is hurtful to ſuffer a road to be made thro one's ground; for a toleration may, after immemorial cuſtom, be interpreted into a ſervitude: And every body knows, how hurtful to many valuable improvements, and how deſtructive to the fruits of the earth, it is to have one's grounds lying open.

Things, which belong to the public, are 'thoſe, the property of which 'is held to be veſted in the public, while the uſe of them is patent to the in-'dividuals, of whom the public conſiſts.' Such are 1) Thoſe ſeas, which are held to be part of the dominions of Britain; 2) The ſhore; 3) Ports; 4) Highways; 5) Navigable rivers, *&c. l.* 4. § 1. *l.* 5. *p. ff. de rer. div.*——§ 2. 3. 4. 5. *J. de rer. div.*— 2. *F.* 56. The public is 'The ſtate to which one 'is ſubject.' All thoſe things, which were by the Roman Law held to belong to it, are by that of Scotland reckoned *inter regalia*: They belong to the king, who, being the common father of his people, is the proper perſon for having the care of all ſuch things as are intended to be preſerved for general uſe. No other either has or can have a right to them, unleſs he derives it from the crown. It would be improper in this place to enumerate them all; for they will fall to be particularized hereafter: And it would be to anticipate to explain them now.

Things, which belong to communities, are ‘ thoſe, the property of which ‘ is veſted in lawful incorporated ſocieties, while the uſe of them is patent to the ‘ individuals, of whom thoſe ſocieties conſiſt.’ Theſe are the *res univerſitatis* of the Roman Law: For by a community I underſtand in this place the ſame thing, which the Romans called *Univerſitas*, an *univerſity*; ſuch are boroughs, corporations, presbyteries, *&c.* A *Univerſitas* may be defined to be, ‘ A num- ‘ ber of men, who are permitted by Law to aſſociate together for the common ‘ good, are incorporated legally into one ſociety, and are known in it by one com- ‘ mon name, deſcriptive of the collective body.’ Things, which belong to it, are called *res univerſitatis*, ſuch are 1) churches, 2) Seats in churches; for neither of theſe are *in ſingulorum dominio*, they belong to *the pariſh*, are intended for the accommodation of *thoſe who live* in it, are divided among them, and are given to be *poſſeſſed* by individuals as is thought beſt to ſuit the conveniency and the rank of them all; 3) Market-places, *&c.*

From theſe *res publicæ et res univerſitatis* muſt be carefully diſtinguiſhed the revenue of the public, or of the corporation. The uſe of it is not common, but the adminiſtration of it is committed to perſons appointed for this purpoſe, who muſt employ it not on their own private affairs, and for their own particular intereſt, but on thoſe of the public, *l.* 6. § 1. *ff. de rer. div.*

'Tis needleſs to define thoſe things, which are ſaid to belong or to be the property of private perſons; for every one knows the meaning of them.

Things, which belong to nobody, *res nullius*, are ‘ ſuch, as either want ‘ an owner, or are not the property of private perſons.’ Hence to this claſs are referable 1) All thoſe Things, which are not capable of becoming the property of private perſons: for they not only want, but cannot have an owner. Such, for inſtance, is the air, the ſea, and every thing which is not appropriable, or is common. 2) Thoſe things, which, tho they are appropriable, are preſumed never to have had an owner; for they both want a proprietor, and are not the property of private perſons. Such are pebbles, gems, ſhells, *&c.* which are found on the ſhore; birds of the air; fiſhes of the ſea; and wild beaſts of the field. Theſe are not appropriated: But they are capable of becoming the property of private perſons; for the rule of the Civil Law, *quod nullius eſt, id ratione naturali occupanti conceditur*, *l.* 3. *p. ff. de acq. rer. dom.*—§ 12. *J. de rer. div.* takes place in the Law of Scotland in all caſes, in which the things occupied are in their natural ſtate and are not preſumed to have ever had an owner, and in which it is not provided otherwiſe by ſtatute. 3) Thoſe things which are preſumed by the Law to have had an owner, but have not, or at leaſt do not at preſent appear to have one, are *res nullius*. Such are, for inſtance, lands occupied by nobody, treaſures hidden under ground, wreck, waif-beaſts, and waifs of other ſorts. Theſe may all be ſaid to be *res nullius*; for they want an owner, and are not the property of private perſons. They are, however, capable of being appropriated; but they do not, like the former, become the property of him, who firſt ſeizes them. The rule, by which the property of them, and of things like them, is determined in the Law of Scotland, is, *quod nullius eſt, fit domini regis*. They belong, therefore, to the king, or to thoſe who have acquired right to them from him. The reaſon is, that in all caſes, in which a thing is preſumed once to have had an owner, and it appears not who is the preſent proprietor of it, ſuch thing belongs to the king by ſucceſſion, as laſt heir of him, who, tho unknown, was the former proprietor of it: For the king is, by the Law of Scotland, heir of every one to whoſe eſtate no other perſon can legally ſucceed. Of courſe, if a thing is preſumed once to have had an owner, and neither that owner himſelf nor any ſucceſſor of him can be found, it muſt neceſſarily belong to the king, as laſt heir of the former owner, no matter, how great be the diſtance of time, ſince it had one; *Q. A. c.* 48. § 4. 5. 14. —— *ſt. A.* II. *c.* 25. 4) Thoſe things, which belong to the public and to communities, may be ſaid to be *res nullius*. 'Tis true, they do not want an owner: for the public or the community may, in ſome ſort,

ſort, be ſaid to be the proprietor of them. But they are intended for public uſe, and are not the property of private perſons. Therefore, they may be ſaid to be *res nullius*, to be the property of nobody, *l.* 1. *p. l.* 6. § 2. *ff. de rer. div.*

§ 141. III. The religion of the antient Romans gave riſe to a third diviſion of things, by which ſome of them are ſaid to be *divini juris*, others of them to be *juris humani*. Thoſe, which are *divini juris*, are 1) ſacred things, *res ſacræ*, 2) religious things, *res religioſæ*, 3) ſanctified things, *res ſanctæ*. *l.* 1. *p. ff. de rer. div.* Thoſe things were called ſacred, *ſacræ* 'which were conſecrated by public 'authority, either by the Prieſts, or by the prince, to the Gods *above*,' ſuch as temples, altars, ſacrifices, *&c. l.* 6. § 3. *l.* 9. *p.* § 1. 2. 5. *ff. de rer. div.* Religious things, *res religioſæ*, were 'thoſe places, in which the bodies of the dead were buried,' *l.* 6. § 4. 5. *l.* 7. *ff. de r. d. l.* 2. *p.* § 5. *l.* 42. 44. *ff. de relig.* And 'thoſe 'things, which were defended from harm by penal ſanctions,' were called *res ſanctæ*; ſuch as the walls and gates of Cities, the Tribunes of the people, and the Laws, *l.* 8. 9. § 3. 4. *l.* 11. *ff. d. r. d.* *. But this diviſion is of little uſe in Scotland: for we have not now ſuch high Ideas of the veneration, which is due to churches, to ſacred veſtments, and to ſepulchres, as the Romans had. We know, that ſuperſtitious obſervances are not pleaſing to the Deity, and that it is real ſanctity, which renders us acceptable to him. Of courſe, tho no doubt cuſtom has given a ſuperior ſanctity to ſome things above others, the Law of Scotland has given no more countenance to it than decency, and regard for religion require.

§ 142. IV. The fourth and the moſt remarkable diviſion of things is that, by which they are divided into corporeal and incorporeal, *res corporales et incorporales*. Corporeal things are 'thoſe, which are tangible;' ſuch, for inſtance, is a field, a houſe, a tree, a horſe, and every *material* object. Incorporeal things are 'ſuch, as are not tangible.' Thus they were defined in the Roman Law, *l.* 1. § 1. *ff. de rer. div.* § 1. *J. de reb. corpor. et incor.* and very properly: for tangibility is an eſſential part of our complex idea of body. Every thing, which has a *body or* which is corporeal, is tangible; and, converſly, every thing which is tangible, has a *body or* is corporeal; Tangibility being eſſential to every thing, which is ſolid, impenetrable, and extended †. Every thing, which is not tangible, is incorporeal *or* has not a body; and every thing, which is incorporeal *or* has not a body, is not tangible.

§ 143. Corporeal things are divided into moveables and immoveables, *mobiles et immobiles*. Moveables are 'all thoſe things, which either 1) can, by an internal 'power, move themſelves, or 2) can, by others, be moved from place to place.' Moveables of the firſt ſort, thoſe, to wit, which can move themſelves, are all living creatures, and they alone; for animals alone have a locomotive faculty. Inanimate matter is abſolutely inert, has no ſpontaneity, and therefore cannot put itſelf into motion, (§ 10.). Moveables of the ſecond kind are ſhips, coaches, wains, cut corn, mown hay, chairs, and every other thing, which is inanimate, and may be moved from place to place.

Immoveables are 'all thoſe things, which either 1) cannot be moved at all, or '2) cannot, without changing their nature, be moved from place to place.' Thus, Land is an immoveable; for it cannot be moved out of its place; houſes, growing corn, trees, mines, *&c.* are immoveables. 'Tis true, houſes may be demoliſhed, trees may be felled, corn may be cut, minerals may be dug out of the mine. But they cannot be ſeparated from the Earth, without changing their nature. Thus,

* See HEINEC. ant. Rom. l. 2. t. 1.

† *Tangere* enim et *tangi*, niſi *corpus*, nulla poteſt res.
LUCRET. l. 1. v. 305.
Cui ſi *tactus* erit, quamvis levis exiguuſque,
Corporum augebit numerum, ſummamque ſequetur.
Sin *intactile* erit, nulla de parte quod ullam
Rem prohibere queat per ſe tranſire meantem,
Scilicet hoc id erit vacuum, quod *inane* vocamus.
LUCRET. lib. 1. v. 436.

Thus, a houſe, as ſoon as it is demoliſhed, and the continuity of the materials, of which it conſiſts, is deſtroyed, ceaſes to be a houſe. Either it is changed into a heap of rubbiſh; or the materials of it may be applied towards the compoſition of ſome other thing. In the ſame manner, a tree cannot, after it is felled, be ſaid to be the ſame thing, which it was before: by being fixed to the Earth, it was in reality immoveable: as ſoon as it is ſeparated from it, it becomes a moveable, and may be removed from place to place.

Moveables are ſometimes oppoſed not to things, which are immoveable, but to ſuch as are heretable. But this being a general diviſion of things, incorporeal as well as corporeal, it ſhall be treated, after the nature of things, which are incorporeal, has been explained.

§ 144. Moveables are divided into thoſe things, which are, and thoſe which are not *fungible*. Fungibles are, 'thoſe things, which are rated generically by 'weight, number and meaſure, and in which therefore, equal quantities of the ſame 'quality always ſupply the places of one another.' Things which are not fungible, are 'thoſe, which are eſtimated not generically, by weight, number, and meaſure, but ſpecifically, and in which, therefore, the place of one identical ſpecies cannot be ſupplied by a thing ſpecifically different from it.' Thus, grain is a fungible; for one buſhel of it ſupplies the place of another, provided both buſhels be of the ſame kind, and equally good. 'Tis the ſame with wine; one pint of it is as good as another, drawn at the ſame time from the ſame hogſhead, and ſupplies the place of another. Money may be ſaid to be a fungible; for one pound in ſpecie is as good as another. Theſe things are ſaid *functionem recipere*, becauſe equal quantities of the ſame quality are always equally valuable, and may, therefore, ſupply the places of one another. Of courſe, it is no matter, which of them one gets *. But a horſe is not a fungible; for one horſe is not as good as every other. A picture is not a fungible; becauſe pictures are not rated by weight, number and meaſure, they are eſtimated ſpecifically: for one picture is not always as valuable as another. It is, therefore, the identical thing, which is alone preciſely equivalent to itſelf.

§ 145. The Roman Lawyers, attending to nature and to reality, diſtinguiſhed animals, thoſe living moveables (§ 143), into thoſe *quorum natura fera non eſt*, which naturally are not wild, but domeſtic, and thoſe *quorum natura fera eſt*, which are naturally not domeſtic but wild. The domeſtic are 'thoſe, which are 'naturally familiar with men, and uſe to live about their houſes;' ſuch as horſes, cows, geeſe, hens, and were called *manſueta, quaſi ad manum venire ſueta*, ſays FESTUS. § 16. *J. de rer. div. l.* 5. § 6. *ff. de acq. rer. dom.* The wild ones are 'thoſe, which naturally live apart from the abodes of men, and roam freely up 'and down the fields:' theſe uſed to be called *feræ*. Some of them are more fierce, ſuch as lions, tygers, wolves, eagles, *&c.* and were properly called *beſtiæ*, *l.* 1. § 6. *ff. de poſtul. l.* 1. § 10. *ff. ſi quad. paup. fec. dic. l.* 2. § 2. *ff. ad leg. aquil.* Others of them are leſs ſo, ſuch as hares, deers, conies, partridges, *&c.*

Wild beaſts can, ſome of them, be tamed; hence, they were divided into *feræ* properly ſo called, and *manſuefactæ*. *Feræ* are 'thoſe, which have not been 'tamed by man, but continue in their natural wild ſtate:' we may call them *wild* creatures. *Manſuefactæ* are 'ſuch, as have been tamed, and have been 'brought by man to lay aſide their natural wildneſs:' theſe may properly enough be called *tamed* animals.

It belongs to natural hiſtory to determine the ſpecies, which fall under every kind; for this is a matter of fact, which muſt be left to be fixed by experience.

TITLE

* Mutui datio conſiſtit in his rebus, quæ numero, pondere, menſurâ conſiſtunt: quoniam eorum datione poſſumus in creditum ire; quia in *genere ſuo functionem recipiunt* per ſolutionem, quam *ſpecie*. nam in cæteris rebus ideo in creditum ire non poſſumus, quia *aliud pro alio* invito creditori ſolvi non poteſt, l. 2. § 1. ff. de reb. cred.

TITLE IV.

Of incorporeal Things.

§ 146. INCORPOREAL things, it has been ſaid, (§ 142.), are 'ſuch, as are 'not tangible;' they cannot be touched. Hence, they are ſaid *in jure conſiſtere*. They cannot properly be ſaid to be poſſeſſed, or to be delivered; for both poſſeſſion and delivery are applicable to corporeal things alone. Incorporeal ones do not admit of them, *l.* 43. § 1. *ff. de acq. rer. dom. l.* 4. § 27. *ff. de uſurp. et uſuc.* But they may be ſaid analogically to be poſſeſſed and to be delivered. The Lawyers uſe to ſay, *non poſſidentur, nec traduntur, ſed quaſi poſſidentur, quaſi traduntur, l.* 10. *ff. ſi ſer. vindic. l.* 23. § 2. *ff. ex quib. cauſ. maj.*

It would be needleſs to enumerate them; for the incorporeal things, of which Juriſprudence treats, are all reducible to three Claſſes. They are either, 1) rights, or 2) Obligations, or 3) actions.

TITLE V.

Of Rights.

§ 147. RIGHTS and obligations are ſo cloſely connected, that moſt writers have thought it enough to treat of the latter alone, without beſtowing a ſeparate title on the former. 'Tis true, that they are directly oppoſite to one another, and that the very ſame thing, conſidered in different reſpects, may be called both a right and an obligation. 'Tis a right in reſpect of him, who is benefited by it, is entitled to demand ſomething from another, and is called the *creditor* or *obligee*. It is an obligation in reſpect of him, who is bound to do ſomething, from whom the creditor is entitled to demand performance of it, and who is called the *debtor* or *obligor*. Of courſe, one, who underſtands the nature of obligations, may well be ſuppoſed to underſtand that of rights alſo; ſince a right always implies an obligation, or, rather I ſhould ſay, an obligation always implies a right. For there are ſome rights, which do not imply obligations properly ſo called; becauſe they have not reſpect to any particular perſon, but are directed to a particular thing, without regard to any particular perſon. Whereas an obligation has always reſpect to ſome particular perſon, and to him alone. However, it will be uſeful to conſider the nature of rights as well as of obligations, and to treat of them ſeparately, that, by having clear Ideas of both, we may be able with preciſion to diſtinguiſh them from one another, and may not be confounded by inaccurate notions of them.

§ 148. A right may be ſaid to be 'a faculty, by which a perſon, when placed 'in certain determinate circumſtances, is legally entitled to have, to do, or to de-'mand ſomething*.' I. Every right implies a *faculty*. II. It is a faculty competent to a perſon. III. Rights are competent to perſons *placed in certain determinate circumſtances*. IV. By rights mankind are *legally* entitled to have, to do, or

* This definition is almoſt the ſame with that given by GROTIUS. He defines *jus*, a right, to be 'qualitas 'moralis perſonæ competens ad aliquid juſte habendum vel agendum.—Qualitas autem moralis perfecta, *facultas* 'nobis dicitur; minus perfecta, *aptitudo*.' Lib. 1. c. 1. § 4. D. J. B. A. P.

to demand ſomething. V. By rights they are entitled to *have*, to *do*, or to *demand* ſomething.

I. Every right implies a faculty. By a faculty I underſtand, in this place, power, leave, privilege, or liberty. Therefore, when one is ſaid to have a right, it is meant, that he has power, that he has leave, that he has a privilege, or that he is at liberty to do ſomething. The word *faculty* is ſometimes uſed in this ſenſe*. Thus, we may ſay a man, who is attacked, has a faculty to defend himſelf, that is, he has power, may take leave, is privileged, or is at liberty to do it; provided he be not reſtrained by ſome phyſical neceſſity. For a right implies not the abſence of force or of phyſical neceſſity. Nothing leſs. One's right is not infringed by his being forcibly or phyſically reſtrained from exerciſing it. It remains, notwithſtanding, entire to him. All, which is implied in having a right, is, that he, who has it, may lawfully, if he can, exerciſe it, by doing that, which it entitles him to do.

II. Rights are faculties competent to perſons alone; for, being faculties, they imply a power of thinking, ſince they entitle thoſe, who have them, to do ſomething. Of courſe, they can be competent to perſons alone: things cannot have them. 'Tis true, the Law ſometimes conſiders rights as belonging to things. Thus, there are real ſervitudes, as well as perſonal ones: real ſervitudes are 'thoſe, in which one thing ſerves another,' *prædium ſervit prædio*. By them the right to the ſervitude is veſted in that which is called *the dominant tenement*; for 'tis it, which has a right to make ſome advantage of the *ſervient one*. But the right is, in reality, competent not to the tenement itſelf, but to the perſon to whom the tenement belongs. It is ſaid to be competent to the tenement, only becauſe it is annexed to it, accompanies it, and may be exerciſed by any perſon who happens to be owner of it. It is introduced for his utility and convenience: for he alone can feel the advantage of it; the tenement itſelf being inſenſible, cannot be the better for it. Every right, therefore, is competent to a perſon.

III. Rights are competent to perſons placed in certain determinate circumſtances; for they vary according to the variety of circumſtances, in which people are placed. One has not at all times, on all occaſions, in all places, in all circumſtances, and in all relations the ſame rights. In order therefore to entitle one to ſay, that he has a right, it is neceſſary to ſuppoſe him placed in thoſe circumſtances, which are requiſite to make room for the exiſtence of that right. For inſtance, in order to give one the rights of a parent, it is neceſſary that he be a parent. In order to give one the rights of a child, it is neceſſary that he be a child: for rights depend on the circumſtances of perſons. A parent has, by being a parent, rights peculiar to himſelf; a child has, by being a child, rights peculiar to himſelf; and the rights of a parent are different from thoſe of a child: for they ariſe from a circumſtance, which is not common to both, but is, like the rights dependent on it, reſpectively peculiar to each of them. In the ſame manner, a Judge has, in virtue of his office, rights peculiar to himſelf. One, who is not veſted with this office, cannot have thoſe rights; becauſe they depend upon the office, and accompany it. It is plain, therefore, that the rights of mankind muſt vary according to the Circumſtances, in which they are placed.

I mean not, that right and wrong can ever vary; they are, like the eternal relations of things, unalterable, (§ 62.); but it muſt depend upon Circumſtances, what is right and what is wrong. In the ſame circumſtances, the rights and the duties of mankind muſt always be the ſame. In different circumſtances, they muſt be different. But that, which is right, and that, which is wrong, muſt ever remain reſpectively right and wrong.

IV. By

* See JOHNSON's *Dictionary*, v. *faculty*,—1491. c. 53,—1503. c. 78,—1558. c. 65. and Sir GEORGE MACKENZIE's notes upon them.

IV. By rights mankind are *legally* entitled to have, to do, or to demand ſomething. The meaning is, that the Law, natural or civil, either permits one to do ſomething with impunity, or entitles him to demand ſomething to be done by another. For, if there was no Law, neither natural nor civil, human nor divine, there could be no obligations; mankind could not be obliged to act in one way rather than in another. Of courſe, there could be no rights; no man could ſay, that he had a right to any thing; becauſe no other man could be ſaid to be tied down to regulate his conduct by certain rules: nothing either did or could reſtrain him from acting capriciouſly. It is neceſſary, therefore, to ſuppoſe, that there is ſome ſuch thing as Law, by which mankind are veſted with rights, and are entitled to aſſert them.

For, V. By rights they are entitled to *have*, to *do*, or to *demand* ſomething; three words, that ſeem to include all, to which mankind can have rights. For they may be entitled, either 1) To *have* ſomething, that is, to hold or to retain the poſſeſſion of ſomething, which they poſſeſs; or 2) To *do* ſomething, that is, to *act* after a certain manner, for inſtance, to exerciſe their rational faculties, to defend their perſons, to uſe their eſtates, to cultivate them, or to diſpoſe of them; or 3) To *demand* ſomething, that is, to demand another to do ſomething; for inſtance, to fulfil an obligation, to make a deed, or to do an action.

TITLE VI.

Of Obligations.

§ 149. IT will be needleſs to explain very minutely the nature of obligations; for they are oppoſite to rights, and may well be underſtood from the explanation which has been given of theſe.

An obligation is 'a legal tie, by which a perſon is bound to pay, to do, or to 'perform ſomething.' I. It is a tie. II. It is a *legal* tie. III. It is a tie, by which a *perſon* is bound. IV. It is a tie, by which he is bound to do, to pay, or to perform ſomething.

I. It is a tie; for an obligation implies, that he, who is obliged, is, as it were, *bound*, and lies under a neceſſity to do that, which he is obliged to do. It is not optional to him, either to do or not to do it. He is like one who is *bound* with fetters, and has thereby loſt his liberty. He cannot follow his own inclinations; he cannot carry them into execution; his fetters reſtrain him from doing it. So an obligation is, as it were, the fetters, the bonds, by which one is *bound* to do that, which is ſpecified in it. 'Tis true, he does not, like one bound with fetters, lie under a phyſical neceſſity, by which his actual liberty is deſtroyed. But he lies either under a moral, or under a legal one. He either is bound in duty to do that, which he is obliged to do, becauſe the Law of nature commands him to do it, tells him he ought to do it, and of courſe, makes it his duty to do it; or legal means may be uſed by the Civil Law, in order to compel him to do it. If it depends on his own caprice, whether he ſhall or ſhall not, whether he ought or ought not to do, he cannot be ſaid to be obliged, *l.* 8. *ff. de oblig. et act.*

II. Every obligation is a *legal* tie; for, if there was no Law, neither human nor divine, there could be no rules, which it would be the duty of mankind to obſerve: They might act capriciouſly and as they pleaſed. Of courſe, there could be no obligations; for man could not be bound to act in one way rather than in another.

III. By obligations *perſons* and *perſons* alone are bound; for perſons alone are conſcious of their duty; they alone are capable of knowing, that they ought to do

do one action, and to abſtain from doing another. Beſides, every obligation implies, that he, who is obliged, is bound to *do* ſomething. But it is impoſſible for any other than a perſon to *do*. Inanimate matter has not the faculty of ſpontaneous action. It is, at beſt, a neceſſary agent.

'Tis true, things may ſometimes be ſaid to be *obliged*, that is, one may have a *right* to *take* ſome benefit out of a thing, no matter, who be the proprietor of it. Of courſe, the thing may improperly be ſaid to be *obliged*, becauſe the right accompanies it, and he, to whom it belongs, is *bound* to ſuffer him, who has the right, to exerciſe it.

IV. By obligations perſons are bound *to do*, to *pay*, or to *perform* ſomething; three words, which include all the poſſible variety of human actions, all thoſe things, to which obligations can extend.

It would not be proper, in this preliminary part of the work, to go into a detail of rights and obligations. They will fall more properly to be mentioned afterwards. But there is one diviſion of them, of which I ſhall at preſent take particular notice, becauſe it is a very remarkable one, and muſt occur almoſt in every title of the Law; to wit, That, by which they are divided into heritable and moveable. Beſides, this is a general one, extending both to corporeal and to incorporeal things. Therefore, I ſhall inſcribe the next title,

TITLE VII.

Of Things heritable and moveable.

§ 150. THINGS are ſaid to be heritable and moveable in three different reſpects: either 1) in reſpect of the ſucceſſion of heir and executor; or 2) in reſpect of the intereſt of huſband and wife; or 3) in reſpect of the fiſc. It is neceſſary to conſider them in each of theſe different views.

A dead man cannot hold the property of any thing in this world. His eſtate muſt deſcend to ſome perſons who are living. 'Tis therefore, neceſſary, that fixed and invariable rules be eſtabliſhed, by which thoſe, entitled to ſucceed to the eſtates of the dead, may be determined. Thoſe rules have been different in different nations. In ſome the eſtates of the dead have been equally divided among all their relations of equal propinquity, without diſtinction of age or of ſex; in others, the accident of birth has aſcertained the perſons, to whom they ſhould devolve. The Feudal Law hath introduced, and hath propagated among mankind a ſyſtem of principles peculiar to itſelf. It was intended to maintain a warlike ſpirit in the people, among whom it prevailed. For this purpoſe, it caſt its eye upon one perſon, on whom it beſtowed its military fiefs; and having impoſed on him obligations of following his Lord into the field, it endeavoured, by creating dependencies upon him, and producing attachments to him, to augment his influence and his power among his friends. Power uſually accompanies property. Therefore, it was neceſſary for the Law to beſtow property upon him, whom it wiſhed to have power. It was for theſe reaſons, that the feudal ſyſtem diſtinguiſhed the heir of the family above others ſprung from it, and divided all things into heritable and moveable. The heritable were all thoſe, which deſcended to one perſon, who was called the *heir* of the deceaſed. He was the repreſentative of the family, and was intended to ſupport its dignity and power. Therefore, all thoſe parts of the eſtate of his predeceſſor, whom he repreſented, which were of greateſt value, were heritable and devolved to him. Little account was made of the younger children, or of thoſe others, who might, perhaps, be as nearly related to the deceaſed as the heir; they were thought entitled to no more than bare ſubſiſtence. Therefore, thoſe things alone, which were of ſmall value, were diſtributed among them, and were called moveable; becauſe

becauſe the moveables, belonging to the deceaſed, made, in antient times, the greateſt part, if not the whole of them. Thoſe to whom they devolved, were called the *executors* of the deceaſed. From hence it is plain, that heritable things may be defined to be 'thoſe, to which heirs ſtrictly ſo called ſucceed;' and moveables are 'thoſe things, to which executors ſucceed.'

All things, it has been ſaid, (§ 142.) are either corporeal or incorporeal. I ſhall enumerate firſt, Thoſe corporeal things; ſecondly, Thoſe incorporeal things, which are either heritable or moveable.

§ 151. Since all thoſe things, which are moſt valuable and moſt durable, are heritable, (§ 150.) it is plain, 1) That all immoveable *ſubſtances* are heritable; ſuch as land, houſes, mills, *&c.* for they are a perpetual fund both of riches and of power to the heir, *R. M. l.* 3. *c.* 2. § 2.

An acceſſory always follows its principal, and belongs to him, to whom the principal belongs. Therefore, 2) All thoſe moveables, which are deſtined for the *perpetual* uſe of an immoveable, *and* make, as it were, a *part* of it, are heritable. Such are trees, which are planted on land, and are intended to remain either for ſhelter, or for beauty upon it. Such are thoſe things, which are intended for the perpetual uſe of houſes; the windows, the gates, the locks, the keys, or the bolts, *l.* 17. *p.* § 7. 8. 9. 10. *ff. de act. empt.* Theſe are all heritable, becauſe, tho they are moveable *corpora*, they make a *part* of the houſe, and are inſeparable from it. I ſay, make a *part* of the immoveable; for thoſe moveables, which are *parts* of an immoveable, are alone heritable. Thoſe, which are not *parts*, are not heritable. Thus, ploughs, harrows, ſcithes, ſickles, dung-carts, dung-hills, laboring cattle, *&c.* are deſigned for the uſe of the earth; but they are not *parts* of it. Therefore, they are not heritable, but moveable. The heir, if he wants to keep them, muſt purchaſe them from the executors.

For the ſame reaſon, charters, precepts of ſeiſin, inſtruments of ſeiſin, procuratories of reſignation, inſtruments of reſignation, retours, decrees of adjudication, conveyances of heritage, and the *corpora* of *all* other papers, conveyances, titles, aſſignments, writings, or deeds, which conſtitute the right of the heir, are heritable. For the heritage deſcending to the heir, the *corpora* of *all* his titles to it muſt alſo deſcend to him.

§ 152. The only things, which go to executors, are thoſe which are of ſmall value, (§ 150.) Hence 1) All thoſe things, which either may, *ſalva ſubſtantia*, be moved from place to place, or are not *parts* of an immoveable, and made for the perpetual uſe of it, are moveable, or go to executors; except they be heirſhip-moveables: For theſe, tho they are themſelves moveable, are heritable, in caſe they belonged to one, whoſe rank entitled his lineal heir to heirſhip-moveables, that is, to one, who was either a prelate, a baron, or a burgeſs; for the heirs of ſuch perſons alone are entitled to them.

I ſaid, that all immoveable *ſubſtances* are heritable, not that all immoveables are heritable; for the expreſſion might have been liable to miſinterpretation. The Law diſtinguiſhes between a thing, and the fruits produced by it. Every fructiferous immoveable *ſubſtance* itſelf is heritable: But the fruits, which it bears, *may* be moveable, tho they be *fundo annexi* *.

* Fruits are, properly ſpeaking, 'Thoſe things, which proceed out of the body of any ſubſtance, undergo 'certain regular and ſucceſſive changes, come to maturity, at laſt decay, and with the continual return of the 'ſeaſons, proceed out of it again.' Thus, corn, graſs, herbs, plants, trees, &c. are fruits of the earth; apples, pears, plumbs, peaches, walnuts, *&c.* are fruits of trees; and foals, calves, lambs, kids, chickens, whelps, *&c.* are the fruits of animals.

Some of thoſe fruits are produced ſpontaneouſly by the energy of nature alone, without being ſown or planted: ſuch, for inſtance, are that graſs, and thoſe fruits, which grow wild in many countries. Others of them are produced not by the ſpontaneous energy of nature alone, but by the help of human induſtry; ſuch is corn, for inſtance, which the earth does not bear, unleſs ſeed is caſt into it. Fruits of the firſt ſort are called natural, *fructus naturales*; thoſe of the ſecond are called *fructus induſtriales*. They are called *induſtriales*, not becauſe they alone require culture; for natural fruits require it alſo. Thus, fields, which are cultivated by dunging and incloſing them, never fail to produce better crops of natural graſs than ſuch, as lie open and neglected: but

The natural fruits of land are, as it were, *pars ſoli;* they are acceſſories of it. Of courſe, they accompany it, and are, therefore, like it, heritable. Indeed, it is *neceſſary*, that they be ſo: For the only way, in which they are uſed, is by conſuming them on the ground; they are not ſeparated from it. Therefore, the perſon, who ſucceeds to the immoveable, which produces them, that is, the heir, can alone be entitled to reap them; becauſe one, who is owner of the whole, muſt be owner of every part, of which that whole conſiſts. *Dominus totius eſt dominus cujuſlibet partis. Fa.* 7th *Decem.* 1744, *Lady Dalrymple.* Indeed, if they are *actually ſeparated* from the ground, for inſtance, if they are mown, they are moveable: For they are not then *pars ſoli;* they are, in truth *corpora mobilia*, (§ 143.). Therefore, they muſt be moveable, and go to the executors of him, whoſe property they were in this their ſtate of ſeparation, (§ 150.). I ſay, the natural fruits of *land* are heritable; for thoſe of trees and of every other immoveable, which bears fruits *ſtrictly* ſo called, are moveable.

Almoſt all fruits raiſed by induſtry, *induſtriales*, are moveable and go to executors: for they are not conſidered as parts or acceſſories of the land; they muſt be ſown or planted: the ſeeds are caſt into the ground, not to continue in it for ever, but on purpoſe to produce ſomething which in due time may be, and actually with the regular return of the ſeaſons, is conſtantly ſeparated from it. Beſides, the ſeeds, which are neceſſary for the production of them, are themſelves moveable *corpora*, and, in caſe they had not been ſown, would have gone to executors. Of courſe, the fruits ſurrogated into their ſtead muſt alſo be moveable; ſince they ought to ſupply the place of that, into whoſe ſtead they are ſurrogated. *Surrogatum ſapit naturam ejus, cui ſurrogatur.* Hence it follows, that almoſt all fruits, which were ſown or planted before the death of the proprietor of the land, are moveable, and go to his executors; no matter, whether they were or were not reaped, *pendentes* or *percepti.* If they were not ſown or planted before it, there can be no queſtion about them; for the heir ſucceeds to the land, as it is, and has alone right to ſow it. Beſides, it cannot be ſaid, that there were any *fructus induſtriales pendentes* among the eſtate of the deceaſed, ſince the land was not ſown before his death, *Fa.* 7th *Dec.* 1744, *Lady Dalrymple.*

I ſaid,

but becauſe the earth does not produce them, as ſhe produces thoſe which are natural, ſpontaneouſly, *i. e.* without ſowing or planting.

It frequently happens, that thoſe, to whom fructiferous bodies belong, grant to others a right to reap the fruits of them for a certain hire. There are things which are extremely uſeful to human kind, not only by the actual production of fruits, but otherwiſe; ſeveral animals, for inſtance, aſſiſt them by their labor. There are other things, which, tho naturally barren, are extremely uſeful to human kind; ſhips, for inſtance, waggons, carts, houſes, money, *&c.* The uſe of things of this ſort may be ſaid to be their fruits. But the owners of them may ſell their right, and inſtead of uſing or of reaping the fruits of them themſelves, may allow others, for a certain price, rent, or hire, to uſe them, or to reap the fruits of them. This cuſtom gives riſe to a third denomination of fruits: for this price, rent or hire is called civil fruits; becauſe it is not produced by the fructiferous body, but is ſurrogated by law into the place of the natural fruits of it. Such, for inſtance, is the rent of land or houſes; freight of ſhips; hire of horſes; intereſt of money, *&c.* Theſe *jure percipiuntur.*

Thoſe fruits are divided into *pendentes, perceptos, et percipiendos.* Pendent fruits, *fructus pendentes*, are ſuch, as are not ſeparated from the fructiferous body, but remain united to it; apples and pears, for inſtance, before they are ſhaken from the tree; corn and fleeces before they are ſhorn; hay and graſs before it is mown; foals, calves, lambs, *&c.* before they are born. Fruits are ſaid to be *reaped, percepti,* ‘ as ſoon as they are ſepa- ‘ rated from the fructiferous body;’ apples and pears, *v. g.* as ſoon as they are ſhaken from the tree; corn and fleeces as ſoon as they are ſhorn; hay and graſs as ſoon as they are mown; foals, calves, lambs, &c. as ſoon as they are born.

Thoſe fruits are ſaid to have been *percipiendi*, which might have been reaped, but were allowed to periſh; hay, for inſtance, that is allowed to rot on the ground.

This diviſion may be applied to Civil Fruits. Theſe are ſaid to be *reaped, quando dies venit, l.* 213. *ff. de verb. ſig.* as ſoon as they become due, and the legal term at which Law makes them demandable is paſt; for they are ſaid *then* to be *percepti*, tho the time, at which parties by their private agreements have made them payable, be not come. Conſequently, they are pendent, before they become demandable, *antequam dies venit.* They are *percipiendi*, if they have been loſt, after they were demandable.

Fructus percepti, fruits that have been reaped, are divided into thoſe, which are extant, and thoſe, which are conſumed. *Fructus extantes*, fruits are ſaid to be extant, ‘ when they are not conſumed.’ Fruits are conſumed, *conſumpti*, not only, when they are actually deſtroyed, and have ceaſed to exiſt in their former ſhape, but alſo when they are aliened. Thus, apples are ſaid, in a juridical ſenſe, to be *conſumpti*, not only when they are eaten, but alſo when they are ſold, or preſented to others by their owner.

I ſaid, that *almoſt* all fruits raiſed by induſtry are moveable; for they are not all ſo, without any exception. Thus trees may be counted among them; for they are uſually either ſown or planted. But they are ſo cloſely united with the land, that they ought in all caſes to accompany it, and to be held to be heritable; unleſs they are planted on purpoſe to be, like corn or like clover, ſeparated from the earth, and ſold at certain ſucceſſive and regular diſtances of time. For they are deſtined for the perpetual uſe of the land; and on account of the will and deſtination of the proprietor, ought to be heritable. 'Tis otherwiſe, in caſe they are not deſtined to remain upon it, but intended at certain regular and ſucceſſive times to be cut. In that caſe it is neceſſary to diſtinguiſh between trees, wood, or copſes, which are cut once at leaſt every two years, and ſuch, as are cut at greater diſtances of time. In caſe they are cut once every two years, they are moveable at every point of time, as well before as after that, at which they arrive at maturity, provided they were ſown before the death of the proprietor. The reaſon is, it cannot be ſaid, that ſuch fruits, as are both ſown and reaped the ſame year, are alone moveable; for clover remains for two ſeaſons in the ground; yet it is moveable, and goes to the executors of the owner of the field ſown with it, ſuppoſe he ſhould live no more than one day after it was ſown. His executors have a right to reap it as ſoon as they pleaſe. Therefore, a tree, a wood, or a coppice, which uſes to be cut once every two years, muſt alſo, *ex paritate rationis*, be held to be moveable; for it is no more *pars ſoli*, or annexed to the Land, than Clover, which, it cannot be denied, is perpetually and in every inſtant moveable.

In caſe it uſes to be cut at greater diſtances of time, for inſtance, every 5th, every 10th, 12th, or 20th year, it remains heritable till the time, at which it falls to be cut, comes, and then becomes moveable: Becauſe it cannot be ſaid to be a moveable conſtituting a part of the eſtate of its deceaſed proprietor before that time; ſince *dies* cannot be ſaid *veniſſe*. It cannot be held to have been a moveable poſſeſſed by him. But after that time it may be held to have conſtituted a part of his moveable eſtate; becauſe *dies*, as it were, *venit*. 'Tis the ſame as with the intereſt of money which is heritably ſecured; the land, on which the wood is planted, is, like the principal ſum, heritable; but the wood is like the intereſt of it; is heritable before *dies venit*, before it becomes due, or may be cut; and is moveable afterwards.

§ 153. Things incorporeal are divided into 1) Rights, 2) Obligations, and 3) Actions: (§ 146.) Actions may, in one reſpect, be ſaid to be both rights and obligations. They are *rights* of thoſe, who are entitled to bring them; they are obligations incumbent on thoſe, who are liable to be ſued by them. Beſides, an action accompanies every effectual right; for he who has the right, muſt have a mean, that is, he muſt be entitled to bring an action, in order to make it effectual: And he, who is obliged, muſt of courſe, be liable to be ſued, in order to be decreed to fulfil his obligation. From hence it is plain that an action muſt, in all caſes, participate reſpectively of the nature of the right or obligation, on which it depends. If the right is heritable, 'tis the heir; if it is moveable, 'tis the executor, who is alone entitled to bring it: if an obligation is moveable, 'tis the executor, if it is heritable, 'tis the heir, who is alone *properly* liable to be ſued to fulfil it *. Hence, if thoſe rights and obligations, which are heritable and moveable, ſhall have been ſpecified, it will not be neceſſary to ſpecify the actions, which fall under either the one or the other denomination.

Rights †, then, are either heritable or moveable. Heritable rights are 'thoſe, to which ſuch as are properly and ſtrictly called *heirs*, ſucceed;' moveable

* I ſay, is *properly* liable to be ſued by it: For it may happen, that either the heir or the executor is liable to be ſued. The diviſion of the eſtate of the debtor ought not to hurt the right of the creditor.

† It muſt be remembered, that by a right, agreeably to the definition given of it above (§ 148), is here underſtood ſomething, which is profitable, beneficial, and advantageous. When, therefore, I ſay, that a right is either

moveable rights are ‘ thoſe, to which ſuch, as are called executors, ſucceed, 1503. *c.* 76—1535. *c.* 9. 12—1540. *c.* 69—1567. *c.* 1. 5.—1641. *c.* 57—1661. *c.* 32. I ſhall enumerate *firſt* thoſe rights, which are heritable; *ſecondly*, thoſe which are moveable.

§ 154. I. The heir is the repreſentative of the family; and it is intended, that he ſhould maintain its dignity and power. Therefore, all thoſe things, which are durable, and which are capable, by their own nature, of continuing to produce fruits either for a long time or for ever, are heritable; for they are capable of ſupporting the family in the moſt diſtant times. On this principle it has been ſaid, that all thoſe things, which either cannot be moved at all, or cannot, without changing their natures, be moved from place to place, and are, for that reaſon, called immoveable, are alſo heritable; for they are moſt durable, and will laſt as long as the family. *R. M. l.* 3. *c.* 2. § 2—1503. *c.* 76—1535. *c.* 9. 12—1540 *c.* 69, *&c.* From hence it follows, 1) that rights to *immoveables* of *all ſorts* muſt be heritable; for the immoveables themſelves being heritable, the rights to them muſt be ſo alſo: otherwiſe the heir, to whom they deſcend, could not either retain or recover poſſeſſion of them. Of courſe, rights to land, houſes and mills, are heritable. *R. M. l.* 3. *c.* 2. § 2. I ſay, rights *of all ſorts*; for it is no matter of what ſort either the immoveables or the rights concerning them be, whether 1) they be or be not completed by ſeiſin; 2) whether they be or be not formally ſubſcribed by parties; or 3) whether they be or be not reduced into writ. ’Tis true, it may depend upon circumſtances, whether one *has* or *has* not a right. But it is a general rule, that every right, which one *has* to an immoveable, deſcends to his heir, not to his executor.

II. Seiſin can be taken of immoveables alone; for it is, in ſome ſort, ‘ the ‘ formal apprehenſion of the poſſeſſion of an immoveable.’ Therefore, it muſt be true, that all rights, which are not abſolutely complete, till thoſe, who have them, are formally ſeiſed; or which admit of it, are heritable. Hence all rights 1) To land, 2) To houſes, 3) To mills, 4) To fiſhings, 5) To tithes, 6) To patronages, 7) To annual rents out of land, 8) To real warrandice, 9) To territorial juriſdictions, are heritable: as muſt alſo be all deeds, containing clauſes of ſeiſin.

I ſay, *all* rights, on which ſeiſin may be taken; for it matters not, 1) Whether they make thoſe, who have them, ſuperiors or vaſſals; 2) Whether they be redeemable or irredeemable.

III. An acceſſory always follows its principal. Therefore, all the parts, appendants, appurtenances, and acceſſories of every thing, which is either immoveable or heritable, muſt themſelves be alſo heritable, and deſcend to thoſe heirs, who ſucceed to the principal hereditaments themſelves.

Hence, 1) Territorial juriſdictions, 2) Territorial honors, 3) Real ſervitudes, 4) Patronages of churches, 5) Warrandice, either perſonal or real, of every thing which is heritable; all theſe are heritable: for they are annexed to the principal hereditament, accompany it, and are, as it were *parts* of it.

For the ſame reaſon, all caſualties of ſuperiority are heritable, becauſe the ſuperiority itſelf is ſo. Therefore, he who has right to the ſuperiority itſelf, muſt have right to all the caſualties of it.

But from theſe caſualties muſt be carefully diſtinguiſhed the profits ariſing from them. The right to the caſualty itſelf is in all caſes heritable, but the *profits* of it may be moveable; for, we ſhall ſee, that all *arrears* are moveable. Therefore, all thoſe *profits*, which have become *arrears*, that is, which are demandable,

either heritable or moveable, I mean, that the profit, benefit, or advantage, ariſing from it, deſcends reſpectively either to heir or to executor. When I would ſay, that the burden ariſing from the right, is incumbent on heir or executor, and that either the one or the other is bound to *fulfil* an obligation by doing that, to which another has right, I chuſe to expreſs myſelf by ſaying that the *obligation* is either heritable or moveable: for it may happen, that an obligation is heritable at the ſame time that the right, correſponding to it, is moveable; and that an obligation is moveable at the ſame time, that the right correſponding to it, is heritable.

able, *quorum dies venit*, before the death of him who has right to the caſualty, are moveable and go to his executors; becauſe they are held to be a part of the moveables poſſeſſed by him. I know, that a diſtinction has been made between thoſe caſualties, which muſt be *declared* in order to render the right of the ſuperior complete, and thoſe to which he has right without a declaration of them; and it has been found, that all the profits of ſuch as require to be declared continue always to be heritable, till a decree, declaring them to have fallen and the rights thereby acquired by the ſuperior, is actually recovered: becauſe it is ſaid to be *meræ facultatis* in the ſuperior to exact them, *Ha. ult. Nov.* 1609, *Earl of Argyle.*—5th *March* 1611, Lord *Douglaſs*—*St.* 11th *July* 1673, *Faa.* But the principles of Law ſeem to oppoſe this doctrine. 'Tis true, it is *res meræ facultatis* in a ſuperior to exact his caſualties; but it is no leſs ſo in a creditor to aſk payment of money due to him; yet it cannot be from thence inferred, that every debt is heritable. The point therefore which muſt be conſidered in this matter is, whether the ſuperior has acquired a right to make an exaction, whether any arrears are become due to him, or whether *dies venit*. In caſe any arrears have become due to him before the caſualty is declared, theſe muſt be moveable; for they are part of his moveable eſtate. If *nothing* becomes due before it is declared, all the profits depending upon it muſt be heritable; becauſe the heir is alone entitled to get it declared, and, before it is declared, there is nothing due on it; ſo there are no profits, which can go to executors. Thus nonentry is a caſualty of ſuperiority, by which the ſuperior is entitled immediately to enter upon poſſeſſion of the fief held of him, and to retain it as long as he has not a vaſſal entered upon it. The feudal Law gave him the profits of the fief in the mean time, that he might find one to ſerve him inſtead of his vaſſal. But he is not immediately entitled either to enter upon actual poſſeſſion, or to the *full* real rent or profits of it: he is entitled to no more than thoſe which are called the *retoured duties* before he gets his caſualty declared; he has not right to the *full* rents, till he has recovered a decree declaratory of it. Therefore the arrears of the retoured duties, and of them alone, are moveable before the declaration; they are not heritable; for *dies venit*, they are become already due, the ſuperior *has a right* to exact them. Therefore they muſt go to his executors; for they are part of his moveable eſtate: but the full rents are not; for he had not himſelf a *right* to them, becauſe he had not got his caſualty declared. Of courſe, neither his heir nor his executor has right to theſe. But after the caſualty is declared, *all* the arrears of the full rents become due. *Du.* 18th *Feb.* 1624, L. *Couter.*—*St.* 28th *Jan.* 1671, *Keir.*—30th *Jan.* 1671, *Douglas.*

Again, the right, acquired by a decree of adjudication, is heritable; for the thing adjudged is ſo. Therefore *all* the arrears of intereſt of the *accumulated ſum*, as well as the principal itſelf and all its acceſſories, are heritable: for it is not the accumulated ſum and the intereſt of it, to which the adjudger acquires right; he acquires right to the property of the *thing which is adjudged*; the decree is a legal conveyance of it. 'Tis true, his right is redeemable: but it is redeemable from him alone; for he is the alone proprietor. Therefore, he *or* his heir muſt be entitled to every farthing of that money, no matter whether it be principal intereſt or penalty, with which it may be redeemed; for it muſt be redeemed from him. Of courſe, he muſt be entitled to retain it till every farthing is paid *D.* I. 14. 3d *Feb.* 1738, *Ramſay.*

IV. It is the heir, who is principally conſidered in the feudal ſyſtem; he is the repreſentative of the family; and it is his dignity and power, which the Law means to maintain. Hence all rights which rather add to the dignity and power of him who poſſeſſeth them, than put money immediately in his pocket, muſt be heritable. Thus 1) Peerages, 2) *All* titles of honour, 3) Juriſdictions, 4) Patronages of churches, 5) Superiorities, 6) Enſigns armorial*, and every thing of this kind, deſcend to heirs not to executors.

* Enſigns armorial are, no doubt, heritable. But it ſeems not to be agreeable to the antient feudal ſyſtem to ſay,

V. All thoſe things, which are durable, go to heirs, becauſe they are naturally capable of maintaining the dignity of the family. Hence all thoſe, which continue for a time to yield profits, *quæ habent tractum futuri temporis*, are heritable: for thoſe moveables alone, which are *ſuppoſed* to be in the *poſſeſſion* of the deceaſed at the time of his death, go to his executors. Therefore thoſe rights, which continue after it to yield fruits, are heritable; the heir has right to all the fruits, which become due upon them after the death of his predeceſſor. Thoſe *arrears* alone, which became due before it, are moveable.

From hence it follows, that 1) Rights of annual-rents out of land, 2) Penſions conſtituted without ſeiſin, by deeds merely perſonal, 3) Every ſort of rent, payable either in money, in grain, or in other ſpecies, out of land, are heritable. *R. M. l. 3. c. 2. § 2.—Sk. not. ad d. l.* For theſe all continue for a time to yield ſomething.

For the ſame reaſons, 4) Leaſes of land go to the heir of the tenant; and 5) Rights of liferent-eſcheat go to the heir both of the ſuperior and of the donee, to whom the eſcheat belongs. *Du.* 18th *Feb.* 1624, *L. Coulter.*

This principle was, in antient times, carried ſo far that perſonal bonds, granted for money bearing intereſt, became, as we ſhall ſee, heritable after the firſt term of payment either of the principal ſum or of the intereſt was paſt.

VI. Property implies a power of diſpoſing of it: therefore it muſt go to thoſe, to whom its proprietor wills it to go after his death. Hence his will, provided it is declared in a proper and legal manner, muſt make a thing, which is *ſua natura* moveable, become heritable. Thus 1) Rights, limited to heirs-male, are heritable; for they can go to heirs-male alone.

Rights, made in favour of a ſeries of heirs ſubſtituted either nominally or deſcriptively to one another, are 2) heritable; for they muſt go to thoſe perſons, in whoſe favour the deeds are made.

3) Rights,

ſay, that they devolve, in all caſes, to thoſe ſame heirs to whom heritable things of other ſorts deſcend. For women were exempted from following their Lords into the field. Hence, as they were originally, according to the ſtrict feudal principles, excluded from ſucceeding to fiefs, they could not be allowed to bear arms; and enſigns armorial deſcended not to them, but to the heirs male of families who were ſuppoſed to be more capable of uſing them. 'Tis true, the rigour of the feudal law was by degrees moderated; and females being admitted to ſucceed, enjoyed thereby the funds, out of which the vaſſal equipped himſelf for the field, and ſupported the expences of the campaign. Thus the heir-male deprived of the fief, had no longer any obligation to follow the ſuperior of whom it was held, and might by poverty be diſabled from doing it. Beſides, in proceſs of time the warlike notions of the people were changed; and enſigns armorial, inſtead of being memorials of thoſe arms uſed in the field, became marks by which families were diſtinguiſhed, deſcents were traced, and pedigrees aſcertained. Hence one would think, that they are not entailed by the law to heirs-male, but deſcend, in all caſes, to heirs at law; and that heirs-female are entitled to *keep* them, till they get huſbands who can uſe them in their ſtead, and to *tranſmit* them to their repreſentatives. But it is otherwiſe. The huſband is the head of his family; he is the *paterfamilias*; and it is held to belong to him. In fact, naturaliſts aſſure us that the *ſemen*, or that which becomes the child, proceeds from the body of the father alone; and that the mother affords no more than a matrix for its reception and nouriſhment to it. Hence the children are properly *his*; and thoſe of his daughters become parts of other families, to wit, of thoſe of their own fathers, the huſbands of their mothers (§ 99. 204. 205. 226. 354). It follows that families are held to be continued by males alone; that enſigns-armorial deſcend to them alone; and that they deſcend, in *no* caſe, to females. As ſoon therefore as a landed eſtate devolves to an heir-female, and to her iſſue, it goes out of the family from which ſhe ſprang, deſcends to a different one, and is veſted in that of her huſband. Of courſe her children muſt bear the arms of their father; they continue *his* family; and have not right to bear thoſe of the family of *their mother*; theſe deſcend to him who is the heir-male of it.

But being intended for diſtinguiſhing families and aſcertaining deſcents, one cannot have the ſame power of diſpoſing of his arms, which he has over his other property. They depend on the blood, which runs in his veins; and as this is unalterable, it muſt follow that they deſcend, in all caſes, *in linea recta* to him whom the law calls his heir-male; that they are inalienable; and that one cannot either deprive this his lawful heir of the right of ſucceeding to them, or give another a right to wear them, or impoſe it, as a burden, upon him: for it depends entirely on a fact, what arms one is entitled to bear. The lineal repreſentative of a family, and he alone, is entitled to have thoſe of that family, whether he has or has not ſucceeded to the eſtate belonging to it; LION cannot either aſſign him others, or beſtow them on a different perſon; and ſucceſſion to an eſtate cannot give one a right to the arms of the family, to which it belonged, becauſe it cannot make one, who is not deſcended or is not the repreſentative of it, either to have deſcended from it or to repreſent it. Hence it follows, that that condition concerning the bearing of *certain arms*, which uſes to be inſerted in entails, thoſe licenſed aſſaſſins of genius, of independence, of juſtice, and of the induſtrious, is abſolutely ineffectual in law; that it ought to be held *pro non ſcripta*; and that one, who ſhould contravene it by bearing others, could not, for that reaſon, be deprived of the entailed eſtate, becauſe he has it not in his power to fulfil the condition impoſed upon him, the preciſe arms, which he ſhall bear, depending not on his own choice, but upon his deſcent and his rank. *l. 20. p. ff. de con. inſt. l. 45. ff. de hered. inſtit. l. 185. ff. d. r. j. l. 3. ff. de con. et. demon.*—1592, *c.* 127.—1672, *c.* 21.

3) Rights, from which executors are *expreſsly* excluded, for inſtance, bonds
r money, from which executors are *expreſsly* excluded, are heritable, 1661, *c.* 32.
ay, *expreſsly excluded;* for we ſhall ſee, that rights, which are *ſuâ naturâ* move-
le, go to executors, unleſs they are *expreſsly* excluded from them. From
nce it follows, that a bond, from which executors are excluded, continues to
heritable, as long as it is not aſſigned to a ſingular ſucceſſor, or a perſon diffe-
nt from the heir of the original creditor; for the executors of the firſt and
iginal creditor are not alone, but thoſe of *all* even his moſt remote heirs, are
cluded from it. An heir is held to be the ſame perſon with him, whom he
reſents. Therefore, a bond, from which the executors of the perſon repre-
ted are excluded, muſt alſo exclude thoſe of the repreſentative, *K.* 53;
d that, even of him, who is moſt remote. *Qui per ſucceſſionem, quamvis longiſſi-
m, defuncto heredes conſtiterunt, non minus heredes intelliguntur, quam qui princi-
liter heredes exiſtunt, l.* 194. *ff. d. r. j.*

I ſay, it remains heritable, as long as it is not aſſigned to a perſon different
m him, who would be heir of the original creditor. The law does not mind,
ether the heir makes a title to it by a ſervice after the death of his predeceſ-
, or acquires it, *præceptione hereditatis*, during his life, by an aſſignment made
his favor; for the aſſignment is no more than an anticipation of the inheri-
ce, and ſuperſedes the neceſſity of a ſervice, *Fa.* I. 215.

But it is otherwiſe, in caſe it is aſſigned to a ſingular ſucceſſor, that is, to one
o cannot, at the date of the aſſignment, be ſaid to prevent or to anticipate
ſucceſſion, *præcipere hereditatem:* for the words not of the deed aſſigned,
of the aſſignment itſelf, muſt, in this caſe, determine, whether the bond,
rather the money due by it, ſhall go to heirs or to executors. The aſſignment
kes it become the property of the aſſignee. Therefore, it is *his* will, which
alone be the rule for determining the ſucceſſion to it. But he declares his
by the words of the aſſignment; for, if he purchaſes it for a valuable con-
ration, it muſt be granted in terms agreeable to him; and, if it is given
without a valuable conſideration, he ſignifies his will by allowing it to con-
ue in the tenor, of which it is. Therefore, the money or the bond muſt be
veable or go to the executors of the aſſignee, unleſs they are expreſsly ex-
ded from it. For the aſſignment is, in this caſe, moveable; becauſe it is, as
ere, a bond granted by the debtor to the aſſignee, *Fo.* 17th *June*, 1680, *San-
nds.*

It is remarkable, 4) That money, deſigned to be laid out for the be-
f of one's *heir*, for inſtance, deſtined to be laid out either on land, on
ſes, or on heritable ſecurity, is heritable; provided the will of the proprie-
be ſignified in a proper and legal manner, that is, by a deed which *gives* the
a *right*. For, if the heir has a *jus quæſitum*, he can make it effectual, even
inſt the executors of his predeceſſor, tho the money ſhould not be laid out,
t had been intended, *Du.* 19th *Jan.* 1637, *Robertſon*. But, if he has no *jus
ſitum*, it muſt go, according to its own nature, to executors: For the heir,
ing acquired no right, has no action againſt the executors of his predeceſ-
in order to compel them to fulfil his will. A ſimple intention does not im-
an obligation, *Ho. executor*, 18th *June* 1614, *executors of Ruſſel.*

VII. But a right, which is *ſuâ naturâ* moveable, may become heritable *ex
ſtitate juris*, without the intention of him, who has it.

For 1) It becomes heritable, in caſe heritable ſecurity is taken for it, that is,
a right as *ſuâ natura* deſcends to heirs. Thus, a moveable bond becomes
table, in caſe an heritable one is *taken* for it, *Go.* 22d *Nov.* 1671, *Ord.*
n like manner, a moveable right becomes heritable, in caſe an heritable one
ſigned *and* is *accepted* by the creditor in ſecurity of it, *D. heritable and mo-
le*, 21ſt *Nov.* 1734, *Cleland—Fa.* II. 84. The reaſon is, that the heir is
alone perſon, to whom the benefit of the heritable ſecurity can deſcend. Of
rſe, that, for which it is granted, muſt be heritable. I ſay, is *accepted* by
the

the creditor: for it is the creditor, he who has the right, who has alone power of diſpoſing of it; a deed made either by the debtor, or by another, can have no effect upon the ſucceſſion to it. Therefore, it muſt be *accepted* by the creditor, and thereby become his deed, ere it can alter the nature of the right from moveable to heritable, *Fa.* 5th *June*, 1745, *Duff.*

2) Moveable rights become heritable, after a decree of adjudication is recovered for them; becauſe, the decree of adjudication being heritable, that, for which it is recovered, is altered by it from being moveable, *Du.* 20th *Decem.* 1631 *Menzies.*—*D. her. and mov.* 12th *Nov.* 1728, *Reids.* And it makes no difference whether the decree is recovered at the ſuit of the creditor himſelf, or of a truſtee for him, *Fa.* I. 276.

I ſay, it becomes heritable, *after* the *decree* is recovered; for it is from the date of the decree, that it becomes heritable. The reaſon is, it cannot, till that time, be ſaid to be heritably ſecured. Therefore, a moveable debt is not made heritable either by the ſervice of a ſummons of adjudication, or by the commencement of the action, or by any other ſtep taken in order to recover the decree. It is the laſt ſtep, which alters the nature of the right, *Fo.* 16th *Jan.* 1700. *Carnegy.*

§ 155. It is plain, that all thoſe things, which are not heritable, muſt be moveable. If, therefore, one knows thoſe things, which are heritable, he cannot be ignorant of thoſe, which are moveable.

It may not, however, be improper to make a particular enumeration of ſome of them.

I. It has been ſaid, (§ 152.) that thoſe corporeal things alone, which are actually moveable, and are one's property at the time of his death, go to his executors. Therefore, rights to things of this kind muſt be moveable in all caſes, in which they are not conſtituted by writ; for the things themſelves being moveable, and executors not being, by any deed, excluded from them, the rights to them muſt be ſo too.

II. From the ſame principle it follows, that rights to money, grain, and moveable *corpora* of all ſorts, conſtituted by writ, are moveable in all caſes, in which the deeds conſtituting them contain not either clauſes excluding executors, or clauſes of ſeiſin; for it has been ſaid, that rights, conſtituted by deeds containing either of theſe clauſes, are heritable, but without them they are moveable. The reaſon is, that in all theſe caſes, the money or moveable *corpora* are ſuppoſed to be in the actual poſſeſſion of thoſe, who have the rights to them: for the things themſelves, to which the rights are given, are moveable *corpora;* as are alſo the deeds, by which thoſe rights are conſtituted. Beſides, they contain no *excluſion* of executors. So no reaſon can be aſſigned, for which they ought not, according to their own nature, to go to executors, 1661, *c.* 32.

Hence, 1) Bills of exchange are moveable, *Arg. K.* 55. and that, whether they do or do not contain clauſes *ſtipulating* the payment of intereſt, and whether they are or are not bearing intereſt *ex lege*, *D. husband and wife*, 13th *Dec.* 1738 *Gilhagie.* For bills are held to be caſh in the poſſeſſion of thoſe, to whom they are due.

For the ſame reaſon, rights to money, grain, or other moveable *corpora* conſtituted, 2) By promiſſory notes, either of individuals, of banks, or of other corporations, 3) By contracts, 4) By bargains, 5) By accompts, 6) By lottery tickets, or otherwiſe, are moveable.

Again, 7) Shares in the ſtocks either of private companies, or of banks, or of other corporations, are moveable. 'Tis true, they may be ſaid, in ſome caſes, to imply *tractum futuri temporis;* for the reſpective ſhares of every proprietor are, in ſome ſort, ſunk in the general ſtock of the corporation; and afford, at different times, only profits made either by lending or by trading. But it muſt be remembered, that every proprietor acquires a right both in the ſtock of the company and to the profits made by it; this is a right to moveables; it may be ſold

ſold, and thereby turned, every inſtant, into ready money; and executors are not excluded from it; therefore it muſt go to them, *F.* 25th *July*, 1710, *Murray.*—*D. heritable and moveable*, 1ſt *July*, 1735, *Sir John Dalrymple.*

It has been ſaid, that, in antient times, bonds, granted for money bearing intereſt, became heritable after the firſt term of payment either of the principal or of the intereſt. The reaſon was, after that time they were not held to be moveables in the *poſſeſſion* of the creditor, to whom they were due, but were conſidered as eſtates having *tractum futuri temporis;* intended by him to continue, for an indefinite time, to produce fruits for the maintenance of the dignity of his family. Therefore, they were, as it were, fiefs of money, *feoda pecuniæ*, and, of courſe, became heritable, immediately after the creditor, by neglecting to get payment of his money, had declared his intention to let it continue to lie out at intereſt, and to become a *feodum pecuniæ;* that is, they became heritable, as ſoon as the firſt term of payment either of the principal ſum or of the intereſt of it, was paſt. It became heritable, as ſoon as the term of payment of the principal was paſt; becauſe the creditor by neglecting to get payment of it, ſhewed he intended to allow it to become a *feodum pecuniæ*, and to lie out at intereſt. But the firſt term of payment of the intereſt might be made prior to that of the principal ſum: in that caſe, the bond became heritable at that time; becauſe it had, as ſoon as that firſt term was paſt, actually become a *feodum pecuniæ.*

I ſay, it became heritable, *after* the firſt term of payment: For even the antient law held it to be moveable *before* it. The reaſon is plain; the Law ſuppoſes, that the creditor, to whom the money is due, intends to get payment of it againſt the term. Therefore, it is impoſſible for it to ſuppoſe that he intends it to become a *feodum pecuniæ;* for the one ſuppoſition is inconſiſtent with the other. Of courſe, it muſt be moveable perpetually and in every inſtant, in which he intends it not to become a *feodum*, that is, till the firſt term of payment, *Du.* 29th *June*, 1624, *Smith.*—21ſt *Dec.* 1626, *executors of Brown.*—26th *Feb.* 1629, *Douglas.*—20th *March*, 1633, *Simſon.*—*H.* 348.—*Fa.* II. 14.

Thus ſtood matters by the antient Law, before the 1641. At that memorable period, a high ſenſe of the natural equality of men began to prevail; diſtinctions, which had been much reſpected before, were brought into contempt; and that blind veneration, which had been paid to chieftains and to families, could not miſs to be ſomething affected by the levelling ſpirit of the times. People began to think, that ſomething more was due to the younger branches of families, than the law had hitherto allowed them. Thus, the acts 1641, *c.* 57. and 1661, *c.* 32. were enacted. The conſequence is, that all perſonal bonds, which contain not either clauſes excluding executors from ſucceeding to them, or clauſes of ſeiſin, are moveable as to heir and executor, perpetually and in every inſtant, from their date, as well after as before the firſt term of payment; and it is ſo, whether they are made expreſsly in favor of heirs, executors, and aſſigns, or of heirs and aſſigns, or of heirs alone, or of aſſigns alone. The reaſon is, that they are, *ſuâ naturâ*, moveable, and the executor is *heres in mobilibus;* he is the perſon, to whom they deſcend. Therefore, the word *heirs* is deſcriptive, not of heirs ſtrictly ſo called, but of executors, in caſe the thing provided to heirs, is *ſuâ naturâ* moveable; for it is deſcriptive of thoſe perſons, to whom that thing by its own nature and by the ordinary courſe of ſucceſſion deſcends, that is, of executors. Of courſe, ſuch bonds muſt be moveable, unleſs executors are expreſsly excluded from them.

Indeed, if it is expreſsly provided, that they ſhall not go to executors, they are heritable from their date, as well before as after the term of payment. The reaſon is, that the creditor, who has alone the power of diſpoſing of them, has, by excluding his executors by an expreſs *proviſo* contained in the deeds themſelves, actually diſpoſed of them, as much as if he had made a conveyance of

them in favor of his heir, *Fo.* 5th *Nov.* 1687, *Muir.*—20th *Dec.* 1692, *Crawford.*

'Tis the ſame, in caſe they contain clauſes of infeftment: For they are heritable from their date, as well before as after the term of payment, provided the obligation to grant ſeiſin is pure or ſimple, that is, provided he, to whom ſeiſin is to be given, is entitled inſtantly to get it. For, in this caſe, the creditor ſhews his intention inſtantly to have his money *heritably* ſecured, that is, ſecured in ſuch manner, as *muſt* make it go to his heir, *N.* 73.—*Da.* 63.—*n.* 106. 'Tis otherwiſe, in caſe the obligation to grant ſeiſin is either conditional, or *ex die*, that is, in caſe the performance of it is ſuſpended, either till the exiſtence of a certain event, or till the arrival of a certain day. For they continue to be moveable perpetually and in every inſtant, before that event happens, or that day comes, and begin to be heritable only after the exiſtence of the one or the arrival of the other. The reaſon is plain; it is the ſame with that, for which, it has been ſaid, that bonds, bearing ſtipulations of intereſt, were, even by the antient Law, moveable before the term of payment. The creditor, by cauſing the performance of the obligation to grant ſeiſin to be ſuſpended, ſhews, he has no mind to have his money heritably ſecured *till* that obligation becomes pure, *Ho. executor.* 7th *Feb.* 1615, *Naſmyth.*—*K.* 10.

III. All the moveable *corpora*, which belong to one at the time of his death, go to his executors. Beſides, rights to *corpora mobilia* of all ſorts are moveable. Therefore, all arrears, and all rights to them muſt be moveable. For, arrears, or, as they are uſually called in the Scotch Law, *bygones*, are *fructus civiles percepti*, 'moveables, which become due at ſucceſſive terms, and, tho' they may 'be already demanded, as the time, at which *Law* makes them demandable, is 'paſt, remain, notwithſtanding, unpaid.' Therefore, rights to them are, in all caſes, rights to moveables; and they are already, as it were, the property of him, by whom they are demandable: for he is entitled inſtantly to exact them, and it is optional in him to delay the exaction of them. They are, therefore held by Law to be already in his poſſeſſion.

Hence arrears of all duties due to ſuperiors, whether they be conſtant or caſual, for inſtance, 1) Of blanch duties, *Du.* 16th *Feb.* 1627, Lord *Sempil*; 2) Of feu-duties, *St.* 28th *Jan.* 1671, *Keir*—11th *July* 1673, *Faa.*—*Di.* 342—24th *June* 1755, *Agnew* of *Cheuchan* *, 3) Of profits ariſing from *caſualties* of ſuperiority, *Du.* 18th *Feb.* 1624, L. *Culter.*—*St.* 28th *Jan.* 1671, *Keir*, are moveable.

For the ſame reaſon arrears of rent due, either 4) For land, 5) For houſes, 6) For Mills, 7) For fiſhings, 8) For ſhips, 9) For the uſe of animals, or for any other thing, are moveable.

The ſame thing is true of the arrears, 10) Of tithes, 11) Of ſtipends, 12) Of ſalaries, 13) Of penſions, 14) Of annual-rents out of land, 15) Of the intereſt of money, *F.* 26th *Jan.* 1711, Lord *Elibank*—*C. F.* 181—and of all rents out of immoveables.

A thing is held to become an arrear, as ſoon as the legal term, at which the creditor acquires *right* to it, is paſt.

Term is a derivative from the Latin *terminus*: and it ſignifies properly a boundary, limit, or end. Therefore, when applied to time, it may be defined 'a point 'which is the end of a certain period of time;' and the term is ſaid to be paſt, as ſoon as that period is fully paſt, or time has arrived at that point.

Some terms are fixed by Law; others are fixed by the agreement of parties. The firſt are called *legal;* and the ſecond conventional terms. The legal are 'thoſe at which Law makes moveables become, in certain caſes, ſucceſſive-'ly due and demandable;' The conventional are 'thoſe, at which parties agree, 'that they ſhall be due and demandable.'

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* It is ſurpriſing, that this caſe has been omitted to be reported by the committee of the faculty of Advocates. It was determined after hearing council argue it.

In all caſes in which the Law has itſelf fixed terms for making things demandable, in order to determine, whether they are already become arrears or not, regard muſt be had to the *legal* terms alone. None ought to be had to the conventional ones; *except* they are *anticipated* by the agreement of parties: for the legal ones determine, whether the thing is already due or not.

But in all caſes in which the Law has not itſelf fixed legal terms, it muſt be determined from the conventional ones, whether a thing is become an arrear or not.

From hence it follows, 1) That the profits of heritage become moveable, and go to executors as ſoon as the legal term, at which they become due, is paſt, in all caſes, in which terms are fixed by Law; no matter, tho the conventional ones ſhould not be paſt.

The Law has fixed terms, at which duties due to ſuperiors, rent of land, and that of mills become due. Theſe are, at preſent, the 26th day of *May*, and the 22d day of *November*: they were fixed to thoſe times; becauſe the earth was, moſt of it, laboured and ſown towards the middle of May. So one half year's rent was due by the tenant for being allowed to poſſeſs the land till that time, and to labour it. The fruits were generally gathered in before November; ſo the tenant was then in poſſeſſion of funds, out of which to pay his rent.

All thoſe duties, therefore, or rents, which become due on the 26th of May, are moveable, as ſoon as that day is come, and go to the executors of the ſuperior or landlord; and all thoſe which become due on the 22d of November, are moveable, as ſoon as it comes. For the rents due at each reſpective term are heritable, *before* it is come, *Go.* 23d *July* 1668, *Carnegie—D. term legal, Feb.* 1727, Sir *Wil. Johnſtone—Du.* 21ſt *Feb.* 1635, *Weſt-niſbet—St.* 20th *July*, and 8th *Dec.* 1671, *Guthrie.*

It has alſo fixed terms, at which tithes become due; to wit, the 26th of May, and the 10th of October. The reaſon is, that the *ipſa corpora* were due, for corn was titheable, as ſoon as it was reaped. But it uſed to be all both ſown and reaped about theſe times. So tithes become due and moveable, as ſoon as each of theſe reſpective terms is paſt.

Houſes are inhabited continually, and may be ſaid to yield fruits from day to day. Therefore, the rent of them ſeems to become due *de die in diem.* So every day is a term; and every day, a proportionable part of the rent becomes moveable.

The caſe is the ſame with the intereſt of money; for it may be uſed every day. Of courſe, every day is a term, at which intereſt becomes due on perſonal bonds. 'Tis otherwiſe with heritable ones, on which ſeiſin has followed. The intereſt is, in this caſe, as it were, a rent out of Land. Therefore it becomes due at the legal terms, provided it is payable at them, *n.* 81.

I ſaid, the *legal* terms are alone to be regarded, except they be *anticipated* by the agreement of parties; for they may be altered and may be anticipated in this *manner:* and, in caſe they are ſo, 'tis the anticipated ones, which muſt be regarded; becauſe the things which become due at them, are then demandable: for the right of him, to whom they are due, is abſolutely complete, *n.* 131. They may alſo be *poſtponed;* but the intereſt of the heir and of the executor will not thereby be affected. For the arrears will become due at each ſucceſſive legal term, without regard to the conventional one. The reaſon of the difference is, that the Law gives the executor a right, as ſoon as the legal term is come. Of this right the proprietor does not, by poſtponing the term, mean to deprive him; becauſe it is poſtponed in favor of the perſon, by whom the things are due; it is not poſtponed, in order to deprive the executor of his right. But it is otherwiſe in caſe the term is anticipated; becauſe the anticipation makes the right complete, before the legal term comes; for *dies* not only *cedit* but *venit*, as ſoon as the anticipated one comes. So the arrears are not only due but demandable at that time. Of courſe, they are, as

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it were, already in the poſſeſſion of him, to whom they are due; and muſt, therefore, be moveable*.

IV. The

* The three legal terms, in antient times, were Whitſunday, the 29th day of September, and the 11th of November. They were fixed to theſe days, becauſe they were feaſt days, and were religiouſly obſerved by the people. The 29th of September was St. MICHAEL's day or Michaelmas, the 11th of November was St. MARTIN's day or Martinmas, and Whitſunday was a moveable feaſt, the anniverſary of that day, on which the holy Spirit deſcended on the Apoſtles. Of courſe, they were more remarkable, and could not eaſily be miſtaken. But inconveniencies aroſe from the mobility of the term of Whitſunday. Therefore, upon the abolition of Epiſcopacy in Scotland, the 15th day of May was ſubſtituted into the place of it, and made the term, which ſhould to all intents and purpoſes anſwer to it, 1690. *c.* 39—1693. *c.* 24.

Thus, the three legal terms were fixed to the 15th of May, the 29th of September, and the 11th of November, and continued to happen upon thoſe nominal days every year till the year 1752; at which time a remarkable and a very proper alteration was made in the method of computing time by the introduction of the New Style into the dominions of the Crown of Great Britain.

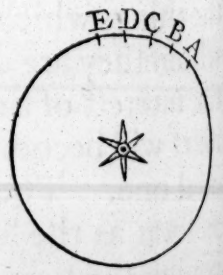
In order to underſtand the alteration which was made, the reaſon of making it, and the effects produced by it, it may not be improper to go into the detail, and to deduce it from thoſe remote principles, which were the cauſes of it. I do it the rather, becauſe, Lawyers being ſeldom either mathematicians or aſtronomers, opinions, which ſeem to be erroneous, have prevailed concerning it.

The year is 'that period of time, which the earth takes to go round the ſun' It is divided into the periodical and the tropical: the periodical year is 'that period of time, which the earth takes to go from any point of *abſolute* 'ſpace, and to return to the ſame point again;' the tropical year is 'that time which the earth takes to go from '*one point of the ecliptic* and to return to *it* again.' The latter is ſhorter than the former; becauſe the conical motion of the axis of the earth makes the equinoctial points, and every other point of the ecliptic, move backwards, *in antecedentia*, in a direction contrary to the motion of the earth. Of courſe, the earth muſt every year arrive at the equinoctial points ſooner than it would have done, in caſe they had remained at reſt; for, moving in a direction contrary to that, in which it moves, they meet it. Two perſons meet ſooner, in caſe they advance towards one another, than they can do, in caſe one of them ſtands ſtill and allows the other to walk towards him. Hence ariſes the preceſſion of the Equinoxes, by which the equinoctial days happen ſooner than they would do, in caſe the axis of the earth had no conical motion, and the tropical year comes to be ſhorter than the periodical one. For the tropical year is that time which paſſes between one vernal equinox and another, or one autumnal equinox and another.

The tropical year is that, by which time is computed in almoſt all the nations of Europe; becauſe the *return* of the ſeaſons depends on that of the earth to the points of the ecliptic. The antient Ægyptians, who ſeem firſt to have by neceſſity been obliged to apply themſelves both to geometry and to aſtronomy, held it to conſiſt of 365 days and 6 hours, In order therefore, to make the year correſpond with the revolution of the earth, they made the ordinary civil year conſiſt of 365 days: but every civil year was thereby ſix hours ſhorter than the time of the tropical revolution of the earth. Six hours in four years make a full day. Therefore, they took into their computation theſe four times 6 hours, and exhauſted them by adding a full day to every fourth year, or making every fourth year conſiſt of 366 days.

Julius Cæſar, high-Pontiff of the Romans, introduced the Ægyptian computation into the Roman Empire. Thus it prevailed in Europe.

But the obſervations made by the antients were not accurate; the tropical year conſiſts not of ſo much as 365 days and 6 hours; by the moſt accurate obſervations it is found to conſiſt of no more than 365 days, 5 hours, 48 minutes, and 57 ſeconds. Thus, every Julian year was too long by about 11 minutes. For the tropical year was ended, the earth had returned to the ſame point of the ecliptic, and it had begun a new revolution about 11 minutes before the Julian year was ended. The conſequence was, that the times and the ſeaſons were every year anticipated 11 minutes; that is, they happened every year 11 minutes ſooner than they had done the former year. This anticipation, which was hardly ſenſible in one century, became in a number of years very remarkable; for it was continual. In the days of Julius Cæſar, the vernal equinox happened about the 25th of March; in our days we have ſeen it happen on the 11th of March; and in proceſs of time, it would have gone through all the days of the year: In ſo much that the vernal equinox would have happened in September, the autumnal equinox in March, the longeſt day in December, and the ſhorteſt one in June. Thus the ſeaſons would have changed their times. The ſpring would have happened in Auguſt, September, and October; the ſummer in November, December, and January; the Autumn in February, March and April; and the winter in May June and July. All this will be plain by applying it to the uſual method of computing time. Suppoſe the firſt civil year to begin at 12 o'clock of the night, between the laſt of December and firſt of January; and the earth to begin its firſt revolution at the ſame inſtant of time from the point A of the ecliptic. The *civil* year does not end till full 365 days and 6 hours are paſſed from that inſtant, and the tropical year does not end till ſuch time as the earth compleats its firſt tropical revolution *or* returns again to the point A of the ecliptic; but the earth performs its full tropical revolution, and returns to the point A in 365 days, 5 hours, 48 minutes, and 57 ſeconds, that is about 11 minutes before the end of the civil year. Theſe eleven minutes ſhe employs in moving onwards in her orbit. Thus, ſhe is arrived at the point B of the eliptic, before the civil year ends. The ſecond *civil* year, therefore, begins at that individual inſtant of time, at which the earth arrives at the point B, and begins to proceed from it. The earth returns to that point B in 365 days 5 hours, 48 minutes and 57 ſeconds. But the civil year is not ended at that inſtant, at which ſhe arrives there; for it laſts about 11 minutes longer. During theſe 11 minutes the earth is proceeding in her orb. So that ſhe has arrived at the point C, before the 2d civil year ends.



From

IV. The principles, which have been explained, are ſo true, that the price even of Land, and of every heritage is moveable. 'Tis true, a price is in all caſes, ſubſtituted into the place of that, for which it is given; and it may, therefore, be ſaid, that it muſt be heritable, in caſe the thing, which is purchaſed with it,

From the inſtant at which ſhe arrives at this point C, the third civil year begins; and it does not end till the earth has returned to the point C, and, having paſſed it, has arrived at D; for the ſame reaſon, the fourth civil year ends not till the earth has paſſed D, and has arrived at E. Thus, the earth, in the ſpace of 4 years, has, beſides performing four tropical revolutions, paſſed over the arc A E; and the fifth *civil* year, inſtead of beginning at the inſtant, at which the earth is at the point A, and begins her fifth tropical revolution, for *every* tropical year begins as ſoon as ſhe arrives at that point A, begins not till ſhe is arrived at the point E, that is, no leſs than 44 minutes later than the firſt civil year began. For inſtance, call the year 1701 the firſt civil year, and ſuppoſe it to have begun at 12 o'clock of the night, which happened between the laſt of December 1700 and the firſt of January 1701. The fifth civil year beginning at the ſame time of the night between the laſt of December 1704 and the firſt of January 1705, begins no leſs than 44 minutes after the earth has begun her fifth revolution; for the fifth tropical revolution begins as ſoon as the earth arrives at the point A, that is, 16 minutes after 11 o'clock of the night of the laſt of December. The ninth tropical revolution would begin 8 times 11 minutes, or an hour and 28 minutes before the commencement of the ninth civil year; the 101 tropical revolution would begin 1100 minutes, or 18 hours and 20 minutes ſooner than the 101 civil year; the 1001 tropical revolution would begin 11000 minutes, or 7 days 15 hours, and 20 minutes, before the thouſand and firſt civil year, or 40 minutes paſt 4 of the morning of the 24th of December; and in a period of about 47,814 years, the beginning of the tropical revolution of the earth will have gone thro' every hour, every day, and every month of the year: for the number of tropical revolutions made by the earth in that period, will be one more than that of the civil years. So that the earth will have got a full revolution before the civil year.

From hence it is plain, that the earth arrived every year at every point of the ecliptic 11 minutes ſooner than, according to the method of computing time eſtabliſhed by Law, ſhe had done the preceding year. Thus, ſhe enters the equator, or arrives at the equinoctial points every year 11 minutes before the time, at which ſhe had entered it the former year; and every year ſhe arrives at the ſolſtitial points, or at her greateſt diſtance from the equator, 11 minutes before the inſtant, in which ſhe had arrived at them the former year. Therefore the equinoxes and the Solſtices happen every year 11 minutes ſooner than they happened the former year: for they depend on the motion and the ſituation of the earth. But the civil year is a fixed and invariable length of time. Therefore, the ſeaſons muſt be anticipated every year; for they depend on the equinoxes and the ſolſtices. The equinoctial day is that one, on which the earth enters the equator; the Solſtitial is that day on which ſhe is at her greateſt diſtance from it. For inſtance, if the point E is the equinoctial point, the equinox happens, every year, the day on which the earth arrives at that point. But it has been ſaid, ſhe arrives at the point E every year 11 minutes ſooner than ſhe did the former year, that is, 11 minutes before the inſtant, in which according to the civil method of computing time, ſhe arrived at it the former year. Of courſe, the equinoxes happen every year ſooner than they did the former one. So the ſeaſons are continually changing their times, and going backwards from December to January.

This continual alteration was inconvenient. Therefore, Pope GREGORY XIII. in the year 1582, introduced a new method of computing time, which, after having been received into the Popiſh Countries of Europe, was lately eſtabliſhed in the Britiſh dominions, by 24th G. II. entitled, 'an act for regulating the commencement of 'the year; and for correcting the Kalendar now in uſe.' By it, it was enacted 1) That every hundredth year, for inſtance, the year 1800, 1900, 2100, 2200, 2300, 2500, 2600, *&c.* ſhould not, as according to the Julian computation it would, be a leap year, conſiſting of 366 days, but conſiſt of no more than 365 days; but 2) That every fourth hundred year, for inſtance, the year 2000, 2400, 2800, *&c.* ſhould be a leap year, and ſhould conſiſt of 366 days. By this means the civil computation is made to correſpond almoſt exactly with the courſe of the earth; as may be eaſily proved by computation. For a year, it has been ſaid, conſiſts of 365 days, 5 hours, 48 minutes, and 57 ſeconds, or thirty one million five hundred and fifty-ſix thouſand nine hundred and thirty-ſeven (31,556,937) ſeconds. Therefore, 400 years conſiſt of twelve thouſand ſix hundred and twenty-two million ſeven hundred ſeventy-four thouſand eight hundred ſeconds, (12,622,774,800). Now, 400 Gregorian years conſiſt of 303 common, and 97 leap years, or of (146,097) one hundred and forty-ſix thouſand and ninety-ſeven days, or of (12,622,780,800) twelve thouſand ſix hundred and twenty-two millions, ſeven hundred and eighty thouſand eight hundred, ſeconds. So that the difference between the Gregorian and the true computation is almoſt inſenſible; for in 400 years it amounts to no more than 6000 ſeconds, or one hour and 40 minutes. Therefore, the civil year will keep pace with the courſe of the ſun; for the 401 revolution of the earth will begin no more than one hour and 40 minutes before the 401 civil year. By conſequence it will take a very long period to produce any ſenſible alteration in the ſeaſons.

Beſides intending to prevent the revolution of the ſeaſons, his holineſs intended to bring back the religious days, obſerved in Popiſh countries, to thoſe, which were reckoned their proper ones, that is, to thoſe ſame days, which were obſerved about the time of holding the firſt general council at Nice. For this purpoſe, he ordered the natural day after the 10th of March to be called not the 11th but the 21ſt of March, and the days to be reckoned numerically forwards from it. By this means a different ſtyle was introduced into Europe. For thoſe countries, which adopted the Gregorian or *new* ſtyle, as it was called, called the 21ſt of March that very day, which was called the 11th of March by thoſe, who adhered to the old ſtyle. It was inconvenient for commercial nations to have different names for the very ſame day; the Gregorian method of computing was the true one; and the old method was erroneous, for it made the ſeaſons change their times. Therefore, the Britiſh legiſlature enacted, 1) That the natural day, next immediately following the ſecond day of September 1752, ſhould be called the 14th day of that month; and 2) That all the natural days of that month following that 14th of September 1752, ſhould be reſpectively called, reckoned and numbered forwards in numerical order, according to the order uſed in the Kalendar before the alteration; the year conſiſting of the ſame nominal months, and the months of the ſame number of days of which they conſiſted before the alteration. All the alteration being,

is heritable. But it is otherwiſe; for every thing has a nature proper to itſelf, and muſt be either heritable or moveable according to it, unleſs he, who has the power of diſpoſing of it, by a proper deed, makes it otherwiſe. Money is a moveable *ſuâ naturâ*. Therefore, the right, which one has to it, muſt be ſo alſo;

being, that the month of September, which uſed to conſiſt of 30 days, ſhould in 1752 conſiſt of no more than 19.

The conſequence was, that all the days of the year ſince the ſecond of September 1752 have changed their names. That day, which would have been called the 1ſt of January, in caſe the ſtyle had not been altered, is now called the 12th of January; that, which would have been called the 1ſt of February, is now called the 12th; and every day has a different name from that which it had. Of courſe, the day, which was called the 15th of May, is now called the 26th of May; that, which was called the 29th of September, is now called the 10th of October; and that, which was called the 11th of November, is now called the 22d of November. So that the day, which is now called the 26th of May, is the *real anniverſary* of that, which was called the 15th of May; the 10th of October is the *real anniverſary* of that day, which was called the 29th of September; and the 22d of November is the *real anniverſary* of the old 11th of November.

Of courſe, the three legal terms are now the 26th of May, the 10th of October, and the 22d of November; that is, the ſame *real* days, which would have been called the 15th of May, the 29th of September, and the 11th of November, in caſe the ſtyle uſed in Britain had not been altered. I ſay, the ſame *real* days; for terms, as it has been ſaid, are *the ends of certain lengths of time*; and they are not ſaid to be paſſed, till theſe lengths of time are *actually* paſſed. Therefore, the legiſlature could not well mean to make the terms fall on the ſame *nominal* days, becauſe it would thereby have made ſtrong encroachments on the rights of private men. It would have made that, which was intended not to be either due or demandable, till *a full year was actually paſſed*, both due and demandable before the end of it; for that, which would not have become due on a *certain* day, in caſe the ſtyle had not been altered, would have, by the alteration of the ſtyle, become due 11 days before it. Thus, people would have loſt rights, which they ought in juſtice to have had; and have acquired rights, which they ought not in juſtice to have acquired. For the Law intended the rights both to be loſt and to be acquired ſucceſſively, only after a *full* year was paſſed, that is, on the *real anniverſary* of the term day. But they would have been both loſt and acquired before the aniverſary returned, in caſe they had been loſt and acquired 11 days before a full year was paſſed; and they would have been loſt and acquired 11 days before the year was paſſed, in caſe they had continued, after the alteration of the ſtyle, to be loſt and acquired on the ſame *nominal* days, on which they uſed to be loſt and acquired before it. Of courſe, not the ſame *nominal*, but the ſame *real* days, which were the terms formerly, are the terms now.

This would have been the caſe, tho the legiſlature had been ſilent upon the matter; for it would have been abſurd to have adjudged that a year was ended before its end. But the legiſlature hath not been ſilent upon it; it hath determined it, agreeably to the dictates of juſtice.

But, it ſeems, it has been maintained, that the terms fall now on the ſame *nominal* days, on which they fell before the introduction of the new ſtyle; an opinion, which, to a mathematician, muſt appear to be very extraordinary. The error can hardly proceed from the words, uſed by the legiſlature: For they are plain; and ſeem not to be capable of being explained to ſupport it. It ariſes from a miſapprehenſion of the uſage of Scotland. Terms are no more than certain fixed *numerical* days of certain months. 'Tis true, ſome of theſe numerical days, to which the terms were fixed, happened to be feaſts obſerved by the church. But they ought not to be rated by thoſe feaſt days; they ought to be rated by the numerical days. This is plain from the term of Whitſunday; for Whitſunday is a *moveable* feaſt; it happens ſometimes on one day, ſometimes on another: But the *term* was fixed to the 15th of May, and, becauſe it was ſubſtituted into the place of Whitſunday, it happened erroneouſly, by a presbyterian nation to be called Whitſunday; it did not, however, become Whitſunday; it was not obſerved by the church of England, and would not have been obſerved in Scotland, in caſe Epiſcopacy had been reſtored. Therefore, the term, which uſed erroneouſly to be called by this name, ought to be held to be no more than a certain numerical day of the month of May.

The ſame thing may be ſaid of all the other terms; for they are no more than numerical days of certain months. 'Tis true, ſome of them happen to be fixed days, on which certain immoveable feaſts are appointed, by the church of England, to be religiouſly obſerved. But it does not from thence follow, that the terms ought to be reckoned by theſe feaſts: For terms are intended ſolely for marking the lapſe of time. Therefore, they ought not to accompany the feaſts, they ought to fall on thoſe *real* days, to which they are fixed; no matter what name they get. For if they fall not on the real days, they cannot anſwer the end, for which they are intended, that is, for marking the paſſing of a certain period of time.

I ſuſpect, ſome people have been miſled to fix the terms to the nominal days, becauſe they apprehended, that there would be two Whitſundays, two Michaelmaſſes, two Martinmaſſes, and two of every other religious days and that there would be great confuſion, in caſe the terms were fixed to the ſame real days, on which they happened before. But they are much miſtaken; for the Church of Scotland knows no religious days but Sunday. Therefore, Whitſunday, Michaelmas, *&c.* are, in truth, in Scotland, no more than *names* of certain days of certain months. 'Tis true, they are religious days to thoſe of the church of England. But they muſt be *religiouſly* obſerved on thoſe ſame *nominal* days, to which they were fixed before the alteration of the ſtyle: for one of the intentions of the eſtabliſhment of the Gregorian computation was to reſtore the obſervance of the religious days, to the ſame days to which they were fixed about the time of holding the council at Nice. Therefore, the ſame *nominal* days, and they alone, which were religious before the alteration of the ſtyle, continue to be held to be religious ſtill. Therefore, Whitſunday is ſtill a moveable feaſt as it was; Lammas is ſtill the 2d of Auguſt; the day, which is now called the 29th of September, is ſtill St. MICHAEL's day or Michaelmas; that, which is called the 11th of November, is ſtill St. MARTIN's day or Martinmas; the day, which is now called the 25th of December, is Chriſtmas; and the day, which is called the 25th of March, is Lady Day. So we have not two Whitſundays, two Martinmaſſes, or two Michaelmaſſes; for they fall on the aforeſaid *nominal* days; and on no others. The 26th of May is not, it ought not to be called Whitſunday. The 10th of October is not Michaelmas; and the 22d of November is not Martinmas. They are no more than certain nominal days, to which the terms are fixed.

ſo; and it muſt go, according to its own nature, to the executors of the ſeller, unleſs they are, by a proper deed, excluded from it. Beſides, the ſeller, by exchanging his heritage for moveables, indicates his intention to leave it to his executors, *Du.* 2d *Feb.* 1628, *Hume.*— *St.* 7th *July* 1680, *Waugh.*—*H.* 456.—*Fo.* 22d *Dec.* 1704, *Chieſly.* — *D. heritable and moveable*, 11th *Nov.* 1737, *Smith.*

V. Heritable is better than perſonal ſecurity. Therefore, an heritable right is not rendered moveable by the addition of moveable ſecurity; for the heir can alone claim the benefit of ſecurity, which is heritable. It, being *ex hypotheſi* prior to the moveable, and in its own nature preferable to it, muſt carry the moveable along with it. *A. obligation*, 12th *March* 1628, *Craw.*—*G.* 102.—*N.* 43.

For the ſame reaſon, heritable rights are not rendered moveable by diligence done on them. They continue to be deſcendible to heirs, as long as they change not their nature, and they ceaſe not to be heritable.

Thus, perſonal bonds, from inheriting which executors are expreſsly excluded, are not rendered moveable either by the commencement of an action in order to recover payment, by the recovery of a decree, *St.* 13th *July* 1676, *Chriſtie.*—*H.* 442.—*D.* I. 374. 3d *July* 1735, *Munro*, by the execution of a charge of horning, *N.* 43 *.—*F.* 24th *July* 1705, *Gray*, or by the execution of a caption. The reaſon is, that the bond is not thereby cancelled. But as long as it remains uncancelled, that is, as long as the debt remains unpaid, and is not diſcharged, it muſt neceſſarily be heritable; becauſe executors are expreſsly excluded from it.

A bond which is heritable, either becauſe it contains a proviſo of ſeiſin, or becauſe a decree of adjudication has been recovered on it, is not now rendered moveable, either by requiſition of payment, by recovery of a decree for it, or by giving a charge on it. The reaſon is, that perſonal diligence does not now looſe heritable ſecurity; for heritable bonds are now drawn after a manner different from that, in which they uſed to be drawn in antient times †. They contain two obligations, a perſonal one to pay the debt, and another to grant ſeiſin, which are entirely different from one another; they are as much diſtinct, as if they were not contained in the ſame deed. Beſides, an expreſs proviſo is uſually made, that the heritable ſecurity ſhall not be looſed by perſonal diligence. Therefore, diligence, done in order to recover performance of one of them, cannot affect the other: That is, the heritable ſecurity ſubſiſts, notwithſtanding perſonal diligence done in order to recover payment, *D.* I. 374. 12th *Nov.* 1728, *Reids.*—*Fa.* II. 234 ‡.

VI. It remains only to be remarked, that money, conſigned by one in order to redeem heritage, becomes moveable, as ſoon as either the redeemable right is renounced, or decree is recovered declaring the heritage to be redeemed; becauſe it then ceaſes to be heritably ſecured. For the heritage ceaſes to belong to him, who had the redeemable right to it; and the money becomes his. So it is rendered moveable, and goes to the executors of him, from whom the heritage is redeemed. But it continues to be heritable, till either the right is voluntarily renounced, or decree is recovered declaring it to be redeemed; becauſe till that time the heritable ſecurity remains entire, *Du.* 21ſt *June* 1626, *Murray.* — 16th *Feb.* 1642, *Veitch.*——*St.* 21ſt *Jan.* 1673, *Nicol.*——8th *Feb.* 1681, *Dunbar.*

§ 156. After having ſpecified thoſe rights, it remains to explain the obligations, which are either heritable or moveable.

It

* See *N.* 56.

† See Mr. Erskine's inſtitutions, book 2. title 2. § 3.

‡ It was otherwiſe in antient times, *Du.* 23d *Feb.* 1628, *Naſmyth.*——10th *March* 1630, *Lindſay.*——24th *Feb.* 1624. *Donaldſon.*——*Fo.* 27th *Feb.* 1712, *Scot.*——*St.* 25th *June* 1672, *executors of Seton.*——24th *Jan.* 1666, *Montgomery.*

It muſt be remembered, that obligations are, in this place, oppoſed to rights, and are underſtood in the ſenſe, annexed to them in the definition formerly given of them, (§ 149.). By heritable obligations then are meant 'thoſe, 'which it is incumbent on ſuch, as are ſtrictly called *heirs*, to fulfil;' by moveable ones I mean 'thoſe, which it is incumbent on executors to fulfil.'

§ 157. It is reaſonable, that profit and loſs be, in all caſes, reciprocal; he, who reaps the one, ought to bear the other. '*Secundum naturam eſt, commoda* '*cujuſque rei eum ſequi, quem ſequuntur incommoda,*' *l.* 10. *ff. d. r. j.* A reciprocity, therefore, ought to be maintained between the profits made and the loſſes borne both by the heir and by the executor. In order to maintain it, every thing, which would be held to make a part of one's heritable eſtate, and would go to his heir, in caſe he had a right to get it done to him; muſt be held to diminiſh it, and to be a burden on his heir, when he is obliged to do it to another; and every thing, which would be held to be a part of one's *moveable* eſtate, and would go to his executors, in caſe he had a right to it, muſt be held to diminiſh it, and to be a burden upon them, when he is *obliged* to do the ſame thing. *Ex qua perſona quis lucrum capit, ejus factum præſtare debet, l.* 149. *ff. d. r. j.*

It is eaſy to apply this principle in determining concerning heritable and moveable obligations.

§ 158. For it may be affirmed in general, that an obligation conſtituted without writ, is heritable in all caſes, in which the heir would have had *right* to that very thing, which it imports to be done, in caſe a *right* had been conſtituted to it without writ. Thus, if one could be ſuppoſed to be brought without writ under an obligation to ſell land, that obligation would be heritable, that is, it would be incumbent on the *heir* of the ſeller to fulfil it by ſelling the land; becauſe, in caſe he had bought it, or had without writ *acquired* a right to get it ſold him, his heir would alone have been the perſon who would have had the benefit of the acquiſition. For the ſame reaſon, an obligation is moveable in all caſes, in which executors would have had *right* to that very thing which is *obliged* to be done, in caſe a *right* had been conſtituted to it without writ. Thus, an obligation, conſtituted without writ, to pay money, is moveable; and it is incumbent on the executors of him, who was *originally* obliged, to pay it; becauſe, in caſe one had acquired a *right* to get money paid to him, that right would have been moveable; and the executors of the original creditor would alone have been entitled to demand payment of it.

It is eaſy to apply theſe principles to thoſe caſes, in which an obligation is conſtituted by writ. For it may be affirmed in general, that an obligation, conſtituted by writ, is heritable in all caſes, in which the heir would have been the perſon, who would have had *Right* to that, which the obligation imports to be done, in caſe the terms of it had been converted, and thoſe individuals, who are expreſsly obliged, had been made to have *right* to that very thing, which they are now obliged to do. Thus, in caſe one binds himſelf by a written obligation to ſell his landed eſtate, the obligation is heritable, and it is incumbent on his heir to fulfil it by ſelling the land; becauſe, in caſe he had, by a written deed, acquired from another a *right* to get land ſold to him, the benefit of that right would have accrued to his heir; and he would have alone been entitled to get it ſold to him. In the ſame manner, the *heir* of one, who has obliged himſelf to grant ſeiſin of an annualrent out of his landed eſtate, is alone *obliged* to grant it; becauſe, in caſe he had acquired *right* to get it granted to himſelf, the benefit of it would have accrued to his heir.

Again, an obligation, conſtituted by writ, is moveable in all caſes, in which executors would have had *right* to that, which the obligation imports to be done, in caſe the terms of it had been converted, and thoſe individuals, who are expreſsly obliged, had been made to have *right* to that very thing, which is now obliged to be done. Thus, in caſe one obliges himſelf, his heirs, executors and

and ſucceſſors, to pay a ſum of money; the obligation is moveable, and it is incumbent on his executors to pay the money; becauſe they would have had right to it, in caſe he had acquired 'a *right* to get money paid to him, his heirs, 'executors and ſucceſſors.'

From hence it is plain, that an obligation, which has an heritable right correſponding to it, may, nevertheleſs, be moveable; and one, which has a moveable right correſponding to it, may be heritable. This proceeds from the different natures of that, to which the right is given, and of that, which the obligation imports to be done. Thus, land is heritable; money is moveable. Therefore, the heir of one, who has bought land, has alone *right* to it; but his executors are *obliged* to pay the price of it. Again, the price of land which is ſold, is moveable. Therefore, the executors of him, who ſold it, have alone *right* to it; but his heir is bound to make the deeds and conveyances, which the ſeller would himſelf have been obliged to make, in order to complete the titles of the purchaſer. The *right*, acquired by a bond for money made payable to one and his heirs, excluding his executors, is heritable *quoad creditorem*; that is, it goes to the heir of the original creditor; but the obligation to pay it is moveable, that is, the executors of the debtor are properly obliged to pay it.

Regard, therefore, ought, in all caſes, to be had to the nature of that, which the obligation imports to be done; for it is the nature of it, which determines, whether an obligation is moveable or heritable. And it were eaſy, from the principles, which have been explained, to ſpecify all thoſe obligations, which are heritable, and thoſe, which are moveable. But it s needleſs to go into the detail: for a particular enumeration of thoſe rights, which are heritable, and of thoſe, which are moveable, has been made; and it is eaſy, in *all* caſes, to apply the general rule, which has been laid down, and, by converting the terms of every obligation, to determine, whether it is heritable or moveable.

§ 159. The eſtate of every one is, all of it, liable to be attached by his creditors; and his repreſentatives are, in all caſes, bound to fulfil his obligations. Therefore, one's heir as well as his executor is ſuable, in all caſes, to fulfil his obligations. But ſome obligations can be fulfilled by one's heir alone; others may be fulfilled by his executor as well as by his heir. In all caſes in which they may be fulfilled by either of them, either the one or the other is ſuable for fulfilling them; for all the repreſentatives of every one are bound, if they can, to fulfil his obligations. Therefore, the heir, in caſe he is ſued and is compelled to fulfil a moveable obligation, is entitled to be reimburſed by the executor; and the executor, in caſe he is compelled to fulfil an heritable obligation, is entitled to be reimburſed by the heir.

§ 160. A huſband, we ſhall ſee*, acquires by his marriage, the property of all the moveable eſtate, which either belongs to his wife at her entrance into marriage, or accrues to her during its ſubſiſtence; and he becomes liable to all the moveable debts due by her. But her heritable eſtate continues to be held to belong to herſelf; and he is not ſubjected, even during his marriage, to her heritable debts. 'Tis therefore neceſſary to know the particulars, which are held to be heritable, and thoſe, which are moveable *quoad virum et uxorem*; for we ſhall thereby know preciſely the acquiſitions which a huſband makes by his marriage, as well as the burdens, under which it brings him.

On this matter, one rule may be laid down, to wit, 'that every thing is at pre-'ſent held to be heritable and moveable *quoad virum et uxorem*, which was held to 'be heritable and moveable *quoad* heir and executor before 1661, *c.* 32. or would 'have been held to have been heritable *quoad* them, in caſe that act had never 'been made.' It is needleſs, therefore, to go into the detail: for the alterations, introduced by that Statute, have already been fully explained; and, by attending to them, it muſt be eaſy to determine, whether any thing is heritable or moveable. I ſhall take notice only of ſome parts of the doctrine, which are moſt material.

* See Book IV.

All thoſe *corporeal* things, which are either heritable or moveable *quoad* heir and executor, are ſo alſo *quoad* huſband and wife.

Bonds, granted for money, bearing ſtipulations of intereſt, it has been ſaid, were held, in antient times, before 1661, *c.* 32. to be heritable, *quoad* heir and executor, *after* the firſt term of payment. Therefore, they are, at preſent, heritable *quoad* huſband and wife *after* the firſt term of payment of the intereſt is paſt. *St.* 28th *June* 1665, *Pitcairn*—4th *July* 1676, *Rollo*—*Fo.* 10th *Jan.* 1696, *Oſburn*—12th *Feb.* 1696, *Hay*—11th *Jan.* and 4th *Feb.* 1704, *Gordon*—13th *July* 1708, *Gordon.* And they are declared to be ſo by 1661, *c.* 32.

I ſay, they are heritable after the term of payment is paſt: for they are moveable before it, as they were in antient times. *Du.* 29th *June* 1624, *Smith*—21ſt *Dec.* 1626, *executors of Brown*—26th *Feb.* 1629, *Douglas*—*Fa.* II. 14. And it is the firſt term of payment not of the principal, but of the *intereſt*, which determines, in this caſe, whether they are heritable or moveable. *H.* 171.

Bonds, bearing obligations of granting ſeiſin, are heritable with reſpect to heir and executor, in caſe theſe obligations are *pure ab initio.* (§ 155.). Therefore, they are ſo alſo *quoad* huſband and wife. *St.* 24th *June* 1663, *Eliſabeth*—*H.* 195. But it is otherwiſe, in caſe the obligation to grant ſeiſin is either conditional or *ex die*: for they continue, in that caſe, to be moveable perpetually and in every inſtant, before the obligation is rendered *pure* by the exiſtence of the condition, or arrival of the day, which ſuſpends it, and they become heritable only *after* that time. The reaſon is, they were ſo, in antient times, before 1661, *c.* 32. *quoad* heir and executor.

'Tis thoſe obligations alone, which bear intereſt *ex pacto*, by containing in their boſoms ſtipulations of payment of it, which are heritable. Therefore, deeds, ſuch as bills of exchange, which bear intereſt *ex lege*, without a ſtipulation, are moveable in all caſes; and that, whether they do or do not contain clauſes ſtipulating the payment of intereſt, *K.* 55—*D.* I. 385. 13th *Dec.* 1738, *Gilhagie.* The reaſon is, that they would have been moveable, tho the Statute 1661, *c.* 32. had not been made: for bills are not *feoda pecuniæ*; they are intended for commercial purpoſes alone, and are ſo far from being held to imply *tractum futuri temporis*, that they are regarded as *caſh* in the actual poſſeſſion of him, to whom they are payable. It is no matter, therefore, whether they do or do not contain ſtipulations of intereſt *; becauſe they bear it *ex lege*, without expreſs ſtipulations.

Arrears are in all caſes moveable. Therefore, thoſe which either are or become due during the marriage, are moveable. If they are due to the wife, they accrue to her huſband. *C. June* 1582, *Pennicook*—*St.* 28th *June* 1665, *Pitcairn*—4th *July* 1676, *Rollo*—21ſt *Feb.* 1679, *Cockburn*—*D.* I. 385. 23d *Feb.* 1739, *Dunlop.* If they are due by her, he is liable, during the ſubſiſtence of the marriage, to pay them, *Home, Dec.* 1682, *Sympſon*—*B.* 84—*Fo.* 13th *July* 1708, *Gordon.*

§ 161. In antient times, the whole moveable eſtate of one, who, having been duly charged to obey a lawful order of the King, did, nevertheleſs, diſobey it, and allowed himſelf for his diſobedience to be denounced rebel, was forfeited to the Crown; and, at preſent, confiſcation of moveables is conſequent on denunciations for criminal cauſes, and is, beſides, the puniſhment of ſeveral crimes. In theſe caſes, the *moveable* eſtate of the delinquent is ſaid to *eſcheat* or to fall by *ſingle* or *ſimple eſcheat* to the Crown.

In caſe one, who has been denounced rebel, continues obſtinate in his rebellion, or, as the expreſſion is, remains for year and day *at the horn*, he is held to be civilly dead: for our barbarous anceſtors made it lawful for every one, who could have the cruelty, to put him to death with impunity, 1612, *c.* 3. If he poſſeſſed any thing, which was feudal, the ſuperior of whom he held it, ceaſed to

* I would not wiſh to miſlead people: Bills of exchange, containing *in gremio* ſtipulations of intereſt are, *ipſo jure*, void; for it is inconſiſtent with all the principles of Law to hold them to be good deeds.

to have a vaſſal to ſerve him. The moment, therefore, his vaſſal was held to be civilly dead, he acquired a right to enter upon the poſſeſſion and to enjoy the fruits of the fief held of him, that he might, thus, be enabled to provide a ſervant for himſelf, during the civil death, that is, during the remainder of the natural life of his former one. And the rigor of the feudal ſyſtem extended this penalty to every heritable thing, which the obſtinate rebel was to enjoy, and might have yielded him ſucceſſive and perpetual profits for *life:* for it made every thing of that ſort eſcheat to ſomebody. This was called the *caſualty of liferent-eſcheat.*

Every thing which is accounted either heritable or moveable *quoad* huſband and wife, is alſo held to be ſo *quoad fiſcum.* The rule is general, *D.* I. 253. and ſeems to admit only of one exception. Rights having *tractum futuri temporis,* ſuch as leaſes of land, and rights of liferent-eſcheat are heritable. But they fall under ſimple eſcheat, unleſs they are to laſt during the life of him, who has them; for they cannot fall under his liferent-eſcheat. Therefore, leaſes of land are heritable *quoad fiſcum* in thoſe caſes alone, in which they are granted for the life of the tenant; and they are moveable, when granted for a term of years. By conſequence, a leaſe for life falls under the liferent-eſcheat of the tenant; and one for term of years falls under his ſimple eſcheat, 1617, *c.* 15.

From hence it follows, that a leaſe, granted for the life of the tenant, in caſe it is aſſigned, falls under the ſimple eſcheat of the *aſſignee:* Becauſe his right to it laſts not for his own life, but during that of the original tenant, *Du.* 10th *March,* 1631, *Stewart.*

For the ſame reaſon, it falls under the ſimple eſcheat of the ſuperior, who has acquired right to it by the liferent-eſcheat; becauſe it is not a right, which is to laſt during his own life; its determination depends on that of the original tenant.

From this principle it is plain, that a right of liferent-eſcheat may itſelf happen to fall either under liferent or under ſimple eſcheat. For the eſcheat of the ſuperior, who has acquired right to the liferent eſcheat of his own vaſſal, may be ſuppoſed to fall either before or after it. In caſe it falls before it, his liferent eſcheat falls to his ſuperior, and he is himſelf held to be civilly dead. Therefore, the liferent-eſcheat of the ſub-vaſſal, which *ex hypotheſi* falls after it, is comprehended under his liferent-eſcheat, and goes to that ſuperior, who has acquired right to it; becauſe he is the next mediate ſuperior, to whom it can go: for the immediate ſuperior is ſuppoſed to be dead. In caſe it falls after it, it muſt fall to the crown under his ſimple eſcheat: for he has already acquired a right to the liferent-eſcheat of his own vaſſal; his right to it depends not on his own life, but on that of his vaſſal. Therefore, as ſoon as his ſimple eſcheat falls to the crown, it muſt carry along with it that right, which he had acquired to the liferent-eſcheat of his vaſſal: For it cannot fall under his liferent-eſcheat; as its duration may not laſt as long as his life, *Du.* 26th *Feb.* 1623, *Sibbald.*----8th *March,* 1628, *Douglas.*----24th *July,* 1632, *Rule.*----*Sp. eſcheat, iiſd.*—*A. vaſſal,* 8th *March,* 1628. *Douglas.*

Thus, I have finiſhed the preliminary part of this work, and ſhall proceed, in the next Book, to treat of marriage; that inſtitution, which has been introduced for the regular propagation of mankind.

A SYS-

A

SYSTEM

OF THE

PRINCIPLES of the LAW of *SCOTLAND.*

PART I.

BOOK IV.

TITLE I.

Of the Inſtitution of Marriage.

§ 162. IF animals had been created either all male or all female, only one race would have been admitted to enjoy the pleaſures of life, and to participate of the bounties with which nature is repleniſhed. As ſoon as thoſe, who were originally created, had paid the debt, the matter of which they conſiſted, made them owe to mortality, none would have remained to taſte of thoſe good things, which are capable of affording to animal kinds ſuch high degrees and various ſorts of felicity. But the ALMIGHTY and all-wiſe Creator of the univerſe was bountifully pleaſed to diſtinguiſh every ſpecies by ſex, that ſucceſſive and continual generations might thereby be brought into being, and becoming each in their ſeveral turns *Spectators of this goodly Scene*, might ſhare the Boons of Providence. And effectually to ſecure the perpetual exiſtence and ſucceſſion of living creatures, nature hath not left to their caprice to determine, whether they ſhall or ſhall not continue their kind; but by inſpiring each individual animal, females as well as males, with the moſt violent appetite after the enjoyment of the other ſex, forces, by a conſtant and powerful impulſe, every individual to propagate its ſpecies; and by annexing the moſt exquiſite joy to

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their mutual careſſes, allures them continually, by the charm of pleaſure, to renew their endeavours, and to make frequent and repeated attempts to give life to new beings.

This appetite is not peculiar to any particular ſpecies; it has the moſt extenſive influence, and produces the moſt conſtant effects on the human as well as on other kinds: for the bodies of them all, being material, ſubject them all equally to thoſe deſires, which ariſe from their material frame and conſtitution, and muſt be ſimilar in all animals in ſo far as theſe are the ſame.

Thus the *violence* of natural appetite, impelling mankind to ſeek the gratification of it in the enjoyment of one another, becomes the neceſſary cauſe of the propagation of a new race.

§ 163. The female is uſually brought by conception into a ſickly condition; during her pregnancy, her bulk and her weight continually increaſing, ſhe becomes ſluggiſh and unwieldy; fatigue might endanger the miſcarriage of the fœtus; the time of her delivery is marked by agonizing pains; the babe, which ſhe brings into the world, implores her pity in the moſt affecting language, and calls upon her to devote her attention to the relief of its wants; and inſtinct pointing the way to that natural food, which ſhe carries in her breaſts, makes it her duty to ſuckle her infant with the milk provided for it. Thus, ſhe is rendered by geſtation unable to provide for herſelf; her delivery makes it neceſſary, that ſhe employ much of her time in attending her child; ſhe becomes dependent on others; and ſome body muſt ſupply her manifold wants. But who can be thought to be ſo much bound to do it, as the man who hath contributed to bring her into this agreeable dependence? He ought not, as ſoon as his appetite is gratified, to abandon her in her helpleſs condition. 'Tis his duty to alleviate her uneaſineſs by ſharing it with her, to give her much of his company, to take care of her, to be aſſiſting to her, and to provide things proper for her. Thus, it appears, that, *as ſoon as* a man and a woman ſet about the diſcharge of this moſt important duty of life, they ought to *begin to live together*, and that they ought to *continue to do ſo*, at leaſt *till* the mother is delivered, is reſtored to her former vigour, and has *weaned* her child.

§ 164. But to anſwer the intentions of nature it is not ſufficient, that mere life be given to new and ſucceſſive generations of animals: For moſt of them are born in a helpleſs condition, and are abſolutely incapable of immediately providing for their own ſupport. Unleſs, therefore, proper care of them be taken by others, till they become able to take care of themſelves, they muſt almoſt all periſh as ſoon as they are admitted to ſee the light. To prevent this diſmal effect, nature hath endowed every animal with a love and affection for its offſpring as powerful as that appetite, by which it was at firſt led to bring them into exiſtence; and by proportioning its duration to the neceſſities of every kind, hath made it to laſt with every creature, till its young grow able to do for themſelves.

Hence, the natural affection, which mankind bear to their children, continues during a much longer time, than that during which the brutes continue to have affection for their offspring. For the young of other animals become ſoon able to protect themſelves from danger, and to procure that food which nature yields to them ſpontaneouſly: whereas the children of human kind are born in an indigent and helpleſs ſtate, and continue in a long and neceſſary dependence on the care of others. For this reaſon, tho the brutes ſoon loſe ſight of their offſpring, and ſeem to become entirely forgetful of their mutual relation, 'tis not ſo with human kind: Men, far from ever loſing entirely, continue, during their whole lives, as long as they retain the ſenſe of any thing, to have a moſt warm love of their children; and when their reliſh of every other enjoyment decays, and the taſte of every other thing becomes inſipid to them, they regard their children with an affectionate concern, and grow more and more diſpoſed to think them the joy and comfort of their gray hairs.

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This affection, which human kind bear to their children, is not peculiar to one of the parents; it is common to both ſexes, to the father as well as to the mother: Each of them likes to fondle, to aſſiſt, and to inſtruct their children. Beſides, both of them have contributed to bring them into being; they are, therefore, both bound to provide for them, and ought, by dividing the obligation properly between them, each to bear a part of the burden incumbent upon them. The parents, therefore, cannot, immediately upon the recovery of the mother, or the weaning of the child, live at a diſtance from one another: But, in order, both of them, to have the pleaſure of its preſence, they muſt continue to live together *till it grow able to do for itſelf;* that neither of them may be either exempted from the burden, or deprived of the endearing taſk of tending, careſſing, inſtructing, and providing for it.

§ 165. Living together, continually impelled by the ſame deſires, and frequently invited to ſeek the gratification of them, ſhall they not hearken to the reiterated calls of nature, and exert thoſe powers with which ſhe has endowed them? Doting on the ſame object, anxious for its happineſs, and feeling every inſtant the moſt exquiſite enjoyment in the indulgence of their affection towards it, ſhall they not wiſh to have others like it, who being educated together, and taught from their infancy to have the greateſt fondneſs for one another, may relieve their parents of their anxieties, and may aſſure them, that their children ſhall not, after they are deprived of their affectionate protection, become deſtitute? Thus, the female produces a numerous offſpring, and *by every birth* the time, during which they are bound to cohabit, is *ſomething protracted.*

§ 166. But ſhall they, as ſoon as their generative powers have departed from them, immediately forſake one another? Acquaintance uſually gives riſe to fondneſs, which, when long continued, ſettles into an habitual affection; and perſons, having been long accuſtomed to live together, cannot eaſily think of reſolving to ſee one another no more. Beſides, having accompliſhed an important end of their being, they grow little concerned about the events of life, and are diſqualified for forming new connexions in it. But a ſolitary ſtate is not ſuited either to the frailty or to the paſſions of human kind. Hence, the father and mother are led ſtill to continue to live together, to be aſſiſting to one another, and to do thoſe mutual offices, which they will not find others ſo willing to do them.

Beſides, all their affections center in their offſpring; they are concerned about their preſervation; and they are anxious to lay up for them a proviſion, which may make them independent of the frowns of fortune. Thus, they have but one common intereſt, to wit, that of their children, and are both of them diſpoſed to manage their pecuniary affairs as may be moſt promotive of it. Hence, it appears, that the propagation of their kind gives immediate riſe to the moſt intimate connexion between the father and mother; that introducing new relations to them, it binds them to a multitude of new duties, and uniting their hearts, makes their intereſts the ſame; and that their cohabitation ſhould *laſt for life.*

§ 167. But it is not from the appetites and the neceſſities of man, that the original of marriage, and the duties which it implies, can alone be derived; they may alſo be traced in the moral part of his conſtitution. For every one muſt be conſcious, that his happineſs depends much on the ſatisfaction of thoſe warm affections, which nature hath interwoven into the human heart. 'Tis friendſhip, which gives the higheſt reliſh to life; and without the joy, the anxieties, the ſympathies, and the offices, which the former implies, the latter is altogether dull and inſipid. Hence, every ingenuous heart is fond of having ſome one, on whom to ſet its affections; and we are then moſt happy, when we have lighted on a friend, whom we think worthy of our regard, and who will repay our affection by reciprocal Love. But other connexions are arbitrary, inconſtant, and feeble; neceſſary abſence, interfering intereſts, a thouſand accidents may diſſolve

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the firmeſt ties; they do not fully ſatisfy an *affectionate* creature, or exhauſt all the force of its paſſions; ſomething more powerful muſt be found, which may take a firmer hold of the mind, may exhauſt the whole force of the affections, and may make more durable impreſſions on the heart; and it is in that love, which is kindled between perſons of different ſexes, that this full ſatisfaction can alone be found. Hence nature, in order to ſecure the completion of her deſigns, and to make them as much as poſſible independent on the rational deductions or whimſical caprices of human kind, hath beſtowed on the one ſex numberleſs charms, whoſe power is irreſiſtible over the other; and laying hold of the *affectionate* part of their conſtitution, makes it alſo ſubſervient to the accompliſhment of her ends. Every individual does not always continue to *regard with equal* deſire all thoſe of the other ſex; a thouſand accidents give riſe to *particular* attachments; and the paſſion of love, ſtealing imperceptibly upon the heart, acquires by degrees the moſt abſolute dominion over it. The ſatisfaction of his paſſion, the lover imagines, will cauſe him to enjoy the moſt exquiſite felicity; and abſence makes him only more fond of the company of the object on which his love is fixed. Every moment, that he is at a diſtance from her, appears tedious and irkſome; and the indigence, with which he is diſtreſſed, obliges him to make his application, and to engage to be conſtant and faithful to her whom he adores. Regard and affection commonly produce reciprocal love; the pair are thus made happy in the enjoyment of one another; the female produces pledges of their mutual endearments; the love, which both parents bear to their offspring, hinders the love they have for one another from growing cool; and a ſenſe of duty prevents the bad effects of fickleneſs and inconſtancy, and induces both parties to adhere to their engagements by adhering to one another. Thus, mingling more delicate enjoyments with thoſe of ſenſe, men find, in the indulgence of this paſſion, objects every way ſuited for filling their whole mind; and they are provided by nature herſelf with the moſt ſincere friends, who are bound to them and to one another by the moſt indiſſoluble ties, and who can alone exhauſt the whole energy of thoſe powerful affections of the heart.

§ 168. The moſt accurate obſervations aſſure us, that the number of males is, all the world over, nearly equal to that of females; and it is almoſt demonſtrable *a priori*, that thoſe accounts, which are given of the great diſproportion obſervable between them in ſome countries, muſt be fabulous. But every individual feels the power of nature, and the joys of wedlock ought not to be monopolized by a few. Hence, the moſt civilized nations of Europe, obſerving the effects of the different ways which the ſexes take to ſatisfy their appetites, and attending to the proportion which the number of the men bears to that of the women, have found by experience, that that, which ſeems to be agreeable to the ſuggeſtions of nature, not only tends more to promote the peace, order, and happineſs of Society in general, and to increaſe the number of human kind, but alſo makes individuals taſte, in a higher degree, the moſt ſincere joys the ſatisfaction of love can afford, and diffuſes pleaſure more extenſively and more equally among men, than any other inſtitution. And the Law of Scotland, mindful of the paradiſiacal original of the conjugal tie, hath been led to enact, that marriage ſhould be entered into only by two perſons, one man and one woman; that it ſhould lay them under the ſtricteſt obligations of fidelity to each other's bed; and that it ſhould regularly continue during the lives of the married perſons.

§ 169. If we attend to the deduction which has been made, it will appear, that marriage may be defined, agreeably to the principles of the Law of Scotland, to be a 'ſtate or condition of human life, entered into voluntarily and with free 'conſent by one man and one woman, primarily for the procreation of chil-'dren, ſecondarily for their mutual comfort and aſſiſtance in the management of 'their common affairs; which man and woman, not being prohibited by law, en-'gage to live together, during their whole lives, as huſband and wife, with mu-'tual

'tual fidelity to each other's bed.' From which definition it evidently follows, I. That all, who are not prohibited by Law, may enter into the ſtate of Marriage, *Decretal. l.* 4. *t.* 1. *c.* 23. *de ſponſ.* II. That marriage is entered into primarily for the procreation of children, 1690, *c.* 5. *ch.* 24. § 2. III. That it is entered into voluntarily, and by free conſent, 1690, *c.* 5. *ch.* 24. § 3. IV. That it ſubſiſts only between one man and one woman, 1690, *c.* 5. *ch.* 24. § 1. V. That during their marriage, duties are mutually incumbent on married perſons both to comfort each other, and to aſſiſt one another in the management of their common affairs, 1690, *c.* 5. *ch.* 24. § 2. VI. That marriage ſubſiſts regularly during the lives of the married perſons, 1690, *c.* 5. *ch.* 24. § 6. VII. That they are bound to live together as huſband and wife. VIII. That they are mutually bound to be faithful to each other's bed.

From a careful attention to theſe axioms, we ſhall eaſily learn, 1) What perſons may lawfully enter into the ſtate of marriage; 2) How perſons, intending to marry each other, enter into that State; 3) What are the effects of marriage, while it ſubſiſts; 4) How it is diſſolved; 5) What are the conſequences of it, after it is diſſolved.

TITLE II.

Of thoſe who can, and thoſe who cannot enter into the State of Marriage.

§ 170. ALL, who are not prohibited by Law, it has been ſaid, (§ 169. *ax.* 1.) may enter into the ſtate of marriage. The Law prohibits people to enter into it, either 1) On account of their inability to anſwer the primary end of it, or 2) On account of their incapacity of declaring that conſent which is eſſential to the conſtitution of it, or 3) Becauſe of propinquity of blood, or 4) On account of the previous engagement of one of the parties, or 5) For the guilt of one of them, who is hindered from marrying *in pœnam.*

§ 171. For, ſince marriage is entered into for the procreation of Children (§ 169. *ax.* 2.), it muſt neceſſarily follow, 1) That all, who are incapable of anſwering this end, are alſo incapable of entering into the ſtate of marriage, *arg. R. M. l.* 2. *c.* 17. § 2*. Hence perſons, who either are naturally, or have been made by caſtration impotent, or have not attained the age of puberty, cannot marry, *Decretal. l.* 4. *t.* 15. *de frigidis.* Regularly, therefore, boys under the age of 14, and girls under that of 12† cannot marry, *l.* 14. *ff. de ſponſal.* I ſay, *regularly*: for if, contrary to the ordinary courſe of nature, they become at an earlier age, than that at which others uſe to become capable of fulfilling the end of marriage, they may be allowed to marry; becauſe it muſt, in all caſes, be lawful for one to marry, as ſoon as he becomes capable of propagating his kind. *Malitia ſupplet ætatem.* Law preſumes perſons of this condition to be qualified, in other reſpects, for diſcharging the duties of a married life. Hence, in ſome countries where the genial heat of the ſun produces in both ſexes a ripeneſs extraordinary when compared with the cold effects of our northern climates, and makes both of them fit for generation about the eighth or ninth year of their age, the legal term of marriage commences from theſe years. For the ſame reaſon, thoſe, whoſe impotence is only temporary and may be cured, are capable of marriage.

'Tis undoubtedly true, that nature has been ſo unfavourable to ſome women, who are capable of copulation, as to render them abſolutely incapable of con-

* Vide SKENE notæ ad hunc locum.

† Sir JOHN SKENE, in his notes upon *R. M. l.* 2. *c.* 17. § 2. ſeems to think the age of 14 years neceſſary not only for men but for women. But the opinion of all other Lawyers is different. He cites for his own, the authority of *R. M. l.* 2. *c.* 48. See his notes, ad *R. M. l.* 2. *c.* 41. § 3.

ceiving and bearing children: yet females can hardly be ſaid to be impotent. For no legal evidence can be had of their natural ſterility; whereas the impotence of males may be demonſtrated by the moſt clear and the moſt convincing proofs. Beſides, women may happen by accidental circumſtances to continue barren during many years after their marriage, and may, yet, become abundantly prolific at laſt. Indeed, if a woman is, as Lawyers expreſs it, *ita arcta ut mulier fieri non poſſit*, it would, certainly, be agreeable to the principles of Law to pronounce her incapable of marriage, and if ſhe attempted to impoſe on the ignorance of a man, to declare her marriage null from the beginning, *l.* 30. *ff. quando dies legat.**

§ 172. Marriage is entered into voluntarily and with free conſent, (§ 169. *ax.* 3.) From whence it muſt neceſſarily follow, 2) That all, who are from imbecillity of mind, incapable of declaring their conſent, or of underſtanding the nature of that to which it is neceſſary, are incapable of entering into the married ſtate: ſuch as Ideots or fatuous perſons, *Fa.* I. 267. and madmen or furious ones; for they cannot *conſent* to marriage. But they have ſometimes lucid intervals, and have, during them, the uſe of their reaſon. Therefore, they may, during them, enter into it, *R. M. l.* 1. *c.* 30. § 3. 4. For this reaſon alſo, perſons, during their pupilage, are legally incapable of marriage, *R. M. l.* 1. *c.* 30. § 5. Therefore, if a boy, before he is fourteen, or a girl, before ſhe is twelve years of age, happens to marry or, rather, to pretend to do it, Law holds the marriage to be null, at leaſt thus far, that the young married perſon may abandon his conſort, and, without aſſigning a reaſon for doing ſo, looſe himſelf from all connections with her at every inſtant before he attains the age of puberty: he cannot be compelled to adhere to her, and may at any time marry another, no matter tho both parties were really willing to marry each other; tho they declared their conſent in the moſt free, open, and expreſs manner; and tho the marriage was celebrated with all the ſolemnity required by Law. For the right, which he has of repenting himſelf of his engagement, ariſes from that defect of judgment and incapacity of giving a deliberate conſent, which experience teaches, and Law, therefore, preſumes to be natural to pupils. Therefore, this doctrine muſt hold, whether the perſon, whom the young one marries, be under or paſt the age of puberty. Only, in caſe both parties are under it, they have both of them a right to repudiate one another and to refuſe to ſtand to the bargain: whereas, if one of them is under it and the other above it, the former alone has that right. So that, if he chuſes to ſtand to the bargain, the other will be bound to adhere to him; becauſe every one, who is of lawful age, and marries another, is preſumed to know the conſequences of what he does, is, therefore, bound by that conſent which he gave, to continue in the married ſtate, and ought not to have it in his power to be free, when he pleaſes, from the obligation of doing what he hath ſolemnly engaged to do. One may, out of hopes of a fortune, marry a child; he may be diſappointed; and an unexpected eſtate may fall to himſelf; ought he, in this caſe, to be allowed to repudiate his conſort, and ought he not to be held to be effectually bound, if ſhe chuſes to take advantage of his engagement? If he had not had a ſerious intention, he ought not to have been ſo fooliſh as to do that from which Law preſumes a determined reſolution of performing his promiſe. Beſides, in all caſes in which ſuch as are held by Law not to be ignorant of the condition of thoſe with whom they contract, enter into contracts with perſons under age, 'tis an eſtabliſhed rule that the minors may be free, while thoſe with whom they contract remain bound, if the minors pleaſe, to fulfil their engagements.

I ſaid, that the marriage of one, who is not of marriageable age, is deemed by Law to be ſo far null, as to give him a right to repudiate his conſort at any time, before he arrives at the age of puberty. For, if he ſhall continue, after he hath arrived

* See a curious caſe in *lib.* 4. *decretal. tit.* 15. *de frigidis et maleficiatis et impotentia coëundi, cap.* 6.

arrived at it, to cohabit with one, whom he married during his pupilage, there is no longer room for repentance; the power of repudiation is at an end; the marriage becomes valid; and both parties are effectually bound to live together, as husband and wife, during the remainder of their days.

§ 173. The next reason, for which persons are prohibited by Law to intermarry, is the propinquity of the relation which they have to one another (§ 170.) One may be related to another either by consanguinity or by affinity. Consanguinity is 'that relation which arises from sameness of blood, and subsists be-'tween such as are descended from one common root or parent;' affinity is 'that 'connexion, which subsists between one and such as are related by blood 'to the person to whom he is married;' or, it is 'the connexion, which subsists 'between a husband and those who are related by blood to his wife; or be-'tween a wife and those who are related by blood to her husband.'

The propinquity of the relation, which two persons bear to one another, is measured by computing the number of degrees, which intervene between them, according to the difference of their lines. A degree is 'the distance of the rela-'tion, that subsists between persons related by consanguinity.' A line is 'a se-'ries or number of persons sprung from one common root.' It is either direct or collateral. The direct, which is sometimes called the right line, *linea recta*, is 'that which comprehends a series of ascendents and descendents, and of them 'alone;' and it is divided into the *ascending* and *descending*. The ascending is 'that which ascends directly upwards from son to father, grand-fa-'ther, *&c.*' Thus, a son, father, grand-father, great-grand-father, *&c.* are related in the direct ascending line. The descending is 'that which descends 'directly downwards from father to son, grand-son, *&c.*' The collateral, which is also called the oblique or transverse line, is 'that, which comprehends persons, 'who are sprung of one common parent, but are not ascendents and descendents of 'one another.' Thus brothers, cousins-german, the children of cousins-german, uncle and nephew, grand-uncle and grand-nephew, are related in the oblique line; and are sometimes called collaterals. The oblique line, again, is either equal or unequal. The equal oblique line is 'that, which comprehends collaterals distant by the 'same number of degrees from their common parent;' such are brothers, cousins-german, the sons and daughters of cousins-german, *&c.* The unequal oblique line is 'that, which comprehends collaterals distant not by the same, but by an 'unequal number of degrees from their common parent;' such as uncle and nephew or niece, aunt and nephew or niece, grand-uncle and grand-nephew, a cousin-german and the children, grand-children, great-grand-children of his cousin-german, the children and the grand-children of cousins-german, *&c.* SKEN. *not. ad R. M. l.* 2. *c.* 32. § 2.

In order to know and to investigate the propinquity, in which two persons stand related to one another, it is necessary to distinguish between the different ways of computing degrees observed in the civil and in the canon law: for the same persons are often said by the civilians to be distant from one another by a number of degrees very different from that, which the canonists make the distance of their relation.

The civil Law affords one general rule, which serves in all cases for ascertaining the propinquity of persons. The rule is, 'that the number of degrees, by 'which two persons are distant from one another, is equal to the number of all 'the persons sprung from the first common root at which it is possible to arrive, 'and which is necessary for making the given relation to exist *.' Only, if they are in the direct line of ascendents and descendents, one of them must be the progenitor or root of the other; 'tis needless, therefore, in that case, to ascend higher, in order to connect them with another and a common root; since we are arrived at one already.

Therefore,

* You do not count both the common parents, both the husband and the wife, but one of them alone.

Therefore, to find the degree of the propinquity of two perſons, 1) Trace them upwards to their common root, except in the caſe juſt mentioned of aſcendents and deſcendents, 2) Count the number of all the perſons generated *from* the original ſtock, and neceſſary for connecting them with it; this number is the degree, in which the two given perſons ſtand related to one another: for the common root itſelf is never counted. Thus, a father and a ſon are only one degree diſtant from one another: for the father is the progenitor, or root, from which the ſon is ſprung; and there is only one perſon, the ſon, generated and neceſſary for connecting to a root, the father, *l.* 1. § 3. *l.* 10. § 12. *ff. de grad.* A grand-father and grand-ſon are diſtant by two degrees from one another: for the number of perſons neceſſary to make the relation exiſt, is 3, the grand-father, the father, and the grand-ſon; therefore, without counting the grand-father, who is the original ſtock, there remain 2 perſons generated, the father and his ſon, the grand-ſon, for the number of degrees, by which the grand-father and grand-ſon are diſtant from one another. From theſe examples 'tis eaſy to ſee, how degrees of propinquity are computed in the direct line. 'Tis not leſs difficult to compute them in the oblique one: for the rule is general and applies to all caſes. Thus two brothers are in the equal oblique line, and are diſtant from one another by two degrees: for, if we trace them upwards to their father, who is the common root, we ſhall find, that there are 3 perſons in whole, the father and his two ſons, the brothers, neceſſary for making the relation exiſt; deducting, therefore, 1 for the common root, 2, the number of perſons generated, is the number of the degrees, by which two brothers are diſtant from one another, *l.* 1. § 4. *l.* 10. § 13. *ff. de grad.* After the ſame manner, couſins-german will be found to be related in the fourth degree: for there are 4 generated perſons neceſſary for connecting them with their grand-father, or original Root; there are 1) The 2 couſins-german themſelves; and 2) The 2 fathers of theſe couſins-german; the ſum of all theſe being 4, ſhews the number of the degree, in which couſins-german ſtand related to one another, *l.* 1. § 6. *l.* 10. § 15. *ff. de grad.* Again, the Children of Couſins-german are related to one another in the ſixth degree: for it is neceſſary, that 6 perſons be generated or ſprung from a great-grand-father, the original root, in order to give exiſtence to the children of couſins-german and to connect them with a common ſtock; 1) The 2 children of the couſins-german, 2) 2 couſins-german; and 3) 2 fathers of the couſins-german; who make 6 perſons neceſſary to have been generated, before we can arrive at an original and common ſtock, the father of theſe two fathers of the couſins-german, who is the great-grand-father of the two children of the couſins-german. From whence it appears that the children of couſins-german ſtand related to one another in the ſixth degree: for the common root, not being conſidered in this queſtion as a perſon generated, is not computed; becauſe as ſoon as we arrive at one common root, we ſtop, and compute the number of thoſe perſons alone, who are *ſprung* from it, *l.* 3. *p. l.* 10. § 17. *ff. eod.*

'Tis eaſy by ſimilar ſteps to compute the degree of the propinquity of two perſons, who ſtand related to each other in the unequal oblique line. Thus, an uncle and his nephew are diſtant from one another in the third degree: for, if we trace them upwards, we find their common parent to be that perſon, who at the ſame time is father of the uncle and grand-father of the nephew. Therefore, that this relation of uncle and nephew may exiſt, 'tis neceſſary, that three perſons be generated and ſprung from the original Root, 1) The uncle himſelf, 2) The father of the nephew, and 3) The nephew himſelf; theſe, added together, make three perſons generated, and ſhew the number of the degree, in which an uncle and his nephew ſtand related to one another, *l.* 1. § 5. *l.* 10. § 14. *ff. eod.* Again, a grand-uncle and his grand-nephew are diſtant from one another by *four* degrees: For, if we trace them upwards to their original and common ſtock, him, who at the ſame time is the father of the grand-uncle and the great-grand-father of the grand-nephew, we ſhall find it to be neceſſary that

that four perſons be generated, ere the relation of grand-uncle and grand-nephew can exiſt; there is, 1) The grand-uncle himſelf, 2) His brother, who is the grand-father of the grand-nephew, 3) The father of the grand-nephew, who is nephew of the grand-uncle, and 4) The grand-nephew himſelf; who, making the ſum of four perſons, ſhew, that grand-uncle and grand-nephew are related to each other in the fourth degree, *l.* 1. § 6. *l.* 10. § 15. *ff. eod.* After the ſame manner a couſin-german and the Son of his couſin-german will be found to be related to one another in the fifth degree: For we muſt trace them upwards to that perſon, who is grand-father of the couſin-german, and great-grand-father of the ſon of the couſin-german, ere we can arrive at a common root: And, counting the number of perſons neceſſary to have been generated that the relation may exiſt, we ſhall find them to be five; 1) The couſin-german, 2) The father of the couſin-german, 3) The grand-father of him whom we call the ſon of the couſin-german, 4) The father of him, whom we call the ſon of the couſin-german, and 5) The ſon of the couſin-german. Therefore, couſins-german and the children of couſins-german ſtand related in the fifth degree, *l.* 1. *l.* 10. *ff. de grad.* From theſe examples 'tis eaſy to ſee, how any degree of propinquity may be computed according to the principles of the Civil Law, and the rules of computation eſtabliſhed by it.

But different rules are eſtabliſhed by the Canon Law for denominating the degrees of the propinquity of perſons, related to one another in the oblique line: for the method of enumerating them in the direct one of aſcendents and deſcendents is, indeed, it muſt neceſſarily be the ſame in both.

The canoniſts diſtinguiſh between the equal and unequal oblique line. The rule which they obſerve in computing degrees of propinquity in the equal oblique line is this, ‘ that the number of degrees, by which two perſons, related ‘ to one another in the equal oblique line, are diſtant from one another, is the ‘ ſame with the number of degrees, by which either of them is diſtant from their ‘ common and original Stock.’ Thus, two brothers are, according to the Canoniſts, related to one another in the firſt degree; becauſe they are diſtant from their father only by one degree: In the ſame manner, couſins-german are related to one another in the ſecond degree; becauſe they are diſtant from their common grand-father by two degrees: The children of couſins-german are related to one another in the third degree; becauſe each of them is related in the ſame degree to their common great-grand-father. Therefore, to find the number of the degrees, by which two perſons, ſtanding related to each other in the equal oblique line, are diſtant from one another, we have only to compute the number of degrees, by which any of them is diſtant from their common parent, according to the rule eſtabliſhed by the Civil Law for the computation of degrees of propinquity in all caſes, and by the Canon Law in the caſe of aſcendents and deſcendents: for this number is the number of degrees, by which the two perſons are diſtant from one another.

The rule, which the Canoniſts obſerve in computing degrees of propinquity in the unequal oblique line, is this, ‘ that the number of degrees, by which two ‘ perſons, related to one another in the unequal oblique line, are diſtant from ‘ one another, is the ſame with the number of degrees, that meaſure the propin- ‘ quity, in which that one of them, who is removed by the greateſt number of ‘ degrees from the original Root, ſtands related to this their common Stock.’ Thus, an uncle and his nephew are ſaid to be diſtant from one another by two degrees; becauſe the number of degrees, by which the uncle is diſtant from the common root his own father and his nephew's grand-father, is only one; whereas the number of degrees, by which the nephew is diſtant from it, is two. Again, a grand-uncle and his grand-nephew are diſtant from one another by three degrees; becauſe that perſon, who is their common root, is father of the grand-uncle, but great-grand-father of the grand-nephew. After the ſame manner, a couſin-german, and the children of his couſin-german, ſtand related to

one another in the third degree; for a couſin-german is diſtant only by two degrees from his own grand-father, who is the common parent, and is great-grand-father of the children of his couſin-german, whereas a ſon of a couſin-german is diſtant from the common root by three degrees.

From what has been ſaid it appears, that the difference between the Roman and Canonical computations ariſes from hence, that the Civil Law computes the number of generations, which muſt neceſſarily have been on both ſides, whereas the Canoniſts compute only the number of generations, which muſt neceſſarily have been in order to give exiſtence to one of the perſons, whoſe propinquity is to be meaſured; and, if theſe perſons happen to be diſtant from their common root, not by the ſame, but by an unequal number of degrees, they compute only the number of generations neceſſary to give exiſtence to that one, who is removed from the common root by the greateſt number of degrees.

The Canon Law had much greater authority in Scotland before, than it has had ſince the Reformation from Popery: for people of all ranks, led captive by a ſuperſtitious veneration for the perſons and the dictates of their prieſts, thought themſelves bound in duty to that God whom they adored, to pay the higheſt reverence to the will of the Pontiff they believed to be infallible. Hence in all matters, eſpecially in ſuch as were held to be intimately connected with Religion, the deciſion of the Canon Law was of great importance. This could hardly not be the caſe with all queſtions relating to marriage: for marriage both was and is, by thoſe of the popiſh religion, numbered among thoſe engagements, which, for the ſolemnity neceſſary for bringing people under them, as well as for the ſtrict obligations ariſing from them, were diſtinguiſhed by the name of *Sacraments*. Hence, degrees of propinquity uſed to be computed in this Country according to the rules of computation eſtabliſhed by the Canon Law; long cuſtom, eſpecially if it concerns matters of ſmall importance, is not eaſily eradicated; and the computation of the Canoniſts has been much uſed ever ſince. Thus, couſins-german are, 1567, *c.* 15. called *ſeconds in degrees of conſanguinity*, and the common way of counting kindred is agreeable to the Canonical Rules.

§ 174. 'Tis ſaid to have been found by obſervation, that ſeed ſown in that ſoil in which it grew, fails not to produce a ſcanty crop. If the experiment is repeated for ſeveral years ſucceſſively, the product grows always worſe and worſe, till at length it dwindles away into what ſcarce deſerves the name, as it has not the appearance of a crop. The mother Earth loaths that ſeed which herſelf brought forth, ſhrinks at its inceſtuous embraces, and refuſes it her cheriſhing influence, when it is caſt into that womb, out of which it originally ſprang. Experience teaches, that nature is every where conſiſtent with herſelf, and makes ſimilar effects be always produced by ſimilar cauſes. The females of all animals, when impregnated by males that are nearly connected with them by blood, produce a diminutive offſpring. The nearer the relation of the parents, and the more frequently the experiment is repeated, the breed turns both of a ſize always ſmaller and ſmaller, and of a nature always leſs and leſs generous, till the offſpring degenerates into a race of pygmies. 'Tis natural to think, that ſimilar effects would be produced by ſimilar embraces among human kind*. For nature ſeems to have imprinted on the heart of man an inveterate abhorrence of them. From whence the legiſlators of moſt nations have been led to hinder, by the ſanctions of their laws, the experiment from being often tried; but the exceſſive and inordinate luſts of ſome of human kind have given opportunity to the curious of making obſervations, ſufficient for confirming the truth of a theory which appeared to be univerſal.

Beſides,

* The ſtory concerning the parentage of the Perſian Magi ſeems to contradict this theory. They were the iſſue of a mother and her ſon, *Catul.* 87. But they were much wiſer than other men.

Beſides, thoſe, who live in the ſame family, have ſo many opportunities of yielding to the calls of nature, that nothing could preſerve purity of manners, were marriage allowed among the neareſt relations, or any intercourſe of love between them ratified by law, or tolerated by cuſtom *.

For theſe reaſons, the law of almoſt every country hath prohibited marriage between perſons, who ſtand related to one another in certain degrees of propinquity. The general rule eſtabliſhed by the law of Scotland for determining who may and who may not intermarry, is contained in 1567, *c.* 14. and *c.* 15. by which acts it is enacted, 1) That marriage be as free, as it is permitted by the word of GOD to be; 2) That all, who are not forbidden in ſacred Scripture, may lawfully intermarry; and 3) That ſuch, as abuſe their bodies with perſons, who ſtand related to them in any degree repugnant to holy writ, particularly to the 18th chapter of LEVITICUS, ſhall be held to have committed the abominable crime of Inceſt, and ſhall, therefore, be puniſhed by death.

The doctrine of ſacred Scripture, which ſeems to be entirely agreeable to the dictates of the natural Law, and has been confirmed by perpetual cuſtom, has laid down one general rule concerning the marriages of perſons related to one another in the direct line; a rule which admits of no exception. For it prohibits aſcendents and deſcendents from intermarrying in all caſes, no matter how great be the number of degrees by which they happen to be removed from one another. Thus, a father cannot marry his daughter; ſo neither can a grandfather marry his grand-daughter, nor a great-grand-father his great-grand-daughter. After the ſame manner, a mother cannot marry her ſon, nor a grand-mother her grand-ſon, nor a great-grand-mother her great-grand-ſon, nor any aſcendent one deſcended either immediately or mediately from him. Indeed, the expreſs prohibitions of Scripture extend to fathers and grand-fathers alone, *Lev. c.* xviii. *v.* 7. 10. We ought not, however to conclude, that remoter aſcendents and deſcendents are, therefore, permitted to intermarry: Nothing leſs; for nature ſhrinks at nothing more. Sacred Scripture accommodates its doctrines, its precepts, its laws to caſes, which happen moſt commonly in the world; it talks not, therefore, of great-grand-fathers, becauſe the ſhortneſs and viciſſitudes of human life permit only a few of mankind to ſee their great-grand-children, or to have it in their power to marry them. To unuſual caſes no laws, either divine or human, are adapted (§ 78.); and parity of reaſon is ſufficient cauſe for extending the diſpoſition of Law to ſimilar caſes.

§ 175. From the particular prohibitions made in Scripture, a *general* rule may be deduced, concerning the marriages of collaterals; to wit, 'that perſons related 'to each other in the collateral line, if they are diſtant from one another by 'what are called two degrees, according to the computation of the Canon Law, '1567, *c.* 15. and four degrees according to that of the Roman Law, may intermarry 'in all caſes.' The truth of the general rule will appear from an induction of all the particular prohibitions made in Scripture. For we ſhall find, that all the perſons, who are expreſsly prohibited in Scripture to intermarry, are related to one another within thoſe degrees; and that no perſons, who are related to one another without them, are forbidden in it to intermarry.

Firſt; A brother is expreſsly prohibited to marry his ſiſter, the daughter of his father, or the daughter of his mother, *Lev. c.* xviii. *v.* 9.—*c.* xx. *v.* 17. for the prohibition extends to *all* brothers and ſiſters, german, conſanguinean, and uterine; that is, either by both father and mother, or by father alone, or by mother alone. But they are removed from one another by no more than one degree according to the Canonical computation, and no more than two degrees according to the computation of the Civil Law, (§ 173.).

Scondly; A man is expreſsly prohibited to marry his aunt, the ſiſter of his father, or the ſiſter of his mother; *Lev. c.* xviii. *v.* 12, 13.—*c.* xx. *v.* 19. 'Tis true,

* See Mr. HUME's Enquiry concerning the principles of Morals.

true, they are diſtant from one another by *two* degrees according to the Canoniſts; but it is no leſs true, that they are not removed from one another by four, for they are removed by no more than three degrees according to the method of computation eſtabliſhed by the Civil Law, (§ 173.).

Thirdly; I contend, that it is unlawful for a man to marry his own niece, the daughter of his brother, or the daughter of his ſiſter; becauſe they are removed from one another by no more than three degrees according to the Civilians.

I know, ſome people diſtinguiſh between the marriage of an aunt and her nephew, and that of an uncle and his niece; and at the ſame time, that they own the former to be inceſtuous and unlawful, they pretend, that the latter is chaſte and lawful; becauſe an aunt is by nature *loco parentis* and ſuperior to her nephew, and an uncle is by nature *loco parentis* and ſuperior to his niece. Of courſe, the natural ſuperiority, which an aunt has over her nephew, and the reſpect, which one owes to his parent, is, in the one caſe, but not in the other, reverſed by that ſuperiority, which a husband acquires by marriage over his wife, and that obedience, which is due from a wife to her huſband. The queſtion is important, and has made ſome noiſe; I ſhall, therefore, endeavour to prove, both from the Spirit and from the Letter of the Law of Scotland, that it is unlawful for a man to marry his own niece, the daughter of his brother, or the daughter of his ſiſter.

In general, it may be remarked, that the very idea, characteriſtic and definition of an inceſtuous marriage, implies, that it is 'one prohibited on account 'of the propinquity of the relation, in which the parties ſtand to one 'another,' (§ 170. 173.). For the Law of Scotland, as well as that of the Jews, and of every other civilized nation, prohibits perſons, who ſtand related to one another in certain degrees of propinquity, to intermarry; *becauſe* it holds marriages between ſuch as ſtand related to one another within thoſe degrees, to be impure, *inceſtæ*, unchaſte: therefore, it calls them inceſtuous. If, therefore, the ſole reaſon upon which this prohibition is founded, is the propinquity, or nearneſs of the relation of the parties, it muſt follow, that marriage muſt be held to be inceſtuous, unlawful, and forbidden in all caſes, in which the propinquity, the relation is the ſame: for it would be abſurd to ſay, that marriage was prohibited on account of the propinquity of the parties, and of it alone, in ſome, but not in all caſes, in which the propinquity is the ſame. The prohibition ought to extend as far, as the reaſon aſſigned for making it. From this doctrine, which ſeems to be not leſs agreeable to the principles of common ſenſe than to thoſe of Law, it plainly follows, that, ſince it is owned to be unlawful for a nephew to marry his aunt, it muſt alſo be unlawful for an uncle to marry his niece; becauſe the propinquity of the parties is in both caſes the ſame; and the marriage would of courſe be, in both caſes, equally unchaſte.

Agreeably to this doctrine, to wit, that it is the degree of the propinquity alone, according to which marriages are to be held to be inceſtuous, unlawful and forbidden, the ſtatutory Law of Scotland refers, in all caſes, its prohibitions to the degrees of propinquity, in which the parties are related, as is plain from the words uſed in all the ſtatutes relating to the chaſtity or inceſtuouſneſs of marriage. Thus, perſons, committing inceſt, are, 1567, *c.* 14. defined, 'Perſons, that abuſes their bodie with *ſik perſons in degrie*, as GOD in his *word* 'has expreſslie forbidden, as is contained in the 18th chapter of LEVITICUS.' The rubric of the act immediately following is, 'Anent lawful marriage of the 'awin blude, in *degries* not forbidden by GOD his word.' And the ſtatutory words of it are, 'Secunds in *degries* of conſanguinitie and affinitie, and all *degries* '*outwith* the ſamin, contained in the word of the Eternal GOD, and that are 'not repugnant to the ſaid word, may lawfully marry.' After the ſame manner, the Confeſſion of Faith, *c.* 24. *ofmarriage and divorce*, § 4. ratified by 1690, *c.* 5.

c. 5. referring ſtill to the *degrees* of the propinquity of the relation, which the parties bear to one another, ſays, 'Marriage ought not to be within the *degrees* 'of conſanguinity or affinity forbidden in the word: Nor can *ſuch inceſtuous* mar-'riages ever be made lawful by any law of man or conſent of parties, ſo as thoſe 'perſons may live together as man and wife. The man may not marry any 'of his wife's kindred nearer in blood, than he may of his own; nor the wo-'man of her husband's kindred, nearer in blood, than of her own.'

From theſe texts of the ſtatutory Law of Scotland it is evident, that it attends to the propinquity of the relation alone, and does not regard the accidental circumſtances, by which the relation may be diſtinguiſhed. The word, which it always uſes, is *degree*; a technical term in Law, which has a known determinate and preciſe meaning, and ſignifies 'the diſtance of the relation, which ſubſiſts between 'perſons related by conſanguinity.' It does not ſay, that a father ſhall not marry his daughter, that a brother ſhall not marry his ſiſter, or that a nephew ſhall not marry his aunt; but abſtracting from theſe particularities, it ſays in general, that marriage ought not to be within the *degrees* forbidden in ſacred Scripture. From whence it muſt follow, that the Law of Scotland meaſures its prohibitions by the degrees of the propinquity of the parties, and that, in order to diſcover, whether a marriage between any two given perſons is or is not held by it to be inceſtuous and unlawful, it is only neceſſary *firſt* to inveſtigate the degree, in which the parties ſtand related to one another, and then to compare it with the prohibitions contained in Scripture. If the degree of their propinquity is found to be the ſame with that, which ſubſiſts between any two perſons, who are prohibited in Scripture to intermarry, the marriage muſt be held to be unlawful. If the degree of their propinquity is not the ſame with any of the degrees prohibited in Scripture, the marriage muſt be held to be lawful. For inſtance, in the preſent caſe, in order to know, whether it is lawful for a man to marry his niece, it is neceſſary *firſt* to find the degree of the relation, which an uncle has to his niece; they are related in the third degree. Then, it muſt be conſidered, whether any of the perſons forbidden in Scripture to intermarry ſtand related to one another in the third degree. This is eaſily inveſtigated by running over the particular prohibitions contained in Scripture. Among theſe it immediately occurs, that a nephew is expreſsly forbidden to marry his aunt, to whom he ſtands related in the third degree. Therefore, it follows, that it is not lawful for a man to marry his niece; becauſe the degree of propinquity is the ſame in both caſes, and muſt therefore be held to be expreſsly included under the ſtatutory words of the Law of Scotland. Thus, a general principle is diſcovered, by which all queſtions concerning the chaſtity and inceſtuouſneſs of marriage may be eaſily reſolved; to wit, 'that perſons, who ſtand related to one another in the third degree, cannot law-'fully intermarry; and that all perſons, who ſtand related to one another in the 'fourth or any remoter degree, may lawfully intermarry; provided they are not 'aſcendents and deſcendents of one another:' for all the perſons, who are forbidden in Scripture to intermarry, are related to one another either in the third or in ſome nearer degree. Therefore, the firſt part of the rule is true, and it may be affirmed in general, that no two perſons, who are related to one another in the third or any nearer degree, can intermarry. But, becauſe there are not any perſons, forbidden in Scripture to intermarry, who are related to one another either in the fourth degree or in any other more remote than the third, it may be affirmed in general, that all perſons, who are related either in the fourth or any more remote degree, may lawfully intermarry; provided they are not aſcendents and deſcendents of one another. For, if one of them is lineally deſcended of the other, it is agreed by all Lawyers, that it is unlawful for them to intermarry: and that, tho their relation be ever ſo remote.

But it may be ſaid, that this doctrine is directly contradictory to that of the ſtatutory Law of Scotland: for, as it has been remarked already, the act of Parl. 1567, *c.* 15. enacts in expreſs words, that '*ſecunds* in degrees of conſan-

'guinity and affinity, and all *degrees outwith* the ſamin, may lawfully marry.' But this difficulty is eaſily reſolved; for by ſeconds we muſt underſtand not thoſe who are called ſeconds, according to the method of counting degrees of propinquity uſed in the Canon Law, but thoſe who are called fourths according to the method of computation uſed in the Roman Law. It is plain, that it cannot be extended to all thoſe, who are called ſeconds in the Canon Law; becauſe ſome of them, for inſtance, nephew and aunt, are expreſsly forbidden in Scripture to intermarry. Therefore, it muſt be underſtood of thoſe alone, whom we have called fourths according to the more diſtinct way both of counting and of expreſſing degrees of propinquity uſed in the Roman Law.

Indeed, this text, which it is plain from what has been ſaid, can be underſtood in no other ſenſe than that which has been given to it, proves, in the cleareſt manner, the truth of the general doctrine delivered above: for it expreſsly enacts, that it is lawful for ſeconds, that is, as ſeconds muſt be underſtood, for all thoſe who are related to one another either in the fourth or in any remoter degree, to intermarry; an allowance, which implies, that it is unlawful for thirds, for inſtance, for uncle and niece to intermarry.

But that this is the will, the ſenſe of the Scotch Legiſlature, is further plain from hence, that it has, as ſhall be proved hereafter, extended its prohibitions to affinity. Now it would have been abſurd for the Legiſlature to have extended them to affinity, and not to have meant to extend them to conſanguinity alſo; for there is, ſurely, much more reaſon for prohibiting a marriage on account of a relation by blood, than on account of one by affinity alone, in which there is no relation by blood ſubſiſting between the parties. Indeed, if it were lawful for a man to marry his niece, this palpable abſurdity would follow, that, ſince the ſame prohibitions, which are made in caſes of conſanguinity, are extended to thoſe of affinity, a man may lawfully marry a blood-relation of his own, who is, ſurely, at leaſt as nearly related to him as a blood-relation of his wife, whom he is, nevertheleſs, prohibited to marry; for inſtance, that a man may marry his own niece, to whom he has a very near relation by blood, at the ſame time that he may not marry his uncle's wife, his aunt-in-law, to whom he has no relation by blood. This abſurdity, were there no other, is ſufficient alone to ſhew, that it is not lawful for a man to marry either his own niece or his wife's niece.

'Tis true, that the ſtatutory Law of Scotland refers to the doctrine contained in ſacred Scripture, and in particular to that of the 18th Chapter of the book of LEVITICUS. But it is no leſs true, that the reference is conſtantly made in thoſe general terms, which have been quoted. The conſequence of which is, as has been ſaid already, that the Scotch Legiſlature holds marriages either to be or not to be inceſtuous according to the degrees of propinquity, in which the parties ſtand related to one another, without reſpecting the particular circumſtances, which diſtinguiſh the relation. Indeed, upon an attentive conſideration of the matter, it appears, that in doing ſo, it agrees entirely with the doctrine inculcated in ſacred writ: for the words uſed and the principles laid down in it plainly prove it to have been the intention of the divine LEGISLATOR, that the prohibitions, made in holy writ, ſhould take place in all caſes, in which the degrees of propinquity are the ſame with thoſe particularized in it.

For it is plain, that the ſole reaſon which is aſſigned in Scripture for the prohibitions made in it, is the propinquity of the relation, which the perſons forbidden to intermarry, have to one another. Thus, in the 12th verſe of the 18th Chapter of LEVITICUS, one is forbidden to marry the ſiſter of his father, and the reaſon aſſigned for the prohibition, is expreſſed in the following words, 'ſhe is 'is thy father's near kins-woman.' In the 13th verſe, a man is forbidden to marry his mother's ſiſter; and the reaſon aſſigned is, 'for ſhe is thy mother's near kins-'woman.' In the ſame manner, in the 19th verſe of the 20th chapter, the ſame prohibitions are repeated; and the reaſon aſſigned for them, is, 'for he uncovereth

'vereth his near kin.' From which texts it is plain, that the reaſon for which theſe prohibitions were made, was the propinquity, the nearneſs of the relation, in which the parties ſtand to one another. Indeed, this is yet more plain from the 6th verſe of the 18th Chapter, in which the *general principle* is expreſsly laid down that no body ſhould marry one, who was nearly related to him; and the reaſon aſſigned in this verſe, which may be called the preamble of the ſtatute, contains the governing principle of it, and is that for which all the prohibitions contained in the following verſes were made. 'None of you,' ſays the Scripture, 'ſhall 'approach to any, that is near of kin to him,' that is, none of you ſhall marry any perſon, who is as nearly related to you, as thoſe, who are, in the following verſes, prohibited to intermarry, are to one another.

If, therefore the reaſon, for which the prohibitions contained in Scripture were made is expreſsly declared in Scripture itſelf to have been the propinquity of the relation, in which the parties ſtand to one another, it muſt follow, according to the eſtabliſhed rules of interpretation, that ſuppoſe the ſtatutory Law of Scotland had never exiſted, and a deciſion had been to be given from the Scripture alone, the prohibition ought to be adjudged to take place in all caſes, in which the degree of propinquity is the ſame; for in all thoſe caſes, there is the ſame reaſon for it.

Indeed, it would be abſurd to maintain, that the prohibitions did not take place in all caſes, in which the nearneſs of the relation of the parties is the ſame, but was confined to thoſe particular caſes ſpecified in Scripture: for, if this doctrine was true, it would follow, that all perſons, who were not expreſsly forbidden in Scripture to intermarry, might lawfully marry; for inſtance, that a great-grand-father might lawfully marry his great-grand-daughter, ſince there is no text in Scripture, in which a great-grand-father is expreſsly forbidden to marry his great-grand-daughter. But ſuch a marriage would indiſputably be inceſtuous; becauſe it is held by all Lawyers to be incontrovertible, that it is, in all caſes, unlawful for aſcendents to marry any of their deſcendents, however remote be the degree of their propinquity.

But, ſuppoſe we were to reſtrict the prohibitions to thoſe preciſe caſes, which are ſpecifically to be found particularized in Scripture, it is not, perhaps, impoſſible to find this caſe ſpecified in it. For there can poſſibly be no more than four caſes, 1. That of a man and his aunt, the ſiſter of his father, 2. That of a man and his aunt, the ſiſter of his mother, 3. That of a man and his niece, the daughter of his brother, and 4. That of a man and his niece, the daughter of his ſiſter. Now, it is not denied, that marriage in the two firſt of theſe four caſes, to wit, between a man and his aunt, the ſiſter of his father and the ſiſter of his mother, is unlawful; becauſe theſe caſes are expreſsly mentioned in Scripture, in the 12th and 13th verſes of the 18th Chapter of LEVITICUS. Again, the third caſe, *viz.* that of a man and the daughter of his brother, ſeems alſo to be particularly mentioned, in the firſt clauſe of the 14th verſe, 'thou ſhalt not uncover the na-'kedneſs of thy father's brother,' which is the ſame with 'thou ſhalt not un-'cover the nakedneſs of thy niece, the daughter of thy brother.' 'Tis true, it is added immediately, 'thou ſhalt not approach to his wife; ſhe is thine aunt.' From whence it may be ſaid, that this verſe contains, not two caſes but one only, to wit, that of the aunt by affinity, the wife of the brother of the father. But it is more natural, and more agreeable both to the Letter and to the Spirit of the context to ſay, that it contains two different caſes, to wit, *firſt*, that of the uncle marrying his niece, the daughter of his brother, and *ſecondly*, that of the nephew marrying his aunt-in-law, the wife of his father's brother. If the verſe is interpreted in this manner, the doctrine of ſacred Scripture is made conſiſtent with the principles and the reaſons, upon which itſelf founds its prohibitions; and contains expreſsly all the four caſes, but one, to wit, that of a man marrying the daughter of his ſiſter. If ſo, it will be no wide ſtep to maintain, that this caſe muſt alſo be held to be expreſſed; becauſe there is undoubtedly the ſame reaſon for

for hindering a man from marrying his niece by his ſiſter, as his niece by his brother.

'Tis true, that the Jews, hiſtorians inform us, uſed to marry their nieces. But it would be abſurd from thence to infer, that it either was lawful for them or is lawful for us, in all caſes, to do ſo. For, tho practice is, in moſt caſes, ſaid to be the beſt interpreter of Law, that maxim can hold in thoſe caſes alone, in which the meaning of the Law is obſcure, and cannot take place in thoſe, like the preſent, in which it is evident. Beſides, the Cuſtom of the Jews ought to have leſs weight than that of other nations: for they are ſaid in Scripture to have been a ſtubborn ſtiff-necked people, and diſcovered on many occaſions, a prodigious inclination to depart from an exact obſervance of their Laws.

At any rate, ſuppoſe it was lawful for them to have married their own nieces, it does not follow, that it is therefore lawful for us to do ſo. 'Tis true, the Scotch Legiſlature refers us to the Levitical Law; but it is no leſs true, that it has not referred us to it *ſimpliciter*, but has eſtabliſhed a *general* principle, which muſt all along be kept in view, in our interpretations of it; and that principle is the one, which has been explained already, and has been ſhewn to be the principle of the Law of Scotland; to wit, that a man and a woman are forbidden to marry one another in all caſes, in which the relation, that ſubſiſts between them, is the ſame with that, which ſubſiſts between any two perſons prohibited in Scripture to intermarry. This is plainly the meaning of the Law of Scotland. Nay, ſuppoſe it were true, that both the Levitical Law and the practice of the Jews made it lawful for a man to marry his niece, it would not therefore follow, that the Scotch Law made it lawful alſo; for the Legiſlature of Scotland has underſtood the Levitical Law in a certain manner, has adopted it into the Law of Scotland to a certain extent, and hath enacted the way, in which it ſhall be underſtood, and the principle which ſhall be applied in the interpretation of it. It remains only to be added, that if reſpect is due to the authority of the Law of England, it is certain, the Judges of it have underſtood the Levitical Law in the ſenſe in which it has been explained above, and have, accordingly, adjudged it to be unlawful for a man to marry his own niece.

It appears, therefore, to be unlawful, in *all* caſes, for perſons, who are related to one another in the firſt, ſecond, or third degree to intermarry. But the prohibitions of the Law of Scotland go no farther; they extend not either to the fourth or to any remoter degree: for no perſons, who are diſtant from one another by four degrees, are found to be prohibited in Scripture to intermarry. Therefore, all perſons, who are related to one another no nearer than the fourth degree, may intermarry.

Hence it follows, that Couſins-german may lawfully, for they are not in Scripture prohibited to intermarry; they are diſtant from one another both by two degrees of the Canon, and by four of the Roman Law. If it is lawful for couſins-german, *a fortiori*, it muſt be lawful for ſuch, as are removed by degrees more remote than that, by which couſins-german are diſtant from one another, to intermarry in *all* caſes. I ſay, in *all* caſes: for it may not be improper in this place, to take notice of an error, into which moſt Lawyers have fallen. They tell us, that a marriage is incestuous and unlawful in all caſes, in which one of the parties is *loco parentis* to the other, that is, in which the one is the immediate deſcendent, the ſon or daughter of the common parent, at the ſame time that the other is farther removed from him: for inſtance, they ſay, that a grand-uncle cannot marry his grand-niece, because he is *loco parentis* to her; a principle, which, tho it is fixed in the Civil Law, has no foundation either in the Levitical Law, in the Law of England, in the Law of Scotland; for they reſpect not the *parentela*; they look only to the degree of the propinquity of the relation, which ſubſiſts between the parties, and hold all marriages to be lawful, in caſe the parties either are not aſcendent and

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and deſcendents of one another, or do not ſtand related in the ſame degree, which meaſures the propinquity of any of the perſons, forbidden in Scripture to intermarry. Therefore, they muſt hold a marriage between a grand-uncle and his grand-niece to be lawful; becauſe they are related not in the third but in the fourth degree. Accordingly, ſuch a marriage has in England been adjudged to be a lawful one *.

§ 176. Such are the degrees, in which perſons, related to one another by blood, either are permitted, or are forbidden to intermarry.

There are properly no degrees of affinity, *l.* 4. § 5. *ff. de grad. et adfin.* But, becauſe of that intimate and cloſe connexion, which ſubſiſts between huſband and wife, and makes them cleave to one another, ſo as to become, as it were, one fleſh, *Gen. c.* ii. *v.* 21, 22, 23, 24, a fictitious unity of perſons is, in ſome caſes, ſuppoſed by law to ſubſiſt between them, *R. M. l.* 4. *c.* 5. § 8. Hence it has been received as a principle of the common Law of Scotland, that a huſband is as nearly connected with thoſe related by blood to his wife as the wife herſelf is, and, reciprocally, that a wife is as nearly connected with thoſe related by blood to her huſband as the huſband is himſelf. From which principle it muſt naturally follow, that the ſame degrees are forbidden and allowed in affinity, which are forbidden and allowed in conſanguinity, 1690, *c.* 5. *ch.* 24. § 4. Thus, a ſon cannot marry his own mother, (§ 174.): therefore, neither can he marry his ſtep-mother, *noverca*, the wife of his father; nor can he marry his mother-in-law, his *ſocrus*, the mother of his wife, *Levit. c.* xviii. *v.* 7, 8. *c.* xx. *v.* 11. A father cannot marry his own daughter, (§ 174); therefore, he cannot marry his ſtep-daughter, *privigna*, the daughter of his wife; *Levit. c.* xviii. *v.* 17. *c.* xx. *v.* 14. nor his daughter-in-law, *nurus*, the wife of his ſon, *Lev. c.* xviii. *v.* 15. *c.* xx. *v.* 12. In the ſame manner, a grand-father cannot marry his grand-daughter, nor a grand-mother her grand-ſon, (§ 174.). Therefore, a grand-father cannot marry either the grand-daughter of his wife, or the wife of his own grand-ſon; and a grand-mother cannot marry either the grand-ſon of her huſband, or the huſband of her own grand-daughter, *Lev. c.* xviii. *v.* 10, 17. Again, in the collateral line, a brother cannot marry his ſiſter (§ 175.); therefore, a brother cannot marry either his ſtep-ſiſter, the daughter of his father by another wife, or of his mother by another huſband; or his ſiſter-in-law, the wife of his brother; and a ſiſter cannot marry either her ſtep-brother, the ſon of her father by another wife or of her mother by another huſband; or her brother-in-law, the huſband of her ſiſter, *Lev. c.* xviii. *v.* 9, 11, 16. *c.* xx. *v.* 17, 21. An uncle cannot marry his niece, nor an aunt her nephew: therefore, a man cannot marry either the niece of his wife, that is, the daughter of the brother or the daughter of the ſiſter of his wife; or the wife of his nephew, that is, the wife of the ſon of his ſiſter, or the wife of the ſon of his brother; and a woman cannot marry either the nephew of her huſband, or he huſband of her niece, *Lev. c.* xviii. *v.* 12, 13, 14. *c.* xx. *v.* 19, 20. In general, all, who are prohibited to intermarry on account of their propinquity by conſanguinity, are alſo prohibited on account of the ſame degree of propinquity by affinity; and, *vice verſâ*, all, who are not prohibited on account of their propinquity by conſanguinity, are not prohibited on account of the ſame degree of propinquity by affinity.

It muſt be remembered, that affinity is 'that connexion, which ſubſiſts between one of the married perſons and thoſe related by blood to the other,' (§ 173.); and that there is not ſuppoſed to be any connexion between the blood-relations of the one, and thoſe of the other party: for Law admits no ſuch thing as affinity of affinity, and makes no prohibitions on account of it. From whence it is plain, that two brothers may lawfully marry two ſiſters, becauſe there is a relation not between the one brother, and *the ſiſter of the wife* of the other, but between the one brother and *the wife* of the other. This rule is

* Dr. HARRIS's notes to his tranſlation of JUSTINIAN's Inſtitutions *De Nuptiis*, § 2. 5.

general, and extends to the direct as well as to the collateral line; becauſe the Word of God makes no diſtinction between them.

§ 177. If perſons, ſtanding related to one another in forbidden degrees, either of conſanguinity or of affinity, marry, not only is their marriage void *ab initio*, but if, knowing the relation which they bear to one another, they *abuſe* their bodies together, they are alſo guilty of the abominable crime of Inceſt; and may, therefore, be puniſhed by death, 1567, *c.* 14.

Firſt; The marriage is held, in *all* caſes, to be null; the parties are held not to have been huſband and wife Of courſe, the children, if any were procreated by them, are held to be illegitimate, and are not entitled to ſucceed to their parents, § 12. *J. de nupt.* They have a right to no more than to be maintained by them, till they ſhall be able to provide for themſelves *.

Since the man and the woman are not held to have ever been huſband and wife, it muſt follow, that, if either both knowing or being both ignorant of their relation, they married, or rather pretended to marry one another, the proviſions, which they may either by contract have made for one another, or which the Law would make for them, cannot be due; becauſe they were made in both caſes, *ſine cauſâ* and *ob cauſam non ſecutam*, and in one of them *ob turpem cauſam*. I ſay, the proviſions are not due, in caſe they either both knew, or were both ignorant of the relation, which they bore to one another; for they are in both caſes *in pari caſu*. Of courſe, the marriage being *ab initio* null, it can produce no effects. So every thing muſt be reſtored, on both ſides, by one to the other. In caſe one of them knew, and the other was ignorant of the relation, that one, who was ignorant of it, will be entitled, not, indeed, to proviſions either legal or conventional made for her: for a marriage, which is null, can produce no effects; a woman, who is not a wife, cannot have right to the proviſions made for wives, § 12. *J. de nupt. arg. Ha.* 14th *July* 1610, *Earl of Eglingtoun.* But ſhe will be entitled to damages: for ſhe has ſuffered wrong. Of courſe, ſhe muſt be entitled to get ſome reparation made for it.

The innocent perſon, therefore, has in this caſe the ſame right to the proviſions made for her either by Law or by contract, which ſhe would have had, if the marriage had been *ab initio* valid, and had been diſſolved by death; for that allowance ſeems to be the moſt reaſonable reparation, which can be awarded to her. 'Tis true, her own and her huſband's circumſtances may *ſometimes* make it reaſonable to give her either more or leſs. But uſually ſhe will be entitled to demand no more.

Of courſe, ſhe muſt be entitled to ſue 1) The guilty party, 2) His repreſentatives, 3) All who had obliged themſelves to make the proviſions effectual, and were conſcious of the deceit, in order to get them made good to her. It is plain, 1) That action ought to lie againſt the guilty perſon himſelf, that is, the perſon, who, knowing the relation, entered into the marriage. For fraud and deceit ought not to be profitable to any body. One, who has been ſo abandoned, as to impoſe on an innocent creature, and to hurt her in the moſt atrocious manner, ought not to be free from the obligations under which he brought himſelf, in order to accompliſh his profligate deſigns. From whence it is plain, 2) That it muſt lie againſt the repreſentatives of the delinquent: for they are held to be one and the ſame perſon with him, and are liable to all his obligations. But action lies againſt no others, unleſs they were partakers of his crime, and bound themſelves to make the proviſions good. Thus, if a ſon, who knew the relation that ſubſiſted between him and a young Lady, while ſhe was entirely ignorant of it, ſhall prevail upon her to marry him, and upon his own father to oblige himſelf to fulfil certain articles, and to make certain proviſions good to her; ſo ſoon as the inceſt is diſcovered, the marriage is held to have been null *ab initio;* all which followed

* By the antient Law of Scotland the children, procreated of ſuch marriages, ſeem to have had a right of ſucceeding to their parents, *R. M. l.* 2. *c.* 16. § 74.

followed on it, becomes void; the iſſue, if any was procreated of it, is reputed illegitimate; the portion given by the wife to the huſband muſt be reſtored to thoſe, from whom it came. Only the deceiver remains bound to make her proviſions, conventional or legal, good to her *nomine damni* in the ſame manner, as if the marriage had been diſſolved on account either of adultery, or of wilful deſertion, committed by him. Of courſe, ſhe is entitled to uſe every mean, which Law affords her, in order to get them made good to her; and that, by doing diligence either againſt his perſon, or againſt his eſtate, if he has any properly belonging to himſelf. For the ſame reaſons, his heirs are alſo bound, and are liable to be ſued by her. But the father will not be bound to fulfil the contract, if he was ignorant of his ſon's deceit: For nobody has a right to involve his parents or relations in the conſequences of his guilt. Indeed, if he was partaker of the fraud, his fraud will bind him alſo. If others were acceſſary to the deceit, but did not oblige themſelves to fulfil the articles of the contract, they are, certainly, guilty of a crime, and may be puniſhed according to Law; for they are acceſſary to the commiſſion of inceſt. But no action lies againſt them for making the marriage-articles good to the innocent party.

But not only is the marriage null; ſecondly, If a man and a woman knowing the relation which they bear to one another, *abuſe* their bodies together, they are guilty of what Law calls the *abominable* crime of inceſt, and are, therefore, liable to be capitally puniſhed. For in order to make them liable to be capitally puniſhed, it is neceſſary both that they know the relation, which they bear to one another, and that, knowing it, they commit an actual abuſe of their bodies.

Firſt; It is neceſſary, that they know their mutual relation; for inceſt is a crime. Therefore, like all other crimes, it implies an *animus delinquendi*, a conſciouſneſs of the circumſtances, in which the action is done, and which render it criminal. Of courſe, if both the unhappy perſons were, in truth, ignorant of the degree of propinquity, in which they ſtood related to one another, they ought to be pitied, not to be puniſhed. It is puniſhment enough, that their marriage is held to be null, and their iſſue illegitimate. If one of them knows the relation, and the other is ignorant of it, that one who knows it is, the other who is ignorant of it is not, liable to be puniſhed; for the knowledge of the one includes an *animus delinquendi*, and the ignorance of the other excludes it. If both of them knew their relation, they are both guilty of inceſt, and are liable to be puniſhed for it; provided they actually *abuſe* the bodies of one another.

For it is neceſſary, ſecondly, That they *abuſe* their bodies by *actual copulation*. Inceſt is not committed, unleſs the laws of chaſtity are violated by an *actual abuſe* of the body. It is not enough that a marriage has been ſolemnized; it muſt have been conſummated by actual copulation, in order to make the married perſons be held to have committed inceſt.

But no more than actual copulation is neceſſary; for it is not neceſſary, that the woman be impregnated, or that conception be the conſequence of that copulation.

'Tis true, it will, in all caſes, render the proof more eaſy, if the woman conceives, and is delivered of a child. But ſhe may have admitted her paramour to abuſe her body, without being impregnated. Of courſe, conception is not neceſſary to the conſtitution of the crime. 'Tis true, proof muſt, in this, as in all other caſes, be made of the actual commiſſion of it. But inceſt is an occult crime, it uſes to be committed by ſtealth, and to be concealed from the inſpection of men. It can never, therefore, be required, that witneſſes, who with their eyes beheld it actually committed, ſhould bear teſtimony to the commiſſion of it. It muſt, in all caſes of this kind, be ſufficient, if a train of circumſtances be proved, by which every ſenſible man will be convinced, that the crime was actually committed. For a fact is then ſaid to be proved, when one is *convinced* by the evidence brought to prove, that it was done. Hence, if the pretended marriage of the perſons accuſed of the crime was celebrated long before the time, at

which

which their propinquity is diſcovered, or if they were openly bedded together, Law will preſume, that they found an opportunity of ſatisfying their luſt, and will hold proof to be thereby made, that they did actually commit a mutual abuſe of their bodies. Indeed, in all caſes, where the marriage is proved to have been celebrated, the commiſſion of the crime will be held to be proved. It will, therefore, be incumbent on the perſons accuſed to prove their innocence, or to exculpate themſelves from that guilt, with which they are loaded. For, undoubtedly, married perſons will put many oars into the water, in order to aſſwage the heat of their deſires. Indeed, if we can ſuppoſe, that the propinquity was accidentally diſcovered immediately after the celebration of the marriage, or ſo ſoon as to prevent the uſual ceremony of bedding, the preſumption will lie for innocence. Of courſe, it will be incumbent on the proſecutor, who charges the commiſſion of the crime upon them, to prove their guilt otherwiſe than from the evidence afforded by the mere ſolemnization of the marriage.

§ 178. Marriage ſubſiſts only between one man and one woman (§ 169. *ax.* 4.). Hence a man, who is actually married, and has really become the lawful huſband of a particular woman, cannot, during the life of this, marry any other woman; and, *vice verſa*, a woman, who is actually married and has become the lawful wife of a particular man, cannot, during the life of this, marry any other man, unleſs they ſhall previouſly have been divorced from one another, in a ſolemn and legal way, by the decree of a competent court. For both bigamy and polygamy are prohibited and held to be crimes by the Law of Scotland; becauſe the number of males and of females being nearly equal, they would be attended with an unequal diſtribution of matrimonial enjoyments, which nature has rendered ſo agreeable to human kind; they would create jealouſies and heart-burnings among the ſpouſes; would hinder the exertion of the generative faculties of mankind from producing its intended effects; would diminiſh the natural affection which parents ought to have for their offſpring; and would render them careleſs about the lives, health, and education of their children. If, therefore, one, who is actually married, ſhall during his marriage with his firſt ſpouſe, commit bigamy with any other woman, 1) The ſecond marriage is void to all intents and purpoſes; the ſecond wife has none of the rights, which lawful wives have; and the iſſue, if any is procreated between the bigamiſts, is illegitimate; 2) The firſt wife, who is innocent, acquires a right to have her marriage with the guilty perſon diſſolved by decree of divorce, *ex capite adulterii;* 3) The bigamiſt is liable to be puniſhed by the pains of Law.

I ſay, 1) the ſecond marriage is void to all intents and purpoſes, and that, whether the parties, one or both, were *in bona* or *in mala fide*; for no man can be at one and the ſame time married to two women, and no woman can, at one and the ſame time, be the wife of two men. That woman, therefore, whom the man married firſt, is his alone lawful wife. Of courſe, ſhe acquires an excluſive title to all the rights, which wives have by Law; but, if ſhe has any, ſhe muſt, ſurely have one to hinder her huſband from marrying another wife, from waſting his ſtrength or beſtowing his favours on ſtrange women; and from depriving her offſpring of the chance of ſucceſſion, to which they have acquired a legal right in conſequence of the marriage of their mother.

Since the marriage is null, it muſt neceſſarily follow, 2) That the ſecond wife acquires not, in any caſe, in conſequence of her marriage, any of the rights, which lawful wives have: for ſhe is not a lawful wife; ſhe is an adultereſs. But no woman, who cannot ſay, that ſhe is a lawful wife, has any of the rights, which the Law gives wives. Of courſe, ſhe is not in any caſe entitled to the proviſions made for her either by Law or by contract. I ſay, ſhe is not, in *any* caſe, entitled to the proviſions made for her either by Law, or by contract: for *res devenit in non cauſam.* Theſe proviſions were made for *a wife*: but it appears that ſhe is not *a wife.* Of courſe, ſhe cannot be entitled to lay claim to them. 'Tis true, ſhe *may* be entitled to damages: for it may be ſuppoſed either that both parties were ignorant of

of the impediment laid by the Law in the way of their marriage; or that one of them was, while the other was not ignorant of it; or that both of them knew it, and were *in mala fide*. In the firſt caſe, in which both parties are ſuppoſed to be *in bona fide*, as ſoon as it is diſcovered, that the former marriage ſtill ſubſiſts, the ſecond begins to be held to have been null from the beginning, and all, which followed in conſequence of it, becomes void. So the portion and every other thing, given by the wife or thoſe who contracted on her part to the huſband, muſt be reſtored to thoſe who gave them; the contract of marriage becomes ineffectual; and the proviſions made by it are not due. But the perſons themſelves, who have been unfortunately involved in ſo direful a calamity, cannot, for they do not deſerve to be puniſhed, ſince *ex hypotheſi* they are in no ſort culpable. In the ſecond caſe, in which one of the parties is *in bona* and the other *in mala fide*, the marriage becomes alſo null; every thing, done in conſideration of it, becomes void. Only the guilty perſon is liable to be puniſhed for the crime committed by him; and the innocent one is entitled to ſue him for damages; for he has done an irreparable injury to her. Knowing his condition, he deceived her into a marriage, which, he knew, would, as ſoon as his former one was diſcovered, be held to be null. Of courſe, he muſt be bound to make reparation for the wrong, which he has done her; that is, he is liable to be ſued for damages. I ſay, for *damages*: for he cannot be bound to make good the *proviſions*, which either he or the Law may have made for her; ſince they were made for a *wife*. But the marriage being null, ſhe cannot ſay, that ſhe is a wife. *Nec vir, nec uxor, nec nuptiæ, nec matrimonium, nec dos intelligitur*; —*ſequitur ergo, ut diſſoluto tali coitu, nec dotis, nec donationis exactioni locus ſit*, § 12. *J. de nuptiis*. Beſides, the firſt wife alone *acquired* the rights, which the Law gives wives. Of courſe, ſhe cannot be deprived of them by any unlawful act done by her huſband. The ſecond marriage, therefore, cannot make any infringement upon them; the ſecond wife cannot be entitled to the proviſions made by Law for lawful wives; for ſhe is not a wife. Of courſe, ſhe cannot be entitled to thoſe, which ſhe may have ſtipulated to herſelf: for ſhe has no better right to the latter than to the former. In the laſt caſe, in which both parties are *in mala fide*, the marriage is held to have been null *ab initio* to all intents and purpoſes; every thing, done in conſequence of it, becomes void; and both parties are liable to be puniſhed with the pains of Law, becauſe they are both criminal.

Since children, produced by the unlawful embraces of parents, who are in ſuch circumſtances as make it abſolutely impoſſible for them either to marry one another or to be held by Law to be married perſons, are illegitimate; it muſt neceſſarily follow, 3) that the iſſue of bigamiſts muſt, in all caſes, be held to be illegitimate, whether either of the parties was or was not *in bona fide*; eſpecially ſince the firſt wife has by her marriage *acquired* for her children an excluſive title to the right of legitimacy and to all the legal conſequences of it. No deed, done by her huſband, either can or ought to deprive her; and no deed, done by herſelf, either can or ought to deprive her children of that right. A man, by marrying, diveſts himſelf of the right he had to diſpoſe of his perſon in marriage to any other woman, and cannot, by ſuperinducing a ſecond wife, hurt the rights either of his firſt and only lawful wife, or of the children whom ſhe may happen to bear him. 'Tis true, an innocent creature may thus be cheated by a profligate deceiver. But, if ſuch a thing ſhall at any time happen, 'tis a misfortune, which neither can nor ought to be remedied at the expence of *rights*, which others have honeſtly *acquired*.

A bigamiſt violates that fidelity which is due to the marriage-bed, (§ 169. *ax.* 8.). Conſequently, 4) he is guilty of the crime of adultery, and gives a right to his firſt wife to get her marriage diſſolved, and herſelf divorced from him on account of adultery.

By violating the fidelity which he owed to his marriage-bed, 5) he becomes guilty of an atrocious crime, violates the Laws of GOD, and diſturbs the peace

of Society. He breaks that ſolemn engagement, into which he entered at the time, when he accepted of his bride as his lawful wife; he breaks the promiſe, which he made her, and by which he bound himſelf, before the people, and, as it were, in the very ſight of GOD, to be faithful to her bed. Thus, he is guilty of an high degree of perjury, becauſe he took GOD, as it were, witneſs to the ſincerity of his intentions. From whence it is plain, why Bigamy is, 1551, *c.* 19. ordained to be puniſhed with the pains of perjury, that is, by confiſcation of all the moveable goods of the bigamiſt; by impriſonment of his perſon for a whole year, or longer, during the will of the King; and by infamy, ſo as to render him incapable of holding any office, honour, dignity, or benefice for the time to come. At the time when this act of Parliament was made, the popiſh religion was eſtabliſhed in Scotland; its doctrines prevailed among the bulk of the people; marriage was numbered among the ſacraments; and the legal puniſhment of perjury would naturally be thought to be the proper one, which Law ought to ordain to be inflicted on bigamiſts.

Bigamiſts are guilty, not of perjury alone, but alſo of adultery. From whence it follows, that they may be both proſecuted and puniſhed as adulterers. By the antient Law of Scotland, adultery was, in no caſe, puniſhed capitally, nay was ſeldom puniſhed ſo ſeverely as bigamy; becauſe an adulterer only violates the fidelity which he owes to the bed of his ſpouſe, whereas a bigamiſt adds to this violation of the marriage-bed an open, deliberate and wilful act of perjury. Hence, by 1551, *c.* 20. adulterers are ordained to be put to the horn, and to be denounced rebels; and all their moveables (§. 161.) are declared to be confiſcated. Afterwards, the Legiſlature became ſenſible of the great hurt, which adultery does to Society, and ordained it, in caſe it was notorious, to be puniſhed by Death, 1563, *c.* 74. In conſequence of this act, a diſtinction was introduced into the Law of Scotland, between ſimple and notorious adultery. Simple adultery is every ſpecious of adultery, which is not notorious. To determine, therefore, with preciſion, what ſhould be reckoned to fall under the latter crime, it was declared, by 1581, *c.* 105. to be notorious adultery, either 1) When iſſue is procreated between the adulterers; or 2) When it is notorious that they keep company *and* bed together; or 3) When having been, in conſequence of the ſuſpicion and ſcandal given by them to the Church, duly admoniſhed to abſtain and to ſatisfy the Church, either by repentance or by purgation, they contumaciouſly refuſe to do ſo, and are excommunicated for their obſtinacy. In any of theſe caſes, the adultery is declared to be notorious, and to be puniſhable by death. Whether this crime may, in any other caſe, be puniſhed capitally, it is not my preſent purpoſe to determine. 'Tis ſufficient to obſerve, that in all caſes, in which adultery may, bigamy may alſo be puniſhed capitally. From whence it eaſily follows, that if bigamy is committed ſo, that the bigamiſt can be ſaid to be guilty of *notorious* adultery, it may be puniſhed by death. In thoſe other caſes, in which adultery can only be puniſhed as ſimple, by an arbitrary puniſhment, bigamy ought to be puniſhed with the pains of perjury in conſequence of 1551, *c.* 19.

§ 179. I ſaid, (178.) that a man, who is *actually married*, and has become the lawful huſband of a particular woman, cannot, during the life of this, marry any other woman; and, *vice verſâ*, that a woman, who is *actually married*, and has become the lawful wife of a particular man, cannot, during the life of this, marry any other man. For, till that time, at which a man becomes and is by Law held to be an huſband, or a woman becomes and is by Law held to be a wife, the man may marry any woman whom he pleaſes, and the woman may marry any man whom ſhe pleaſes. An actual marriage is that, which can alone bind one to live as huſband or wife of another. Till one is really married, he neither is nor can be effectually and validly bound; of courſe, he cannot be forced to take any particular woman to be his wife. Tho, therefore, a man ſhall have made his addreſſes to a woman; ſhall have engaged her

her affections to him; ſhall have obtained her conſent to marry him; ſhall have bound himſelf in honour, and promiſed, in the moſt ſolemn manner, to marry her; and ſhall have proceeded ſo far as to cauſe proclamation of bans to have been regularly made; yet neither party becomes bound to marry the other; both of them may alter their minds, and marry any other perſon at pleaſure. There is always room for repentance on both ſides, perpetually and in every inſtant, till they are actually joined together by the bond of marriage; becauſe marriage is entered into by conſent *de præſenti*. Till, therefore, that conſent is really given, the parties do not, and may refuſe to give their conſent to become married perſons, *l.* 1. *C. de ſponſ. l.* 2. *C. de repud. et jud. de mor. ſublato.* Becauſe nothing ought to be more free than marriage. If men who had promiſed to marry particular women, or women who had promiſed to marry particular men, could by legal means be compelled to fulfil their promiſes, tho they ſhould unfortunately happen, afterwards, to conceive unconquerable averſions to one another, for reaſons, which, tho they may be good in themſelves, they do not, however, chuſe to tell; a plentiful ſource of miſery and woe would be introduced into human Society. The happineſs of a married life depends greatly on the ſincerity of that affection and regard, which the married perſons have for one another. But how is it poſſible, that thoſe ſhall love one another, who have from the beginning a rooted diſguſt of one another? In fact, ſuch marriages commonly produce the moſt direful effects: either the unhappy couple are obliged to ſeparate from one another, and are, thereby, deprived of all the pleaſures which marriage affords; or, if they continue to live together, the comfort, peace and felicity of their lives are greatly diſturbed by conſtant uproars; nay, ſometimes more fatal cataſtrophes have flowed from them.

Theſe principles have taken ſuch deep root in the Law of Scotland, that not only may both parties, however their honour may be engaged, lawfully repent at any time before they are actually married, but that perſon, who refuſes to perfect the marriage, does not even become liable, and therefore cannot be obliged to pay damages to the other. Nay, tho both parties ſhould have bound themſelves to pay a certain penalty, the perſon, who refuſes, to the perſon willing to accompliſh the marriage, and a formal deed or written contract ſhould have been made on this agreement; either party may ſtill be free at pleaſure, and will not, notwithſtanding his formal written obligation, be obliged to pay the penalty: *quia*, ſays the Roman Lawyer, *inhoneſtum viſum eſt, vinculo pœnæ matrimonia obſtringi*, ſive futura, *ſive jam contracta, l.* 134. *p. ff. de verb. obl.* For this doctrine is agreeable both to the principles and to the letter of the civil Law, *d. l.* 134. *p. ff. de verb. obl. l.* 2. *C. de inut. ſtip.* to thoſe of the Canon Law, *c.* 29. *t.* 1. *lib.* 4. *Decretal.* and has been adopted into the Law of Scotland *, as appears from ſeveral judgments of the Court of Seſſion, B. 35. †, and from the unanimous opinion of all the writers on the Law of Scotland. 'Tis true, that it is uſual in England to award damages, in ſuch caſes, to the party thought to be injured. Such ſeems alſo to have been the antient Law of Rome ‡; and by our communication with the Engliſh, manners and opinions have been gradually introduced into Scotland ſimilar to

* Vide SKENE ad R. M. l. 2. c. 6. § 2.

† It is true, that there is an old caſe reported, *Du.* 16th *Dec.* 1628, *Craig*, from which one would be apt to conclude, that penalties, promiſed in caſes of this kind, are due; but it muſt be remarked, that the penalty was, in this caſe, promiſed after the man had been ordered to complete the marriage. So that there muſt have been ſome good reaſon, why he was no longer at liberty to marry any other, than her to whom he bound himſelf to pay the penalty. Beſides, if the man afterwards married the woman, this penalty would fall under the *jus mariti*, and accrue to him.

‡ 'Sponſalia in eâ parte Italiæ, quæ Latium appellatur, hoc more atque jure ſolita fieri ſcripſit SER. SULPITIUS, in libro quem ſcripſit de Dotibus: qui uxorem, inquit, ducturus erat, ab eo, unde ducenda erat, ſtipulabatur eam in matrimonium ductum iri: qui daturus erat, itidem ſpondebat. Is contractus ſtipulationum ſponſionumque dicebatur ſponſalia. Tunc quæ promiſſa erat, ſponſa apellabatur; qui ſpoponderat ducturum, ſponſus. Sed ſi poſt eas ſtipulationes uxor non dabatur, aut non ducebatur, qui ſtipulabatur ex ſponſu agebat; judices cognoſcebant; judex quamobrem data acceptave non eſſet uxor, quærebat; ſi nihil juſtæ cauſæ videbatur, litem pecunia æſtimabat, quantique interfuerat eam uxorem accipi aut dari, eum, qui ſpoponderat, aut qui ſtipulatus erat, condemnabat. Hoc jus ſponſaliorum obſervatum dicit SERVIUS ad id tempus, quo civitas univerſo Latio lege JULIA data eſt. AUL. GELL. lib. 4. cap. 4.

to thoſe which prevail in England. Hence, of late, from the common notions of the people, one would be apt to conclude, that a perſon injured in this manner would be found, by the Law of Scotland, to be entitled to obtain an adequate reparation of an injury eſteemed ſo atrocious. But nothing can be more diſagreeable to the ſpirit which has hitherto been diſcovered in the Law of Scotland; and it may well be doubted whether any alteration ought in this matter ever to be introduced into it. That real infamy, which muſt neceſſarily attend ſuch baſe and diſhonourable actions, ſeems to be a puniſhment ſufficient for them, and will be, in moſt caſes, more than able to prevent them. If the Law ſhould begin to go farther, the worſt conſequences might follow.

We ought, however, carefully to diſtinguiſh, another which is indeed very different from the former caſe. It was ſaid, that both parties, however they may have bound themſelves in honour, may always be off with the match, till they do actually become married perſons; and that the party who declares off, tho he can give no good reaſon why he does ſo, is not obliged, and therefore, cannot be decreed to pay any thing in name of damages for the injury, which by his repentance merely he hath done to the other party that is willing to fulfil the bargain. But, if that perſon, who is willing to adhere to the engagement and to marry the other, hath ſuffered not an injury only, but a pecuniary loſs, he will have action againſt the other for reparation of this pecuniary loſs he hath ſuffered by the repentance of the other party; provided the latter can give no good reaſon, why he altered his reſolution. For, if he either can give a reaſon, that is both good, and neither had nor could come to his knowledge, or took care to declare his intention of being off, before the other was put to expence; he is not bound to repair the loſs of the other; for the latter has no body but himſelf to blame, and ought not to have been ſo raſh as to throw away money, after he knew the alteration of the reſolution of the former. Therefore, *ſibi imputet*, if he has ſuffered any needleſs loſs. But if he can give no good reaſon, or if he neglected to give timely notice of his change of reſolution, he will be bound to repair to the other party the loſs he has ſuſtained, *Fo.* 2d *Jan.* 1685, *Graham*. The reaſon is plain; in all caſes, in which pecuniary intereſt is concerned, *nemo poteſt mutare conſilium ſuum in alterius injuriam*, *l.* 75. *ff. de reg. jur.*

§ 180. *Laſtly*; Marriage is prohibited by Statute, 1600, *c.* 20. between one divorced for adultery and that perſon, with whom the one divorced is declared by the ſentence of the Judge to have committed the crime. The reaſon is, becauſe the Law puniſhes perſons guilty of adultery, by making it impoſſible for them to have the happineſs of marrying thoſe, with whom they committed the delinquency.

§ 181. Since all thoſe, who are not prohibited, may enter into the ſtate of marriage (§ 170.), it is plain, that all others than thoſe whom I have enumerated, may marry. 'Tis needleſs therefore to make a particular enumeration of them; for the reaſons, for which, and for which alone the prohibitions are made, may eaſily be applied to every caſe.

TITLE III.

Of the Way, by which People intending to marry each other, enter into the State of Marriage, or become *Huſband and Wife.*

§ 182. THe State of marriage is entered into voluntarily and by free conſent (§ 169. *ax.* 3.). Therefore, it is *conſent* alone, which conſtitutes marriage, makes a man and a woman become huſband and wife, and brings them under the obligations incumbent on married perſons.

Conſent,

Conſent, when taken in its moſt extenſive ſenſe, ſignifies 'the real and hearty 'agreement of two or more perſons concerning ſomething.' I. It implies, that they are thinking about *one and the ſame object:* for, if their minds have not one and the ſame, but each of them is employed about a different object, they cannot be ſaid *to conſent, conſentire.* II. They muſt *agree in thinking* about it; they muſt not be at variance; their ſentiments muſt be at one; that is, the one muſt have thoſe very thoughts, which the other wants him to have. III. Their agreement muſt be *real, ſerious,* and *hearty;* it muſt not be either *pretended, fictitious* and *affected,* or *forced,* and *involuntary*; it muſt be from the heart.

People may agree either in their ſpeculative opinions, or concerning their conduct. 'Tis ſeldom, that the word is applied to the former; and it is in the latter ſignification in which it can alone be *properly* uſed. In this title, therefore, it means 'the real and hearty agreement of two perſons concerning *the doing* of 'ſomething:' and that, about which they are here ſuppoſed to agree, is *the marrying* one another. It may be given in this caſe, either *de præſenti* or *de futuro.* It is ſaid to be given *de præſenti,* 'when a man and a woman *do* conſent 'and agree to become huſband and wife, the one of the other, from a *preſent* 'moment, to wit, from that inſtant, at which their conſent is declared;' conſent is ſaid to be given *de futuro,* when a man and a woman agree, that they *will* 'become huſband and wife, the one of the other, not from the preſent, but a-'gainſt ſome future time.'

In order, therefore, to make a man and a woman become huſband and wife, no more is neceſſary than 'that they give their *preſent* conſent to be married perſons:' for conſent *de præſenti,* and it alone, completes marriage, and diveſts both parties of the power of repudiating one another. Till they have given it, they have, both of them, liberty to be free from their engagements, and to *marry* any others whom they pleaſe.

§ 183. Conſent being the real and hearty agreement of two perſons, that, which is neceſſary to make a complete marriage, muſt be, 1) Free and voluntary; it muſt not be forced. Therefore, if one is induced by force to give it, the marriage is void, *l.* 14. *C. de nupt.*

'Tis not, however, every degree either of compulſion or of fear, which will render a marriage void. It muſt be ſuch a degree of it, as would have influence on a perſon of conſtancy and reſolution; *Metus non vani hominis, ſed qui merito et in hominem conſtantiſſimum cadat, l.* 6. *ff. quod met. cauſ.* If, therefore, one ſhall be induced, by the regard which he pays to the advice, and by the awe in which he ſtands of his parent, to marry a particular woman, to whom he may have happened to have conceived an averſion, and who is therefore loathſome to him; the marriage will, notwithſtanding, be valid: For he ought not to have carried his ſimplicity ſo far as, in conſequence of the awe he had of his father, to take a ſtep which was ſo contrary to his own inclination, and on which the happineſs of his life ſo much depended. Indeed, if force was actually uſed in order to obtain his conſent, the marriage is void, no matter by whom it was uſed, whether by his parent, or by another: For the law makes no diſtinction between ſuch as are, and ſuch as are not related to the perſon, who is compelled, *l.* 21. 22. *ff. de ritu nupt.* and juſtly; becauſe nobody, whatever be the relation which he may have to another, has a right to *force* him to do a thing of ſuch importance to his happineſs.

The force muſt not only be ſuch, as would prevail on a man of reſolution; it muſt alſo be uſed *preſently, l.* 9. *p. ff. quod met. cauſa.* That is, the terrible act muſt be threatened to be put in execution preſently, unleſs the perſon intended to be forced, will inſtantly marry the other. Thus, if a man preſents a loaded piſtol to the breaſt of a woman, and threatens to put her to death the next moment, unleſs ſhe will immediately marry him; and if, out of fear, ſhe marries him, the marriage is *ipſo jure* null. 'Tis otherwiſe, in caſe the evil which is

threatened, is threatened to be put in execution only at ſome future time, which either is indeterminate, or is, at leaſt, at a conſiderable diſtance from that at which the threats are actually made. Thus, if one ſhall tell another, that he is reſolved to put him to death, unleſs he will marry a particular woman, and if the perſon threatened is ſo ſimple as actually to marry this woman, the marriage is good; becauſe the proſpect of ſuch diſtant calamities can never be conſtrued to amount to actual force, and ought, therefore, to have effect on no man. Nobody ought to be moved by the fear of them, or to have done any thing raſhly on account of them; ſince 'tis odds, if any man, however big language he may uſe, is of a conſtitution ſo hardy and ſevere as ever once to dare to put his threats in execution, *l.* 7. *p. l.* 9. *ff. quod met. cauſ.*

The force, which is uſed, muſt be atrocious; it muſt imply a calamity ſo dreadful as to be able to overcome the courage of a reſolute man, and to produce a diſtraction of mind, which will make him, who is oppreſſed by it, willing to do any thing rather than ſuffer the evil threatened to be done him. Such is the fear, which muſt ſeize on one, who is threatened to be killed, tortured, or raviſhed. It is not, therefore, ſufficient to render null a marriage, that it was contracted out of fear of ſome deſpicable and inſignificant danger; becauſe nobody can be ſuppoſed to be ſo much frightened by the apprehenſion of what is in itſelf ſo little terrible, as to be rendered incapable of refuſing his conſent, if he pleaſes. The fear muſt always be *majoris malitatis*, *l.* 3. § 1. *l.* 4. *l.* 5. *ff. quod met. cauſ.* It muſt be ſuch, as it may well be thought, will deprive a man of the liberty of refuſing his conſent, will reduce him to ſuch a confuſed and diſtracted ſtate of mind, as will render him almoſt inſenſible of what he is doing, and will make him prefer doing what he is forced to do, to ſuffering what it is threatened he ſhall ſuffer. Regard, therefore, ought to be had to the different diſpoſitions of mankind. Some are by nature of a timorous and fearful conſtitution; others are hardy, reſolute and bold: women are more eaſily frighted than men; children and old people, than ſuch as are in full vigor both of body and of mind: the ſame danger which will make the former tremble, will make little or no impreſſion on the latter. There ought, therefore, the greateſt regard to be had to thoſe vaſt differences of ſpirit, by which nature hath ſo remarkably diſtinguiſhed individuals of human kind.

One may be frightened into a marriage by the fear of ill befalling not to himſelf, but to others. If, therefore, the ill ſhall be threatened to be done to one, for whom he has an affection ſo great, as to make him almoſt as anxious about his ſafety and welfare as he is about his own, the marriage will be held to be null. Thus, if one threatens that he will inſtantly kill the only child of another, unleſs this other will immediately marry a particular perſon, tho one in ſuch circumſtances ſhould actually conſent, that the marriage be immediately celebrated, and it be celebrated accordingly; it will, notwithſtanding, be held to be null, *cum pro affectu parentes magis in liberis terreantur*, *l.* 8. § 3. *ff. quod met. cauſ.* The Law, 'tis true, ſpeaks of children alone. But every one, who is not altogether inſenſible to the feelings of humanity, muſt evidently ſee, that it ought to be extended to parents, brothers and ſiſters, as well as to children; for who is there of a heart ſo hard, as not to be willing to pretend to marry any one rather than allow a dreadful calamity to befall thoſe, whom nature has made ſo dear to him.

Marriages, contracted out of force or fear, are ſo null, that it is in no ſort neceſſary for them to be found by decree of a competent court to be ſo. The perſon, who was forced, may, as ſoon as he is at liberty, refuſe to adhere; and if the other ſhall bring an action of adherence againſt him, it will be competent to him to defend himſelf from it, by pleading the exception of force and fear, and to inſiſt, that his marriage be declared to have been null from the beginning.

Forcible

Forcible marriages are null; they are however capable of being ratified, or of being rendered valid by ſubſequent voluntary conſent. If, therefore, a woman, who was forced, ſhall continue to cohabit with the man whom ſhe married, the ſubſequent voluntary cohabitation renders the marriage valid, makes them become huſband and wife to all intents and purpoſes, and effectually diveſts both parties of the power of deſerting one another, and of having the marriage declared to be null; becauſe they might have married each other in the ſame irregular manner at the beginning, *Decretal. l. 4. t. 1. c. 21. de ſponſal. et matrim.*

But it muſt be remarked, that the perſon, who was forced, has alone the liberty of obtaining the marriage to be declared null; for that one, who uſed the force, is bound, if the other, who was forced, is willing to adhere. Thus, if a man of low circumſtances ſhall have forced a woman of fortune to marry him, and if an immenſe acceſſion ſhall, by ſome unforeſeen and unexpected accident, be made to his eſtate after the marriage; he will be bound, if the woman is willing to adhere; and will not have it in his power, however deſirous he may be, to get rid of her, in order to have his choice of a woman more ſuitable to his preſent condition; becauſe the marriage was free and voluntary on his part. One, who could think of employing unlawful means to obtain a fortune, ought to be obliged to ſtand to all the conſequences of them, and ought not to be allowed to change his reſolution with the change of his circumſtances. Indeed, if both parties were forced, the marriage continues null on all ſides, till it is ratified either by ſubſequent voluntary cohabitation, or in ſome other legal way.

§ 184. But it is not ſufficient for perfecting a marriage, that the conſent be free and voluntary; it muſt be 2) Serious: for conſent implies, in all caſes, the *ſerious* agreement of parties, (§ 182.).

Hence a marriage, which one makes out of a joke, without any ſerious intention of being married, is void. *Simulatæ nuptiæ nullius momenti ſunt, l. 30. ff. de ritu nupt.* 'Tis true, it is very improper for one to joke about ſuch a ſerious matter. However, if the whole appears to have been, in truth, no more than a joke, a frolic intended for the diverſion of company, it would be wrong for the law to enſnare one into a marriage by laying hold of actions done merely out of *gaieté de cœur*, in order to make one.

But conſent is an act of the mind, and is diſcoverable from ouvert actions alone. Therefore, the Law requires no more in order to hold it to be ſerious, than that it *appear* to be ſo: for it is impoſſible to penetrate into the ſecret receſſes of the heart, and we muſt, in all caſes, judge from appearances alone.

§ 185. Conſent is the agreement of two perſons (§ 182.), and muſt therefore, in order to perfect marriage, be 3) Mutual; it muſt be both free and ſerious on both ſides; and the parties muſt agree concerning the perſons of one another; they muſt not be miſtaken about each other's identity.

People, who agree not in the object of their thoughts, either may differ about the identity of one another, or, agreeing in that, may differ about the qualities which they believe one another to have: for one may marry a perſon different from her whom he intended to marry; and he may imagine her to have qualities, of which ſhe is not poſſeſſed.

In the firſt caſe, in which parties differ about the perſon intended to be married, they are ſaid to diſagree about the *ſubſtantials* of marriage; and it is the common opinion of the writers on the Scotch, as well as of thoſe on the Civil Law, that errors concerning theſe render marriage void, *cum non conſentiant, qui errant, l. 15. ff. de juriſdic.* Conſent, it is ſaid, implies that thoſe, who give it, are thinking about one and the ſame object, (§ 182.). But a man, who intending to marry one woman marries another, does not *conſent* to marry that one whom he formally marries; becauſe his mind is employed in thinking of another. Therefore, if a man marries one, when he intended to marry a different

rent woman, the marriage is generally believed to be void from the beginning, and to be liable to be adjudged to be ſo.

But this opinion ſeems to be contrary to the principles of Law, and ought not to be admitted without many diſtinctions and much reſerve. For the *pair* may be ſuppoſed either to know or not to know one another: in caſe they are acquainted, they may be ſuppoſed either to ſee or not to ſee one another at the time of the ſolemnization of their marriage.

'Tis impoſſible, that a couple, who know and ſee one another, can fall into a miſtake of this kind; each of them being, *ex hypotheſi*, certain of the identity of the other. 'Tis in thoſe caſes alone, in which they do not ſee one another at the time of the ſolemnization of the marriage, that people, who are well acquainted, can fall into an error: but it ſeems not, that a marriage could in theſe be held to be void. Marriage is not an event of ſmall importance in life; people ought to conduct every thing relating to it with that ſerioufneſs, which its importance requires. They ought not at the time of its ſolemnization to ſport themſelves by marrying either in veils or in maſks or in darkneſs; but, each of them beholding the other with their eyes, to be ſure of the identity of one another. What can be more abſurd than for a man to go to bed with a woman as his married wife, without knowing with certainty, whether ſhe, with whom he is bedded, is the Lady whom he intended to marry? Ought he afterwards to be allowed to complain, that he has been *beguiled*, and that it was not this woman, but another, whom he meant to take for his wife? It was *that* woman, whom he married without ſeeing, that he actually took; and by going into ſuch an extravagant frolic, he muſt be held to have been willing to run the riſk of an impoſition. He knew it to be poſſible that a trick might be played him; and married his wife by a ſort of game. The woman, whom he married, might happen to be the one whom he intended, and he might gain; but it was alſo poſſible, that ſhe might be another, and that he might loſe. He muſt, therefore, be contented with the lot which befalls him, and take that woman who comes up to him; for he ought not to have played for his wife.

In caſe the couple have never ſeen one another, the man may be ſuppoſed either to marry his wife by Proxy before he ſees her, or to go to make his addreſſes to her, and, after having finiſhed the courtſhip, to marry her. In caſe a marriage is ſolemnized by proxy, thoſe individuals, who marry one another in this manner, become huſband and wife from the moment, at which their conſent is given by the concluſion of the ceremony. Therefore, it is not poſſible, that a miſtake can, in this caſe, be committed: for the perſons, who intend to marry one another, are aſcertained by their parentage, by their eſtates, by their profeſſions, by their titles, and otherwiſe; and thoſe, who anſwer to theſe deſcriptions, are the alone perſons, who either conſent or intend to marry one another. Therefore, if others are impoſed on the proxies, the marriage muſt be void: for the proxies themſelves are not bound; they have no intention of marrying, and do no more than repreſent their conſtituents; as little are the latter, for they impowered their proxies to marry certain perſons; theſe have married others and have thereby exceeded their powers; of courſe, that, which they have done, is void, and binds not the conſtituents, who remain ſtill unmarried perſons. In caſe the proxies marry thoſe individuals, whom their conſtituents intended to marry, but others are impoſed on the conſtituents themſelves, the impoſition can avail nothing, it cannot make the perſon impoſed become the ſpouſe of the other; for the conſtituents became married perſons by the ſolemnization of the marriage with their proxies, and an impoſition made upon either of them cannot diſſolve the ties with which they are bound.

In caſe one goes to make his addreſſes to a Lady, whom he has never ſeen, reſolved to take her, if he can prevail on her to marry him, and another is impoſed on him inſtead of her, the marriage muſt, nevertheleſs, be held to be good

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in all caſes, in which the perſon impoſed is ignorant of the impoſition: for *ex hypotheſi*, he knew this woman, ſaw her, became acquainted with her, made his addreſſes to her, obtained her conſent, engaged her affections, and actually married her. Would it then be reaſonable to ſuffer him afterwards to ſay, that he was miſtaken, and that he intended another for his wife? He ought to have been at more pains to have diſcovered the truth; a little care would have prevented the poſſibility of a miſtake; and if he did not think it worth while to take it, he ought to be allowed to ſuffer for his negligence. The woman agreed *bonâ fide* to marry him; ſhe is, in no ſort, culpable; and ought not to be rendered miſerable, becauſe he was careleſs. Her innocence ought to protect her, and to make the favour be ſhewn to her: for in all caſes more favour is due to one, whoſe conduct is blameleſs, than to one, who has been negligent about a matter, which called for his utmoſt attention. The marriage, therefore, muſt be held to be good.

'Tis otherwiſe, in caſe the perſon impoſed is *particeps fraudis*, knows the miſtake, and has not the honour to diſcover it: for it is her duty to inform the other of it; ſhe ought not to allow him to deceive himſelf, and to remain in ignorance; and, if ſhe has not the honour to undeceive him, he ought to be allowed to get free of her. This of all the caſes, in which one can be ſuppoſed to be miſtaken about the perſon he intends to marry, is the moſt favourable. But it ſeems not, that a marriage ought always, even in this one, to be adjudged to be void. For people intending to marry ought to be at due pains to fix their choice, and, if it is fixed without regard to the perſonal qualities of one another, to take care to have proper evidence concerning the identity of thoſe to whom they make their addreſſes. Therefore, one ought, in no caſe, to get free of a marriage, which he has made voluntarily, unleſs he can prove, that his ignorance is excuſable, that the miſtake is, on his part, innocent, and that the other, who was impoſed on him, was *particeps fraudis*. For marriage is a tie which ought not to be looſed for every frivolous pretext; and, if it was to be diſſolved for every miſtake which could be pretended to be made about the ſubſtantials of it, it would be eaſy for any couple, who were not pleaſed with one another, to have their marriage declared to be void.

People, agreeing about the identity of one another, may be miſtaken about the qualities which they poſſeſs. Theſe concern either their characters, their fortunes, their parentage, their age, or the condition of their bodies. It is agreed among Lawyers, that miſtakes concerning the four firſt of theſe do not make marriage void; for one ought to have taken care to have been better informed about them. Therefore, one, who marries a woman, whom he believes to be virtuous and chaſte, will not get free of her, on diſcovering that ſhe is vitious and immodeſt; one, who marries a woman, believing her to be prudent, will not get free of her on finding her to be a fool; one, who marries a woman believing her to be good-natured, will not get rid of her, tho ſhe ſhould diſcover herſelf to be a very devil. In the ſame manner, one who marries a woman, believing her to be a fortune, to be well-born, or to be young, muſt adhere to her, tho he ſhould find her to have not a farthing, to be deſcended of low parents, or to be old: for the end of marriage is not the acquiſition of wealth, the gratification of vanity, or the ſatisfaction of other paſſions, but the procreation of children; and one may anſwer it without being either virtuous, prudent, good-natured, rich, well-born or young.

Miſtakes about the condition of one's body make not marriage void in any other but one caſe. For a man, who marries a woman, believing her to be poſſeſſed of her virginity, would not get free of her, in caſe he ſhould diſcover that ſhe had loſt it. Virginity is ſomething real; but thoſe, which are called the tokens of it, *M. de* BUFFON maintains to be deceitful and imaginary. In the ſame manner, a marriage is not void, becauſe one of the parties may happen to have a diſeaſe, which the other did not know her to have. But it is other-

wiſe, in caſe a woman who is actually with child, has the impudence to marry a man different from the father of it; provided he was ignorant of her condition, and his ignorance was not inexcuſable. For if a bridegroom has reaſon to ſuſpect the pregnancy of his bride either from her appearance or from her indecent familiarity with other men, he ſeems to have himſelf to blame for not making a diligent enquiry into her conduct. But if his ignorance is blameleſs, the marriage is either void from the beginning, or liable to be declared ſo, as ſoon as the condition of the woman is become viſible. *Propter hoc, quo nihil magis matrimonio adverſatur, quos ſponſaliorum opinio, non veritas copulavit, diſjungantur. Quomodo enim vera ſponſalia ſunt, in quibus nihil verum neque genuinum conſpicitur? ubi meretricium ſe offert ſcelus, ubi cauſæ ſunt diſſidiorum et odii, ubi animorum alienatio; (quæ mala acervatim omnia pariter cum peregrino alienoque ſemine ſuſcipiuntur) quomodo ibi matrimonialis concordia, quomodo purus ſponſaliſque amor? quin ut quiſpiam alterius fœtum ſibi ſubjiciat, id vero ratio non patitur. Neque item juſtum eſt, ut qui ſpe honeſtæ caſti matrimonii oblectationis ſponſam in domicilium ſuum recipere conſtituerit, ſi illa matrimonii legibus inſultet, et cum aliis laſciviendo, oblectationis ſpem evanidam ipſi reddat, in meretricia illa facilitate ipſam uxorem agnoſcere debeat. Lco. nov. Conſt. 93—Deut.* ch. xxii. *

§ 186. But it muſt be remarked, that it does not make a marriage void, that one was induced by fraud, that is, that arts which are, perhaps, unjuſtifiable, and will not give one the moſt favourable opinion of the morals of him who employs them, were uſed to induce him to enter into it: for the conſent, which one is induced by theſe means to give, is, nevertheleſs, free and voluntary; a thouſand little artifices are lawful on this occaſion; and a marriage, which is completed by a full and free conſent, cannot be diſſolved, becauſe one of the parties was enſnared into it. The knot being once tied is indiſſolvible.

§ 187. Marriage, it has been ſaid (§ 182), is perfected by conſent. Therefore perſons, who are at any time ſeized by a fit of madneſs or ideotiſm, cannot marry during its continuance; becauſe they know not what they do, and are thereby rendered incapable of giving their conſent to any thing. Nothing, therefore, whoſe ſubſiſtence or validity depends on conſent, can be done by them during that time ſo as to render it valid without being ratified. From hence it is natural to infer, that perſons, who have been rendered delirious by the violence of a fever, of an ague, or of any other diſeaſe, cannot marry during the fury of the diſtemper. Therefore, tho they have given their conſent to marry while they were overwhelmed by the delirium, they become not thereby married perſons, becauſe the Law diſtinguiſhes not between the different cauſes from which madneſs or inſenſibility may proceed; all, to which it attends, is the reality of the diſorder; and, if it appears to be real, not fictitious, it enquires no farther.

From the ſame principle it follows, that Law cannot hold thoſe to be, who have given their conſent to become married perſons, while they were intoxicated by the force and abundance of liquor, provided they were ſo deeply immerſed in inebriation as to be totally deprived of the uſe of their reaſon. Drunkenneſs, 'tis true, is an odious and illiberal vice; but it is, at the ſame time, a vice which is common among mankind, and which does not mark the worſt diſpoſition in the world. Men, who have no wicked intentions, and are not poſſeſſed of any flagitious depravity of heart, may be led into it unawares at an unguarded hour. Without any previous reſolution, affection for their friends, love of their company, and warmneſs of heart, may lead them by degrees to take larger and larger draughts of the intoxicating beverage, till at length they are wholly overcome by its violence

* After all, one may be allowed to doubt, whether the marriage is not good even in this caſe: for it is, ſurely, completed. But marriage can be diſſolved for adultery or deſertion alone; and ante-nuptial fornication is not adultery. Therefore, it ſeems to be more agreeable to the principles of Law to ſay, that the marriage is not either void or voidable for this reaſon, and that one, who meets with this misfortune, muſt put up with it.

olence and power. In ſuch caſes, it would be cruel to expoſe, perhaps good men to the profligate deſigns of the crafty and abandoned, and to puniſh them for a ſmall, becauſe a general, offence ſo ſeverely, by binding them forever to one, who was ſo baſe, as to think of taking advantage of their inebriation to enſnare them into a marriage, which, at their cool and deliberate moments, would have been abſolutely diſagreeable to them. I mean not to ſay that every degree of drunkenneſs is ſufficient to render a marriage void. 'Tis only ſuch a degree, as deprives the inebriated perſon of the uſe of his reaſon, and makes him either abſolutely ſtupid or greatly delirious. In that caſe, the marriage becomes ineffectual to all intents and purpoſes, provided the perſon injured, as ſoon as he diſcovers the cheat, recollects where he is, and finds out with whom he is in bed, flies the embraces of the deceiver, and ſhews his intention of not being married. For, if after he has returned to the uſe of his reaſon, and knows what has paſt, he ſhall, notwithſtanding, continue to act like a huſband, the marriage *becomes* valid; becauſe it is ratified. I ſay, if he knew what had paſt: for, if a man, who ſhall, during his *perfect* inebriation, be married in the moſt ſolemn manner, and ſhall be bedded with his bride, awaking in the morning, finding by his ſide a beautiful female, being entirely forgetful of the ceremonious conſent which he had given the former night, ſhall be hurried, by the impetuoſity of deſire, to do what the bulk of *men* in ſuch a ſituation would hardly hinder themſelves from doing, the marriage will, notwithſtanding, be ſtill invalid; becauſe the woman, who knew the condition, in which he was when he married her, ought to have acquainted him of what had paſt, before ſhe ſubmitted to his embraces, and may well from her ſilence be ſuppoſed to have renounced her pretentions to be the perpetual conſort of his bed.

§ 188. 'Tis the conſent of thoſe perſons alone, who intend to marry each other, that is eſſential to the conſtitution of marriage; that of parents, guardians, relations, or others is, in no ſort, neceſſary. People may effectually enter into the lawful bond of marriage, without the conſent and againſt the will of any of theſe *. Marriage ought to be free; and, ſince it ought to be encouraged, no more impediments ought to be laid in its way than the Law of nature ſeems to make abſolutely neceſſary. This was the doctrine of the Roman Law, *l.* 28. *p. l.* 72. § 4. 5. 6. *ff. de condit. et dem.* and has been received into Scotland.

Since the conſent of parents, guardians or others is not neceſſary in order to make it lawful for one to marry, it is plain that they cannot, either directly or indirectly, either forcibly or fraudulently, hinder one from marrying. Of courſe, every deed, every condition, every impoſition, contrary to the freedom of marriage, muſt be odious to the Law, and disfavoured by it; becauſe he, who makes it, aſſumes to himſelf a power, which the Law does not give him, endeavours to lay an embargo on marriage, and may thereby prevent the multiplication of human race. Hence, if one makes a deed in favour of another, and qualifies his benefaction by a condition contrary to the freedom of marriage, the condition muſt either be held *pro non ſcriptâ*, or be ſtrictly interpreted.

It muſt be held *pro non ſcriptâ* in all caſes, in which it appears to be either tyrannical, or capricious, or impoſed without any reaſonable view. *Quod in fraudem legis ad impediendas nuptias ſcriptum eſt, nullam vim habet, l.* 79. § 4. *ff. de condit. et dem.*

Hence,

* In antient times a woman, who held lands by ward-tenure of her ſuperior, could not marry without conſulting him and obtaining his conſent. The reaſon was, that ſhe might not marry a man who either was himſelf or whoſe family was at enmity with her Lord. But this tyrannical part of the feudal Law is either aboliſhed by ſtatute or gone into deſuetude. *R. M. l.* 2. *c.* 48. § 1. *ſqq. c.* 49. § 3. 4. Scotchmen were prohibited, under the pain of death, 1587, *c.* 105. to marry Engliſh women dwelling on the borders, without the expreſs licence of the King, ſignified under the great ſeal. The reaſon was, they might have formed leagues together, have each of them made their habitations an aſylum to one another, have thus with greater ſafety ſpoiled the counties around; and, beſides, might have alienated their affections from their own country.

Hence, if one limits his benefaction by this condition, 'if the perſon, in whoſe 'favour it is made, ſhall not marry,' *ſi non nupſerit*, the condition is in all caſes held *pro non ſcriptâ;* no matter, whether it be impoſed directly and in expreſs general terms, or indirectly, in a manner, which is equivalent to an expreſs prohibition, *l.* 63. § 1. *l* 64. § 1. *l.* 72. § 5. *l.* 74. *ff. condit. et demon.* Becauſe no body has a right to hinder another from marrying; and if he attempts to do it, he does what it is unlawful for him to do: for the good of Society requires, that human kind be propagated. Every one ought to have it in his own power, either to marry or to abſtain from marrying according to circumſtances. It is tyrannical, therefore, for one to pretend to ſay imperiouſly to another, that he ſhall not marry *.

For the ſame reaſon, the condition *ſi certæ perſonæ nupſerit*, 'provided he, in 'whoſe favour the deed is made, ſhall marry a particular perſon,' ought to be held *pro non ſcriptâ; Fo.* 2d *Jan.* 1712, *M'Rath—F.* 2d *Jan.* 1712, *M'Reoch.* Becauſe one ought not to have it in his power to limit the choice of another. If effect were given to this condition, the Law would be defrauded: for the conſent of one, different from the perſons intending to marry, would be made neceſſary to the conſtitution of their marriage. Beſides, the happineſs of life depends much on the choice, which one makes upon this occaſion. 'Tis, therefore, cruel for one to force a marriage upon another; for to limit one's benefaction by this condition is, in reality, to force the inclination of him, in whoſe favor the deed is made, and to make him run the riſk of being miſerable. No doubt, caſes may be ſuppoſed, in which it may be extremely proper for him to marry the perſon, whom he is ordered to marry. But it ought to be left to one's ſelf to determine himſelf; an advice may be given; but it is tyrannical to forfeit one, in caſe he will not follow it.

'Tis otherwiſe, in caſe the condition, impoſed on the benefaction, is 'ſi certæ 'perſonæ non nupſerit,' 'provided he, in whoſe favour it is made, ſhall not marry 'a certain perſon,' *l.* 63. *p. ff. de condit. et demonſtrat.* For circumſtances may make this a very reaſonable condition; and it may be extremely proper for one to be reſtrained from marrying either a particular perſon, or one of a particular family. Of courſe, this one may be allowed to be effectual, provided it appears to have been impoſed not capriciouſly, but for a good reaſon: for, if no good reaſon can be aſſigned for impoſing it, it ought to be held *pro non ſcriptâ.* One ought not to have it in his power to ſay capriciouſly, either to his heir, or to any other, in whoſe favor he has made a deed, 'you ſhall not marry ſuch a 'perſon.' To ſay ſo, without a good reaſon, is to make a very tyrannical uſe of one's power. Indeed, if a good reaſon can be aſſigned for the prohibition, it ought to be effectual; becauſe it ſeldom happens, that one may not be happy without the enjoyment of a particular perſon. Nature has taken care to beſtow different taſtes on different individuals, to diffuſe beauty among human kind, and to make a thouſand accidents both raiſe and extinguiſh the moſt violent paſſions.

The laſt condition, of which I ſhall take notice, is that, by which one is reſtrained from marrying without the conſent of certain perſons. This may, in ſome caſes, be a reaſonable one. Therefore, it ought not to be held *pro non ſcriptâ.* But it does not give thoſe, whoſe conſent is ordered to be got, an arbitrary power of refuſing it capriciouſly and without reaſon. On the contrary, the condition will be held either *pro non ſcriptâ*, or *pro impletâ*, in caſe either they will not either give or refuſe their conſent, or they will not aſſign a reaſon for refuſing to give it, or the reaſon, aſſigned by them, is not a good one, or no good one could be aſſigned for refuſing it †.

§ 189.

* I find a caſe reported by Lord Gosford, 28th *Feb.* 1672, *Foulis*, in which the Lords of Seſſion adjudged this condition to be a lawful one.

† Some of the judgments of the Court of Seſſion, (*Vide D. condition, p.* 189. 190,) ſeem to have given more force to theſe conditions, than ſeems to be agreeable to the principles of the Law of Scotland.

§ 189. Conſent, and it alone, conſtitutes marriage; therefore, neither 1) Copulation, tho it is the mean which muſt be employed in order to accompliſh its primary end, nor 2) Cohabitation is eſſential to the conſtitution of it. A man and a woman may actually become married perſons, may be totally diveſted of the power of marrying others, may be bound to live together as huſband and wife, and may be brought under all the obligations of a married life, not only before but even without copulation: for the maxim of the Roman Law, *nuptias non concubitus, ſed conſenſus facit, l.* 30. *ff. de reg. jur.* having been adopted by the Canoniſts *, was from them eaſily received into the common Law of Scotland. 'Tis true, that married perſons, if they obſtinately refuſe to cohabit, may be divorced for not adhering to one another. But this very divorce ſuppoſes them to have once been actually married, and to have been effectually diveſted of the power of marrying others at their own pleaſure. For from that moment at which they declare their preſent conſent, they become huſband and wife, the one of the other, to all intents and purpoſes, whether they do it ſolemnly or clandeſtinely. Thus from that moment, at which a miniſter, in conſequence of the conſent of a man and a woman, declares them to be married perſons, they do actually become huſband and wife, not only before they go, but tho they ſhould happen never to go to bed together; and they are ſo effectually bound, that they have it not in their power to deliver themſelves from the relation which ſubſiſts between them, and from the obligations ariſing from it. The ſentence of a competent court is that, which can alone diſſolve a marriage which is once lawfully conſtituted. Indeed, if they are in ſuch circumſtances as make their marriage to be contrary to the prohibitions of Law, it is null from the beginning, whether they do or do not bed together, (§ 170. *ſqq.*).

As little is it neceſſary 3) That any ſolemnity be uſed in declaring it: for it is ſimple, naked conſent, which is alone required to complete a marriage. The Law of Scotland requires no ceremonious obſervances, no formal rites, no anxious ſolemnities to its completion. No more is neceſſary to perfect it than that a man and a woman freely and ſeriouſly take one another for huſband and wife. Of courſe, 4) A formal ſolemnization of it either by a clergyman, by a magiſtrate, or by any other, is not neceſſary to make them become married perſons.

§ 190. One ought not, when treating a ſubject ſyſtematically, to take it for granted, that any part of it, however obvious it may be thought to be, is already underſtood: every thing ought to be explained. Therefore, it would be improper to omit remarking, that conſent may be ſignified either verbally, in writing, or by actions. When it is ſignified either verbally or in writing, it may be ſaid to be *expreſs*; becauſe it is expreſſed by words, the moſt ſure and the moſt infallible *media*, which one can employ, in order to ſignify to another that he gives it: when it is ſignified by actions, it may be called *tacit* or implied; for it is not expreſſed by words, but ſignified by actions which imply it.

'Tis needleſs to prove, that it may be given in the latter as well as in the former way: for every one knows, that there are, in moſt caſes, ſigns, tokens, or marks of it. Thus, when a marriage is formally ſolemnized by a clergyman, 'tis ſeldom that the bride and bridegroom give their expreſs conſent to become huſband and wife; they uſually give it by their actions, by doing thoſe things which are the common marks of it on this occaſion. They ſtand together before the clergyman, who ſolemnizes it; they allow themſelves to be addreſſed by him; they give attention to his exhortations; when asked by him, whether they are willing to marry one another, they anſwer the queſtion either by ſilence, which is expreſſive of it, or by the uſual forms; at his deſire, they take each other by the hand; and they allow him to declare them to be married perſons. Thus, they give by the actions, which they do at this time, that conſent which they never gave before.

* Matrimonium non facit coïtus, ſed voluntas, *Dec. p.* 2. *cauſ.* 27. *q.* 2. *c.* 1. *ſequ. de ſponſal.*

§ 191. The actual giving of conſent is a very different thing from proving it to have been given. It may have been actually given; yet it may be impoſſible to prove the giving of it.

Being capable of being ſignified by ouvert acts alone, proof of the giving of it may be made either by the teſtimony of witneſſes, by written evidence, or by oath of party. 'Tis plain, that it may be made in the two laſt ways; for a writ, a letter, for inſtance, under the hand of a man, by which he owns a woman for his wife, proves him to be her huſband, and, therefore, to have given his conſent *de præſenti* to marry her, *F. m.* 23d *Feb.* 1714, *Anderſon.* In the ſame manner, a letter, under the hand of a woman, in which ſhe owns a man for her huſband, proves her to be his wife, and, therefore, preſent conſent on her part to be held ſo. 'Tis true the import of that, which is proved by the writ, muſt be conſidered: for every fond expreſſion is not an acknowledgment of marriage; it may be no more than a declaration of a reſolution, which one has taken, to enter into it.

Again, it may be proved by referring it to one's oath, whether he has not given conſent *de præſenti* to become the huſband of another, and whether he is not actually ſo; and it may be proved by the oath of a woman, whether ſhe is not the wife of a particular man, and has not given conſent *de præſenti* to marry him.

But the giving of it may alſo be proved by witneſſes: for *facts* may *imply* it; theſe may be proved by the teſtimony of witneſſes; and in all caſes, in which facts that imply it are proved, it muſt itſelf be alſo held to be proved. But it is by depoſing to facts alone, that proof of it may be made by witneſſes: they cannot prove a verbal declaration of it; for this is no more than a *nuda emiſſio verborum.* But the Law of Scotland allows not proof to be made by witneſſes of a *nuda emiſſio verborum* in any caſe, in which the point in iſſue depends on them alone: for conſent both may and uſes to be expreſſed in a few words; theſe might happen to occur in converſation without being intended to expreſs conſent to marriage; and witneſſes might frequently miſtake both the words themſelves and the import of them.

'Tis, however, ſeldom that the proof of the giving of matrimonial conſent depends on one of theſe means alone; it uſes to depend on a variety of circumſtances, which muſt be proved in various ways, and being proved ſhew the man and the woman to be huſband and wife. Therefore, all the three means of proof may be employed to verify the reality of a marriage, and each of them being brought to prove particular circumſtances, may be made to lend aid to one another.

§ 192. The conſent, which has hitherto been explained and has been ſaid alone to complete marriage, is the *ſincere* agreement of the ſentiments of the man and the woman, and may, therefore, be called *true* conſent; becauſe it is once actually and ſeriouſly given, tho one of the parties may, perhaps, afterwards deny that h gave it. But one may, from baſe motives, *pretend* to give it, when he has no ſerious intention of being bound. Beſides, fraud ought not to be beneficial to any man. Therefore, the Law knowing that men ſometimes employ the moſt flagitious means in order to obtain the gratification of their paſſion, requires not even in all caſes *true* conſent, in order to complete marriage. It may be *convinced*, that that which has been given was not, in truth, ſincere and genuine; yet it may found a marriage upon it. It does ſo in all caſes, *in which it preſumes conſent to have been given;* and it preſumes it to have been given in all caſes, ' in which a man makes a woman believe that he ſeriouſly intends ' to marry her, induces her thereby to confide in his honour, and prevails upon ' her by theſe fraudulent means to yield to his importunity, and to ſubmit ' to his embraces.' The Law holds him, in theſe caſes, to be her huſband, and the marriage to be completed by conſummation. 'Tis true, he has not actually given his conſent *de præſenti* to marry her; but he has employed fraud in order

order to accompliſh his deſigns; and this ſupplies the place of his real conſent. Thus, a promiſe of marriage, as has been obſerved, (§ 179.), does not alone make the perſons who have promiſed to become huſband and wife; for a promiſe is not conſent *de præſenti;* but it is conſent *de præſenti*, which alone by itſelf conſtitutes marriage. However, a promiſe followed by copulation is held by Law to complete the marriage, to make the copulating perſons become huſband and wife, to bind them inſeparably together, and to deprive them effectually of the power which till the copulation they had of repudiating one another: for Law *preſumes*, that perſons in theſe circumſtances did, at the time of the copulation, give an actual and preſent conſent to become from that moment, huſband and wife; and the preſumption, which is made in this caſe, is one of thoſe which Lawyers call *præſumptiones juris et de jure, et contra præſumptionem hujuſmodi non eſt probatio admittenda*, *Decretal. lib.* 4. *t.* 1. *c.* 15. 30. *de ſponſal. et matrim.* The reaſon, upon which it is founded, is plain: Perſons, who have gone ſo far as to make ſolemn promiſes of marriage, may well be ſuppoſed to have conceived the moſt warm affection, to have formed the beſt opinions, and to have repoſed the moſt entire confidence in the honour of one another. If, therefore, they ſhall at an affectionate moment, from the keenneſs of their mutual deſires, become forgetful of the ceremonious anxiety of law, and ſhall proceed to an actual accompliſhment of their felicity; would it not be cruel to allow one of them, after he has ſated his own appetite, by depriving the other of her honour, to avail himſelf of his own perfidiouſneſs, and to abandon to infamy and contempt one whom he enſnared to ſubmit to his embraces, for whom he pretended to have the moſt ſincere affection, and whom, if he ſhall deſert her, he has, by the baſeſt and the moſt flagitious deceit, injured in the moſt afflicting manner? The Law of no country allows one to reap advantage from his own villany; much leſs can the Law of Scotland, which requires not any ceremonious obſervances to the conſtitution of marriage, allow the perfidy of men, in a matter of this ſort, to be profitable to them by affording them opportunities of ſatiating their appetites at the expence of the chaſtity, honour and happineſs of the innocent.

In the ſame manner, if one has made honourable propoſals of marriage to a woman, and during his courtſhip, perhaps before he has obtained her expreſs acceptance of them, prevails upon her to grant him the laſt favour, he becomes thereby her huſband; the marriage is held to be conſummated; and they are bound for life to one another. The reaſon is, becauſe his fraud makes the Law preſume him to have given his preſent conſent to marry her; and formal propoſals imply a promiſe on the part of him who makes them. Indeed, they are ſtronger than it; for they are uſually made in an honourable way, and out of a motive which is honourable *from the beginning;* whereas promiſes are not always made out of views which can be ſaid to be ſo; they are uſually, in ſome ſort, extorted by women who by their behaviour almoſt prevent application from men who are, as it were, invited to apply, and would probably, by a little perſeverance, have prevailed without making them.

The proof, therefore, of the completion of a marriage, founded on preſumed conſent, muſt, in all caſes, depend upon circumſtances: for *ex hypotheſi*, true conſent is not given in this caſe; the Law only preſumes it to have been given; therefore, it muſt allow proof to be brought of all facts and circumſtances, and muſt decide concerning the fraud and the marriage from the import of thoſe which are proved. Hence, it may not be improper to take notice of ſome of thoſe circumſtances, which may make parts of the evidence of the conſtitution of a marriage. Every one may, by attending to the ordinary courſe of human affairs, recollect them; for the conduct of the bulk of mankind is ſimilar upon this occaſion. Similar expreſſions are uſed, ſimilar compliments are paid, ſimilar preſents are given, ſimilar viſits are made, ſimilar conduct is held. It may not, however, be improper to take notice of ſome of thoſe which are moſt remarkable.

able. They may ariſe 1) From the condition, 2) From the actions of the perſons whoſe marriage is diſputed, *l.* 31. *p. ff. de donat.*

§ 193. The principal circumſtances, ariſing from their condition, depend on a compariſon of their rank, of their beauty, of their riches, and of their character.

If they are of unequal rank, law will not, *cæteris paribus*, ſo eaſily preſume a marriage between them, as it would do if they were, in all reſpects, matches for one another. For all preſumptions are founded on an attentive obſervation of that which happens commonly in the world. But experience teaches every one that it is moſt common for perſons to marry ſuch as are reckoned their equals. Pride, as well as other motives, hinder the bulk of mankind from matching with thoſe, who, for it is impoſſible to avoid uſing the phraſes of the vulgar, are thought to be below them. Law, therefore, will not hold it to be ſo *probable*, that two perſons of unequal, as that two of equal rank conſented to marry each other *.

Beauty is another circumſtance, from which a preſumption of marriage may ſometimes ariſe. 'Tis true, that marriages ſeldom proceed from love alone. The bulk of mankind are actuated by a variety of powerful motives, and are, by their diſtracting force, enabled to keep their amorous deſires under ſuch command, that it is ſeldom love overcomes the united force of pride, of ambition, of avarice, and of the other paſſions of the human heart. 'Tis rare, therefore, for men, regardleſs of every other conſideration, to precipitate themſelves into the embraces of the object, which appears to them to be moſt deſirable, and inflames their paſſion to the higheſt degree. But all men are compoſed of fleſh and blood; and it is impoſſible for any one, who is not impotent, to be altogether inſenſible to the charms of beauty, and to be equally indifferent to every air, to every proportion, to every ſet of features. Of courſe, they are ſometimes catched, and, in ſpite of themſelves, are hurried on to try every poſſible way of accompliſhing the ſatisfaction of their deſires. If regard to honour, to chaſtity, and to virtue, enables them to reſiſt the moſt powerful temptations, both ſexes will ſometimes condeſcend to obtain in an honourable, that, which they cannot obtain in a diſhonourable way, and to ſatisfy their love by a formal marriage of one, whom they cannot otherwiſe enjoy. If, therefore, the woman, who claims a man for her huſband, is a deſirable creature, it will be held by Law to be, becauſe it is more probable, that the man conſented to marry her, than if ſhe were perfectly ugly and loathſome.

'Tis true, beauty is ſaid to depend on taſte; and, perhaps, in ſome ſort it does ſo. But it would be more proper to ſay, that the paſſion of love owes its riſe to accidents, that is, a thouſand accidents both make beauty produce, and hinder it from producing its effect, by making one grow paſſionately fond of the perſon poſſeſſed of it. For it is not always produced by beauty alone; a thouſand things beſides help to raiſe it. A fine air, an elegant manner, an obliging behaviour, a ſimple neatneſs, ſprightlineſs, good-nature, affability; theſe are, perhaps, more powerful than beauty, in producing fondneſs, and, of courſe, in raiſing love. Beſides, a thouſand things may conſpire to hinder one, who is owned to be a beauty, from being beloved.

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* Agreeably to this doctrine, we find, that the Roman Law *preſumed* a free woman to be not a concubine, but a lawful wife; unleſs ſhe had been a common proſtitute, *l.* 24. *ff. de rit. nupt.* If, therefore, one aſſumed a woman of rank and of modeſty to be the partner of his bed, it was neceſſary for him to proteſt, that he meant her to be not his wife but his concubine: elſe he would have been held either to hold her for his wife, or, if he denied her to be his wife, to have committed a crime, which was, by the Civil Law, called *ſtuprum*, and ſubjected the criminal to puniſhment, *l.* 3. *p. ff. de concub.* In the ſame manner, neither fornication nor adultery could, according to the doctrine of the Civil Law, be committed either by or with maid-ſervants in inns or taverns: whereas both crimes could be committed both by and with the miſtreſs of the inn. 'Ab his fœminis,' ſays the Emperor, in *l.* 29. *C. ad leg. Jul. de adult.* 'pudicitiæ ratio requiratur, quæ *juris nexibus detinentur*, et '*matris familias* nomen obtinent. Hæ autem immunes a judiciaria ſeveritate et ſtupri et adulterii præſtentur, '*quas vitæ vilitas dignas legum obſervatione non credidit.*'

The paſſion, therefore, of love, and the recognition of beauty, are very different things. Beauty muſt be recognized by every one, who beholds it; but every beauty may not be beloved. Therefore, it does not depend ſo much on taſte, caprice and fancy, as is pretended: for it is not either impoſſible, or even difficult, for one to determine, whether an individual will appear to another to be beautiful. There is in the nature and the reality of things a certain ſtandard, by which the ideas, apprehenſions, and conceptions of the *bulk* of mankind are regulated. A whimſical mortal may be conſtituted after a manner quite different from other men; ſo that one, who is thought by the world to be a beauty, may by him be regarded with perfect indifference, as an object unworthy of attention. But this alters not the caſe: for there is ſomething in real beauty, which makes an immediate and ſtrong impreſſion, and carries irreſiſtible conviction to the heart.

Therefore, it admits not of ſo much diſpute, as it at firſt ſight appears to do, whether one is or is not ſo beautiful, as to afford juſt reaſon for preſuming, that one might be moved by her charms to ſeek by marriage the gratification of his paſſion.

'Tis true, all preſumptions are founded on the reality of things, and are formed from events, which actually happen in the world. The ſtrength of a preſumption therefore muſt be proportionable to the variety, frequency, or conſtancy of thoſe events; becauſe on theſe depends the degree of probability of the real exiſtence of any future one. If an event is obſerved to happen very ſeldom, the probability of its happening again is proportionably ſmall. If it happens frequently, the probability of its futurity increaſes proportionably, and becomes proportionably great. If it is found by experience to happen conſtantly and uniformly, it becomes *infinitely* probable, *i. e.* there is a moral certainty, that it will happen. The application of this general doctrine to the preſent point is plain. For the preſumption of a marriage ariſing from the beauty of her who affirms that ſhe is married to another, is ſmall; becauſe few marriages proceed from love of beauty alone. The force, therefore, of this preſumption cannot be great, unleſs it be accompanied by the corroborative evidence of other circumſtances: In which caſe, it will add no more than a ſmall pittance of probability to the proof, which is already brought.

The comparative riches of the perſons may alſo afford a preſumption in favour of marriage on the one, and againſt it on the other part. For the advantages, ariſing from opulence, are ſo many, ſo apparent, and ſo dazzling, that few even of thoſe, who cannot be called avaritious, are not deſirous of acquiring them. If, therefore, a poor girl ſhall claim a man of fortune for her huſband, the probability lies againſt the marriage; becauſe it is not probable, for it ſeldom happens, that a man in ſuch circumſtances makes his addreſſes in an honourable way to a poor woman. But *if we could ſuppoſe*, that it was the woman who denied the marriage, and the man who claimed her for his wife, the probability lies for it: becauſe it is not probable, that a poor girl would refuſe an advantageous match; and the probability, which lies againſt it, is removed by the claim made by the man. In the ſame manner, if a man in low circumſtances, claims for his wife a woman poſſeſſed of a great fortune, the probability lies againſt the marriage; becauſe it is ſeldom, that fortunes diſpoſe of themſelves after this manner.

The character of the perſons is alſo to be attended to: for it is not probable, that a man, whoſe ſole paſſion is avarice, will marry a woman, who cannot add one farthing to his ſtock. But, if he is alſo diſpoſed, in an exceſſive manner, to amorous deſires, and is very ſuſceptible of love, his avarice and his love may balance each other; and may deſtroy the preſumption, which is either for or againſt the marriage. Again, if we ſuppoſe him alſo to be proud of his rank in life, and to deſpiſe his inferiors, his pride muſt be taken into the account, and by conſidering the aggregate, and by balancing the paſſions, the probability

will be eaſily inveſtigated and will depend on the inclination of the balance.

If the woman has the character of a proſtitute, and can be proved either to be or to be thought to be one, it muſt diminiſh the probability of her marriage: for men ſeldom marry proſtitutes, who, having made light of their honour, muſt be abandoned to their luſts, and may, after marriage, continue thoſe practices, which they uſed before it. Beſides, one, who can for money obtain the gratification of his paſſion, will hardly chuſe to tie himſelf for life to one, of whom he will not be able to hinder himſelf from having a bad opinion.

§ 194. But it is not upon preſumptions made from the *condition* of parties, that the proof of a marriage either will or ought to depend. The evidence afforded by them, like the ſmall duſt in the balance, muſt be of little weight, tho it may have ſome. The proof of diſputed marriages muſt chiefly depend on the *actions* of the parties concerned in the diſpute. From the nature and circumſtances of them, preſumptions, ſtronger and weaker, ariſe; degrees of probability grow greater or ſmaller; and the evidence becomes, upon the whole, more or leſs convincing. Theſe actions may be referred to two different periods, either to that which preceded, or to that which followed the time, at which the marriage is affirmed to have been finally concluded.

'Tis a vulgar obſervation, that females of ſome kinds are coy; they yield not immediately to every impulſe; they accept not of every offer; a thouſand little endearing arts muſt be uſed, in order to prevail upon them to do that, which, at the ſame time that they affect to be averſe to it, it would be unnatural for them to want inclination to do.

Dr. SWIFT, who never omits an opportunity of painting mankind in the moſt odious colours, has obſerved, and he is perhaps the firſt who made the obſervation, that the ſhe Yahoo is the only female who admits the male at all ſeaſons. But he could not have denied, that women have at leaſt ſomething of coyneſs, indeed are diſtinguiſhed by it: for human kind have feelings more delicate than other animals. Hence, thatwhich is inſtinct among other females, becomes a virtue in women, and is called Modeſty. I will not ſay with MANDEVILLE, that it owes its original to cuſtom and education alone; the ſeeds of it are deeply rooted in human nature; It is a part of the preſent conſtitution of man; and it is uſeful to ſociety. Without pretending to eradicate thoſe appetites implanted by nature into human kind, it makes every thing concerning the gratification of them be conducted with decency. Enjoyment, or the power of it, extinguiſhes the violence of deſire; men are uſually, by the difficulty of attaining their ends, rendered more keen, than they would otherwiſe be, to obtain the accompliſhment of them. Thus, by the coyneſs of the woman, the paſſion of the male is enflamed; mutual affection is produced; and joys more refined are mixed with thoſe of ſenſe.

Hence it is not uſual for women to ſurrender their charms immediately even to thoſe, who, they are *determined* ſhall become maſters of them. Formalities muſt be obſerved; addreſſes muſt be made; preſents muſt be given; affection muſt be pretended; incenſe muſt be offered; viſits muſt be repeated; abſence muſt be pretended to be intolerable.

One point, therefore, which will be material in the proof of moſt marriages, is the *amor præambulus*, or that courtſhip which *uſually* precedes marriage. For, if a woman can prove, that a man made his addreſſes, in anhonourable way, by making propoſals of marriage to her; that he uſed to make her viſits as frequently as lovers uſe to make one another; that he declared his intentions either to their relations or to others; that he made her ſuch preſents as are made women on this occaſion: if ſhe can make proof of theſe or of other circumſtances, which uſually accompany courtſhip, ſhe makes an important ſtep and gains an important point in the proof of her marriage. For from them ſhe proves, that the man made propoſals of marriage to her. But, if a woman proves, that

propoſals

propoſals of marriage were made her, and were *followed* by copulation, full proof will be held to be made of the marriage *C. F.* 164. provided the copulation happened ſo ſoon after the propoſals were made, as to make it impoſſible for the woman to have reaſon to imagine, that the man had changed his mind. For the marriage muſt, in this caſe, be held to be actually perfected by the preſumed conſent of both parties (§ 192.). Indeed, if the copulation followed ſo long after the propoſals were made, as to give the woman juſt cauſe either to believe or even to ſuſpect, from the long interruption of them, that the man had altered his reſolution, and broken off the match, the preſumption in favour of the marriage becomes ſmall; nay may be totally diminiſhed. It is ſo alſo, in caſe ſhe had reaſon to ſuſpect the change of his mind from the ſudden change of his behaviour, from the unuſual infrequency of his viſits, from the viſible coolneſs of his affection, or from any other circumſtances. Agreeable to this doctrine is that of a judgment of the Court of Seſſion, for I remember to have read it ſomewhere, tho I cannot at preſent light on the place where it is to be found, by which it was adjudged, that a woman, who had born a child to a man four years after he had made, or, rather, had deſiſted from making propoſals of marriage to her, had no right to him as her huſband; becauſe ſhe could lay the blame of her misfortune on nothing but her own facility, by which ſhe was moved to yield to his embraces after ſo long and ſo expreſſive a ſilence.

If no previous courtſhip can be proved, a ſtrong preſumption in favour of the marriage is loſt; for courtſhip uſually precedes marriage. But marriage may be proved, for it may be made, without it; people ſometimes make private marriages for themſelves, without acquainting others of their intention; ſometimes they marry thoſe, whom they have already enjoyed, and whom they had not originally the moſt diſtant intention of marrying. In theſe caſes, the evidence muſt depend on the circumſtances, which can be proved for inſtructing the reality of the marriage, either by a formal ſolemnization of it, or by the behaviour of the perſons towards one another.

If the parties declared, in a ſolemn manner, their mutual conſent *de præſenti* to become huſband and wife, the truth of this declaration, and of the circumſtances attending it, may be proved by the teſtimony of witneſſes, by writ, or by the oath of that party, who denies the marriage.

But, if there was no formal declaration of conſent, the proof muſt ariſe from the behaviour and conduct of the perſons themſelves. For, if they are proved to behave to one another, as huſbands and wives uſually do, their conſent will be preſumed, *præſumptione juris et de jure*, from their actions, ſince they imply it. The more near the reſemblance, which their behaviour has to that of the generality of married perſons, the ſtronger will be the preſumption in favour of the marriage: the leſs their conduct reſembles the common conduct of married perſons, the preſumption in favour of the marriage will be the ſmaller.

Thus, if it is proved, that they did not ſeem to deſire to conceal their communication from the world; that they lived openly, in all reſpects, as huſband and wife; that they dwelt in the ſame houſe, eat at the ſame table, and ſlept in the ſame bed; the preſumptions in favour of the marriage will become preſumptions *juris et de jure*, and will make full proof. This will, eſpecially, be the caſe, if they behave to one another in ſuch manner as to be commonly held and reputed to be married perſons. Indeed, this circumſtance of being, what is by the Law of Scotland called, *habite* and *repute* has a ſingular force, becauſe the common opinion muſt ariſe from the behaviour of the perſons, about whom it is formed, and muſt, of neceſſity, come to their ears. From whence it is probable, that perſons really are, and are willing to be, what they know they are thought to be, married: for it is not to be believed, that, if they were not, they would have continued to behave as if they were really married perſons, and would not have done ſomething to ſhew they were not, after they became acquainted with the general opinion of the world.

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'Tis otherwiſe, if they approached each other, as the Secretary did the daughter of CHARLES the Great, by ſtealth, and endeavoured to conceal their correſpondence from the world; in this caſe, the probability of the marriage becomes ſmall, and the proof of it muſt depend much on other circumſtances.

§ 195. But it is needleſs, in a matter of evidence, to be more particular. Therefore, I ſhall conclude this part of the title with the following general obſervations:

Firſt; It may not be improper to obſerve, that marriage is, in all caſes, proveable by witneſſes. For it is conſtituted by conſent alone (§ 182. *ſqq.*). But conſent may be ſignified as well by actions as by words (§ 190. *ſqq.*). Therefore, in all caſes, in which facts are ſpecified, which, taken together, import conſent and infer a marriage, proof ought to be allowed to be brought by witneſſes of them. For it is abſurd to ſay, that the Law of Scotland knows no other kinds of marriage, than thoſe, which are completely conſtituted either by a formal ceremonious ſolemnization, or by a promiſe followed by copulation: marriage is completely conſtituted by conſent alone; therefore, it may be conſtituted, for conſent may be given, in a variety of ways. Of courſe, Witneſſes ought, in all caſes, to be admitted to prove facts, which will make it. For the Law has required witneſſes to be preſent at the ſolemnization of it. Its intention in requiring their preſence is to prove, by their teſtimonies, the conſtitution of the marriage, that is, to prove the conſent *de præſenti* of the parties. But how can they prove it otherwiſe, than by proving the ſolemnization of the marriage, the declarations of the parties, the ceremony of bedding, and other circumſtances, which import conſent, and from which it is inferred? Since, therefore, the Law allows conſent and marriage, in one caſe, to be proved by witneſſes, why ought it not to allow it in every other?

'Tis true, in caſe a marriage is ſolemnized, conſent is in ſome ſort actually declared; and that it is otherwiſe, in caſe it is not ſolemnized. But conſent *may be* declared without ſolemnization. Beſides, the Law holds it to be given, not only when it is actually declared, but alſo when ſuch inſidious expreſſions are uſed or actions are done, as are ſufficient to make one believe a marriage to be truly intended: for Law allows no body to be benefited by his own fraud. Therefore, if it finds one employing fraud in order to obtain the ſatisfaction of his deſires, it holds him to be bound, in caſe the perſon, whom he meant to deceive, chuſes that he ſhould not be free. Of courſe, it muſt admit witneſſes to prove every thing concerning marriage.

It muſt be remarked, *ſecondly*, that every diſputed caſe muſt reſt on its own foundation. If the allegations of parties, which have by the Judge been admitted to proof, are ſo far proved, as to afford to his mind a ſincere conviction of facts which import a marriage, it is his duty to declare the marriage to have ſubſiſted ſince that point of time, at which, it appears to him, the parties bound themſelves to one another; ſince conſent alone and by itſelf conſtitutes marriage. If the evidence which is brought, ſhall appear to him not to be ſufficient for proving the marriage, 'tis his duty to declare in favour of that party, who affirms there was no marriage. Thus, the proof of a marriage muſt in every caſe depend on the force, which all the particular facts and circumſtances proved have to inſtruct it, and to make the Judge believe it to have been the intention of parties to marry one another.

Only, 3) Every judge ought, in *all* caſes, to be more diſpoſed to declare, that a marriage is, than that it is not conſtituted. For marriage is eſſential to the good of ſociety, and ought to be encouraged. But it will be encouraged in caſe people find, that the Law will lay hold of every circumſtance in order to bind them with connubial fetters. Indeed, I believe, it would be a good Law, which ſhould enact, that every man, who had, after a certain age, enjoyed a woman, ſhould *eo ipſo* become her huſband. Thus, irregular amours would be effectually prevented; and every one would be forced to marry.

Laſtly,

Laſtly, It muſt be remarked, that the ſame things, which would be held to conſtitute a marriage, if done in Scotland, will conſtitute it, if proved to have happened in any other part of the Globe. Thus, conſent *alone* will conſtitute it, no matter, whether it be given in Scotland, in England, or in any the moſt remote corner of the world; whether it be given in a country, in which the Law requires certain ſolemnities to the *conſtitution* of Marriage, or in one, like Scotland, in which it requires none. Again a promiſe of marriage *cum copula ſubſecuta* will be held to complete the marriage of the parties, no matter where the promiſe was made and the marriage *conſummated*; whether none of them, one of them, or both of them were made out of Scotland. In the ſame manner, any other circumſtances, which will make a marriage, if they happened in Scotland, will make one *in it*, tho they happened in another part of the world. The reaſon is, the Law of Scotland holds marriage to be a covenant of divine inſtitution. Therefore, it holds no more to be *neceſſary*, than it takes the divine Law to require, to render it *complete*. But it holds, 1690, *c.* 5. § 24. that the divine Law requires no more than bare conſent to render marriage complete. Of courſe, it muſt itſelf require no more. But the divine Law is obligatory in all countries, is the ſame at all times, and is intended to be ſpread over the face of the earth. Of courſe, that, which the divine Law holds to conſtitute a marriage in one place, muſt make one every where, 1758, *Forbes v.* the Counteſs of *Strathmore*.

§ 196. But, tho conſent is alone ſufficient to conſtitute marriage, and no anxious ceremonies are required by the Law of Scotland to make a man and a woman become huſband and wife, we are not from thence to imagine, that every way, by which marriage may be conſtituted, is equally approved by Law; and and that it is held to be indifferent after what manner one enters into it. 'Tis much otherwiſe; the Law hath wiſely diſtinguiſhed ſolemn, regular, or public, from clandeſtine, irregular or private marriages; and hath given its countenance to the former by inflicting puniſhment as well on thoſe who marry, as on thoſe who are acceſſary to marriages made, after an irregular, clandeſtine or private manner.

The entrance into the ſtate of marriage is a matter of the greateſt importance in human life; ſince it may be productive of very oppoſite effects, and may either become a ſource of perpetual happineſs, or entail perpetual miſery on married perſons. If, therefore, there is in human conduct any ſtep which requires mature deliberation, it is that, on the conſequences of which the peace and tranquillity of life chiefly depend. Hence, Moraliſts, Divines, and Legiſlators have, on all occaſions, delivered it, as a precept of the moral, natural, and divine Law, that every one, who is intending to marry, ſhould, before he carries his deſign into execution, make it known to thoſe, whom he thinks moſt able and moſt diſpoſed to give him good advice upon the matter. Children ought to take the advice of their parents, minors that of their guardians, and every one that of thoſe his near relations, who, at the ſame time, that they may be preſumed to have the warmeſt affection for him, and to have the moſt anxious concern about his real welfare, are ableſt to give him ſound counſel and advice.

But mankind are often at that time, at which the vigour of their body declares them to be fitteſt for marriage, vehemently enflamed by heat of blood; from whence being actuated by the impetuoſity of paſſion alone, they become forgetful of the dictates of reaſon, and are regardleſs of the ties of nature. Children forget the duty which they owe to their parents; others forget the reſpect due from them to thoſe, who love them; and are hurried on to take the moſt raſh and precipitate ſteps, without conſulting thoſe to whom they are moſt dear.

The Law of Scotland, attending to the nature of human paſſions, hath endeavoured to reſtrain their impetuoſity by introducing certain ſolemnities previous to the celebration of marriage. The intention, which it has in the introduction

of them, is evident; it is to procure, if it can, a delay, and to hinder thoſe inflamed by paſſion from proceeding immediately to the gratification of their appetites. Thereby the paſſions of thoſe concerned have time to cool; the lovers themſelves have time to think; and their relations have both time to get notice of their purpoſe, and opportunity to give their advice before the marriage be actually completed, or to prevent it, if they think it fooliſh and precipitate.

Beſides, if thoſe, who were captivated with each other's charms, yielding immediately to the impulſes of love, ſhould fly into the arms of one another, they might eaſily happen to commit either inceſt or bigamy. Thus, the peace of ſociety might be diſturbed; the moſt abominable crimes might be committed; the happineſs of private perſons might be deſtroyed; an inceſtuous or adulterous offspring be produced, and be expoſed to poverty, contempt, and thoſe other calamities, which, tho they have themſelves done nothing to deſerve them, the rigour of human laws makes a neceſſary conſequence of the fatality of their birth.

The Law of Scotland hath, therefore, approved of certain ſolemnities, which had been introduced by the church and eſtabliſhed by cuſtom, and hath appointed them to be obſerved in the celebration of every marriage. Theſe reſpect the forms to be obſerved either *before*, or *at* the celebration of it.

§ 197. The only ſolemnity, which is required by Law to be uſed *before* the celebration of marriage, is *Proclamation of Bans*. Proclamation of bans is, 'the 'ceremony of publiſhing the reſolution which a man and a woman have taken 'to marry one another in the pariſh-churches of both the bride and the bride-'groom, when the congregation is aſſembled for divine ſervice, that, if any 'one knows any lawful impediment (§ 170.) why they ought not to be joined 'in wedlock, he may declare it at a convenient time and place.' This ceremony was obſerved in ſeveral places many centuries ago. At laſt, it was ordained by the fifty firſt canon of the fourth general Lateran Council, held *A.* 1215, under Pope INNOCENT III. remarkable for having given its ſanction to the doctrine of tranſubſtantiation, and enjoined auricular confeſſion, that, before marriage ſhould be celebrated, proclamation of bans ſhould be made publickly by the prieſt. '*Specialem quorundam locorum* conſuetudinem ad alia *generaliter* prorogando, 'ſtatuimus, ut, cum matrimonia fuerint contrahenda, in *Eccleſiis* per *preſbyteros* '*publice* proponantur,' *Decretal. l.* 4. *t.* 3. *c.* 3. *de clandeſt. deſponſatione.* It does not from hence appear directly either on what day, or how often, it behoved the bans to be proclaimed. 'Tis probable it was intended, that proclamation ſhould be made on a Sunday. Afterwards, the Chriſtian Church began to ſee the uſefulneſs of frequent proclamation. Hence by an act of the Council of Trent, paſſed in the 24th ſeſſion of it, on the 11th day of November 1563, under Pope PIUS IV. it was enacted, that proclamation of bans ſhould be made publickly, by the miniſter of the pariſh, to which the perſons intending to marry belonged, in the church, on three ſeveral and continual *holy days*, *i. e.* days on which the congregation ſhould be aſſembled for divine ſervice, during the ſolemnity of celebrating maſs. *Idcirco ſacri Lateranenſis concilii, ſub* INNOCENTIO III. *celebrati veſtigiis inhærendo præcipit, ut in poſterum, antequam matrimonium contrahatur, ter a proprio contrahentium parocho tribus continuis diebus feſtivis in eccleſia, inter miſſarum ſolennia publice denuntietur, inter quos matrimonium ſit contrahendum.* The ſame opinions were embraced by the firſt reformers of the Church of Scotland. Thus, we find it declared, in the firſt book of diſcipline, *c.* 13. § 5. a work compoſed, in conſequence of an order of the Scotch Privy-council, by Mr. KNOX and others of the original reformers, ratified by the church, and confirmed by an act of the privy-council, dated 17th January 1560-1, to be expedient, that bans of marriage be publickly proclaimed three ſeveral Sundays, unleſs the perſons intending to marry be ſo well known, that no ſuſpicion of danger can ariſe from neglect of making the proclamation; in which caſe it is declared, that *the time may be ſhortened at the diſcretion of the miniſtry.* From whence it appears, for this ſeems to be the meaning of the words, that the miniſtry

ſtry had a diſcretionary power to hold it ſufficient, tho the bans were not proclaimed either ſo often as thrice, or on three ſeveral Sundays. Accordingly, it is expreſsly enacted, by act of Aſſembly 1638, *Seſ.* 23. 24. *art.* 21. that preſbyteries ſhall have power to diſpenſe with proclamation of bans altogether on ſome neceſſary occaſions. The Directory for the public worſhip of GOD, compoſed by the Aſſembly of proteſtant divines, which met at Weſtminſter *A.* 1644, received into the church of Scotland, and approved by act of the General Aſſembly, directs purpoſes of marriage to be publiſhed three ſeveral Sabbaths in the congregations, to which both the parties, intending to marry, do reſpectively belong. And the 18th act of Aſſembly 1698, and 5th act of Aſſembly 1699, do expreſsly appoint and ordain, that proclamation of bans ſhould be made in *all* the churches of the place or town, within which the parties intending to marry reſide, *three ſeveral Sabbaths*, immediately before divine worſhip begins before noon.

From what has been ſaid, it appears to be agreeable to the eſtabliſhed order, conſtitution and practice of the church, that proclamation of bans be made, 1) Before *every* marriage, except that court, if there is now any, which hath power to do it, diſpenſe with this ceremony, 2) Three ſeveral times, 3) On three ſeveral Sundays, 4) Within the parochial churches of both the bridegroom and the bride. Accordingly, this ſeems to be held to be the known and fixed law of the land by an act paſſed 10*mo Annæ*, *c.* 6. by which it is enacted, that no epiſcopal miniſter, reſiding in Scotland, ſhall preſume to marry any perſons, but thoſe whoſe bans have been *duly* publiſhed three ſeveral Lord's-days, either both in the epiſcopal congregations which the parties frequent, and in the churches to whom they belong as pariſhioners by virtue of their reſidence; or, if they happen to be either neglected or refuſed to be proclaimed within the eſtabliſhed church of the pariſh, in the epiſcopal congregation which the parties frequent.

Theſe authorities from the eccleſiaſtical law have greater weight, not only becauſe they have been confirmed by cuſtom and by the opinion of the people; but alſo becauſe *all* the acts of parliament, made for preventing clandeſtine and irregular marriages, do conſtantly and expreſsly refer to the eſtabliſhed order and conſtitution of the church, and ordain all perſons, who procure themſelves to be married in a diſorderly manner, *i. e.* contrary to this laudable and eſtabliſhed order and conſtitution of the church to be puniſhed. A marriage, therefore, which is entered into without obſerving the forms eſtabliſhed by the church, muſt be held by the Civil Law to be irregular, diſorderly and clandeſtine, and makes thoſe, who procure themſelves to be married without obſerving theſe forms, liable to be puniſhed with the pains of Law.

All perſons, therefore, who marry after this clandeſtine manner, 'without preceding proclamation of bans,' offend againſt the order of ſociety, and are juſtly ordained by Law to be puniſhed according to their rank, and to the circumſtances of their delinquency. For people may procure themſelves to be married either in Scotland, or out of it, for inſtance, in England or in Ireland. If they procure themſelves to be married within the kingdom of Scotland, they are ordained by 1661. *c.* 34. 1) To be puniſhed by impriſonment during three months, 2) To pay, each nobleman, 1000 *l. Sc.*; each baron and landed gentleman, 1000 merks; each gentleman and burgeſs, 500 *l.*; and every other perſon 100 merks; 3) To remain in priſon, till they pay each of them theſe reſpective penalties; which, it is further declared by the act, ſhall *all* be applied to pious uſes within the ſeveral pariſhes, where the delinquents dwell. If perſons, who have their ordinary reſidence in Scotland, procure themſelves to be married out of it, for inſtance, within the kingdoms of England or of Ireland, without proclamation of bans, they are ordained to be puniſhed by a pecuniary mulct, each nobleman of 1000 *l. Sc.* each landed gentleman of 1000 merks *Sc.* each burgeſs 500 *l. Sc.* each other ſubſtantial perſon 500 merks *Sc.* each yeoman 100 *l. Sc.* each perſon of inferior quality of 100 merks *Sc.*; the one half of which penalties, it is enacted,

acted, ſhall belong to the king, the other half to the pariſhes, where the delinquents dwell.

But, becauſe the perſons, who obtained themſelves to be thus clandeſtinely married, might happen to be poor and unable to pay the fine, it is enacted, that delinquents of this condition ſhould be corporally *puniſhed with ſtocks and irons* agreeably to the general maxim of Law, *qui non habet in ære, luat in pelle.*

And to ſecure the execution of the act, his Majeſty's Advocate and the Procurator for the church are ordained to ſue before the civil judge, all, who *contravene* the act, or any part of it, for payment of the penalties above-mentioned.

Proclamation of bans, if it is followed by actual marriage, produces ſignal effects; it makes the woman ceaſe to be *ſui juris*, and deprives her of the power of granting any deed, without a good and valuable conſideration, or, as we call it, any *gratuitous* deed, which may be hurtful either to her own intereſt or to that of her huſband. The reaſon is, becauſe the law preſumes all ſuch deeds to be fraudulent on the part both of the bride, who grants them, and of thoſe in whoſe favour they are granted, and to be contrivances for defeating the rights which the bridegroom will have after the marriage is perfected. Therefore, it makes them liable to be ſet aſide at the ſuit of the huſband. *Ha.* 7th *June* 1605, *Swyne.*—5th *July* 1611, *Fletcher.*—*Du.* 29th *Jan.* 1633, *Scot.*—*Home*, *March* 1682, *Grant.*—*St.* 5th *January* 1666, *Lady Bute.*

Since gratuitous deeds, granted by a woman in this condition, are voidable, becauſe they are granted by her with a fraudulent intention to perſons, who are preſumed to be partakers of the fraud; 'tis plain, that the law muſt require ſome convincing evidence of their participation of the fraud; for it makes not deeds, accepted by perſons *in bona fide*, liable to be ſet aſide. The evidence it requires, is the very proclamation of bans; which, it preſumes, makes the purpoſe of marriage come to the knowledge of every body, puts all the world *in mala fide* to accept of gratuitous deeds from the bride, and makes ſuch, as accept of them, partakers of her intention to cheat her huſband.

But it is not ſufficient, that proclamation of bans be made in the pariſh-church of the bridegroom; proclamation, made at it, puts ſuch alone, as live within this pariſh, *in mala fide:* it muſt alſo be made at the pariſh-church of the bride; elſe the deed will not be voidable; becauſe it is the reſidence of the bride, which is principally conſidered in this matter. For, unleſs the proclamation be made in her pariſh, there is nothing done to put the world *in mala fide* to deal with her, *Du.* 8th *July* 1623, *M'Doual.* If proclamation is made in both their pariſhes, the whole world is put *in mala fide*, as well thoſe, who reſide without, as thoſe who live within the pariſhes, to which the bride and the bridegroom belong.

Since gratuitous deeds, granted by a bride after proclamation of bans, are liable to be ſet aſide *ex capite fraudis*, 'tis plain, that they muſt be voidable in all caſes, in which fraud *muſt* be preſumed, *i. e.* in which thoſe, in whoſe favour the deeds are made, either did actually know, or muſt be preſumed to have known the purpoſe of marriage; whether the bans were or were not duly proclaimed in the pariſh churches of both the bride and the bridegroom, *D. Husband and wife*, 3d *July* 1722, *M'Lellan.* Thus, if a deed was granted by the bride to a *conjuncta perſona*, *v. g.* to a ſon, who muſt be preſumed to know her intention whether bans have been or have not been proclaimed, it muſt be voidable; becauſe one ſo nearly related to the bride cannot be ignorant of her intentions, and is, by Law, preſumed to be *particeps fraudis*, *St.* 18th *Dec.* 1667, *Gilleſpie.*

Since deeds granted by brides are voidable only *ex capite fraudis*, 'tis plain, that *gratuitous* ones can alone be ſet aſide; and that onerous ones are not liable to be ſo: for an onerous deed can hardly be fraudulent, *Jan.* 1723, *Wotherſpoon.*

§ 198.

§ 198. After proclamation of bans has been regularly made (§ 197.), the next ſolemnity required by Law is *the formal celebration of the marriage;* that is, it muſt be celebrated by a perſon authoriſed by Law to ſolemnize marriage.

The perſons authorized by Law to celebrate marriage, may be divided into two ſorts, 1) The miniſters of the eſtabliſhed church of Scotland; and 2) Thoſe diſſenting clergymen of the church of England, who are qualified according to Law, 10*mo Annæ*, *c.* 6.—19*no* G. II.—21*mo* G. II. to preach, and to make uſe of the ſervice and liturgy of the church of England, in their Epiſcopal diſſenting meetings in Scotland. Theſe are the perſons, to whom alone the Law of Scotland entruſts the power of ſolemnizing marriage. This appears 1) From the *expreſs* words of all the acts of parliament, which relate to clandeſtine and irregular marriages: for they have one uniform ſtyle, and ordain puniſhment to be inflicted on all ſuch, as procure themſelves to be married by *other than thoſe perſons, who are, by the* eſtabliſhed *church, authorized to celebrate marriage*, 1661, *c.* 34.—1672, *c.* 9.—1695, *c.* 12.—1698, *c.* 6. It appears 2) From the conduct of the Legiſlature, at ſeveral different periods: for, in the year 1695, a ſhort time after the Revolution, the parliament of Scotland did, by the 12th act of that year, ſtrictly prohibit all *outed* miniſters to ſolemnize marriage. In order to underſtand the meaning of this word, 'tis neceſſary to look into the hiſtory of thoſe times. Immediately after the Revolution, the epiſcopal government, which was at all times diſagreeable to the inclinations of the people of Scotland, and had, by the cruel, tyrannical and forcible means employed to introduce and to protect it, been rendered odious to them, was aboliſhed 1689, *c.* 3. thoſe preſbyterian miniſters, who had, on the Reſtoration of CHARLES II. and of epiſcopacy, been thruſt out of their churches, and were, at the time of the Revolution, alive, were reſtored to thoſe churches, out of which they had been thruſt, and were impowered to exerciſe their ſacred functions in them, by 1690, *c.* 2.; and the preſbyterian government was, by 1690, *c.* 5. re-eſtabliſhed. The conſequence was, ſeveral of the epiſcopal clergy were obliged to quit their churches, partly that they might make way for the preſbyterian miniſters, who were reſtored to the churches, of which they had formerly about 1661 been poſſeſſed, and out of which they had then been thruſt; partly becauſe they would not conform to the new and preſbyterian eſtabliſhment. All thoſe miniſters, therefore, who were for theſe reaſons obliged, at the Revolution, to leave their churches, were, by 1695, *c.* 12. ſtrictly prohibited to ſolemnize marriage, under the pain of being impriſoned, till they ſhould find caution that they would go out of the kingdom of Scotland, and would never return to it.

And the Law of Scotland was held to confine the power of celebrating marriage to the miniſters of the eſtabliſhed church ſo cloſely, that, when fortune ſeemed to look with malignant eyes on the liberty of Britain, and the adminiſtration of affairs was devolved on a party, which was ſuſpected of meditating ſchemes deſtructive of the happineſs of their country, an expreſs act of parliament appeared to be *neceſſary*, and was, therefore, made for reſtoring thoſe of the epiſcopal communion to the free and undiſturbed exerciſe of their religion. In it a clauſe was inſerted, by which the 1695, *c.* 12. was expreſsly and totally repealed, and diſſenting epiſcopal clergymen were, among other things, impowered *to celebrate marriage.*

From hence it appears plainly, that the diſpoſition of the antient Law of Scotland, by which the miniſters of the *eſtabliſhed* church were *alone* impowered to ſolemnize marriage, muſt be adjudged ſtill to continue in force, in all points, thoſe alone excepted, in which it has by the Legiſlature been expreſsly altered. But it is plain, that the miniſters of the eſtabliſhed church were by the antient Law, becauſe they were by the church of Scotland the only perſons authoriſed to celebrate marriage; and that only one alteration has been made of it, *viz.* 10*mo Annæ*, *c.* 6.; by which the *epiſcopal diſſenting clergy* were, *if* qualified accord-

ing to Law, authorized and impowered to celebrate it. From whence it neceſſarily follows, that *no other* perſons, either clergymen or laymen, have authority to celebrate marriage. Therefore, 1) Not only all prieſts of the church of Rome, but alſo 2) *All other* proteſtant diſſenting miniſters, except thoſe above excepted, are prohibitedito celebrate it; and, if they do, they become liable to be puniſhed by the pains of Law. 'Tis true, the Law at preſent points its ſanctions chiefly againſt the popiſh clergy, and thoſe diſſenters, who are diſaffected to the preſent eſtabliſhment. But at the ſame time, all proteſtant diſſenters, except ſuch of the epiſcopal communion as are qualified, are and muſt be held to be included under the letter of the Law; becauſe they are not *ſtrictiſſimo jure*, entitled to the benefit of the Toleration. 'Tis true, the ſpirit of the government as well as of the times, regarding with an indifferent eye the whimſies of mankind, makes people diſpoſed rather to ſport themſelves with the views of the nonſenſe of human kind, and to contemplate with a ſtudious eye the various ſcenes of human folly, than to perſecute the vulgar becauſe they are fools. Hence, every form of nonſenſe and of folly, which is not believed to be ſubverſive of the true principles of government, deſtructive of the liberties of mankind, and dangerous to the conſtitution of Britain, is tolerated in a moſt liberal manner. So that it is become neceſſary to *connive* at every ſect, from which no danger is apprehended, and to allow the clergy of theſe ſects to exerciſe every office, which is generally believed to make a part of the ſacred function. Conſequently, if they preſume to celebrate marriage, tho they are, no doubt, comprehended under the ſtrict ſanctions of the Law, they ought not to be proſecuted, or to be brought to puniſhment, but to be tolerated, provided they celebrate no marriage, of which bans have not been publickly proclaimed.

If diſſenting miniſters, who have not the benefit of the Toleration, are, much more muſt laymen of all denominations be held to be prohibited to celebrate it. I ſay, laymen of *all* denominations; becauſe all laymen are, indiſcriminately, prohibited to marry, whether they be, or be not veſted with publick authority. For the Law of Scotland confines the power of ſolemnizing it preciſely to thoſe, who are by the eſtabliſhed church authorized to celebrate it; *i. e.* to the miniſters of the eſtabliſhed church, and to thoſe others, whom I have mentioned. It does not any where devolve this power either on private perſons, or on magiſtrates, or on other laymen veſted with authority. Conſequently, neither the Lords of Seſſion, nor the Lords of Juſticiary, nor the Barons of Exchequer, nor Commiſſaries of Dioceſes, nor Sheriffs of Shires, nor Magiſtrates of Boroughs, nor Bailiffs of Regalities, nor Bailiffs of Baronies, nor Juſtices of the Peace, nor any other magiſtrates, are by Law impowered to celebrate marriage: for each of theſe has a certain juriſdiction and a certain power entruſted to him; and he cannot, by his own authority, extend his power, and aſſume a juriſdiction, which was not delegated to him, eſpecially when the Law has expreſsly intruſted it to others, and has ſtrictly prohibited any but thoſe to whom it has committed it, to exert it. So much I thought it neceſſary to ſay, becauſe I know it is a vulgar error, that magiſtrates are impowered to celebrate marriage. No doubt, a marriage, celebrated either by a magiſtrate or by *any other* perſon, is valid; provided the parties themſelves conſent; becauſe it is not the celebration of the marriage, but the conſent of parties, which makes them become married perſons. However, tho the marriage be valid, the magiſtrate, who celebrates it, eſpecially if it is celebrated without proclamation of bans, is liable to be puniſhed.

§ 199. The penalties, which are by Law, 1661, *c.* 34. ordained to be inflicted on ſuch as procure themſelves to be married by perſons, who are not legally authorized to celebrate marriage, (§ 198.), are the ſame with thoſe ordained to be inflicted on ſuch as marry without proclamation of bans (§ 197.). 'Tis true, that marriage has for many years paſt been as free as the conſtitution of the country, the manners of the people, or the opinions of the times; and that no example

example of puniſhment, inflicted on any ſolely for obtaining themſelves to be married by one, who was not legally impowered to ſolemnize marriage, can be cited. But this proves no more than that thoſe, to whom the care of this part of public affairs has been committed, have been willing to indulge the people in their folly, and to connive at delinquencies, which are not eſteemed to be totally ſubverſive of the order of ſociety. It proves not, that either the Law or cuſtom hath exempted the delinquents from puniſhment; elſe every crime, which happens by connivance to paſs unpuniſhed, muſt be held to have acquired an exemption from puniſhment, and to have got the ſanction of cuſtom to approve of it: which is abſurd.

If ſuch, as procure themſelves to be married by one, who is not by Law authorized to celebrate marriage, are, *a fortiori* thoſe, who marry one another without any formal celebration of their marriage, are liable to be puniſhed. For their marriage is at leaſt as irregular, as clandeſtine and as private as that of the others. Therefore their delinquency, being as great, muſt be as ſeverely puniſhable.

If perſons, who obtain themſelves to be married in an irregular manner, *either* without proclamation of bans, *or* by one who is not authorized to ſolemnize marriage, are by Law ordained to be puniſhed; much more ought thoſe, who aggravate their delinquency by obtaining themſelves to be married not only by one who is not by Law authorized to celebrate marriage, but alſo without proclamation of bans, to be puniſhed. For their contempt of the Law, and infringment of the order of ſociety, are evidently great on a double account.

§ 200. But the Law, more effectually to prevent clandeſtine and irregular marriages, hath ordained puniſhment to be inflicted not only on the parties, who obtain themſelves to be married, but alſo on thoſe, who either celebrate, or are witneſſes to marriages celebrated after an irregular and clandeſtine manner. For they are acceſſary to the diſorder, which is committed (§ 196.).

Perſons, who preſume to ſolemnize marriage, either when they are not by Law authorized to celebrate it, or when they know that proclamation of bans has not been made, are by Law, 1661, *c.* 34.—1698, *c.* 6. ordained, 1) To be liable to be ſeized and impriſoned on the warrant of any ordinary magiſtrate, or juſtice of peace, 2) To be puniſhed *a*) by perpetual baniſhment out of the kingdom of Scotland, and *b*) by either a pecuniary or a corporal puniſhment, in caſe it ſhall appear to the court, before which they are tried, to be proper, that they ſhould be puniſhed by ſome other ſuch puniſhment, over and above baniſhment. Laſtly, they are ordained never to return to Scotland, under the pain of death.

Thoſe, who are witneſſes to the celebration of clandeſtine marriages, are, by 1698, *c.* 6. ordained each of them ſeverally to be puniſhed either by a pecuniary mulct of 100 *l. Scotch, toties quoties*, to be applied to pious uſes within the pariſhes, within which they dwell; or, if they are inſolvent, by an arbitrary corporal puniſhment.

And, in order more effectually and more eaſily to diſcover both thoſe who ſolemnize, and thoſe, who are witneſſes to the celebration of clandeſtine and irregular marriages, it is, by 1698, *c.* 6. enacted, 1) That ſuch, as ſhall have obtained themſelves to be clandeſtinely or irregularly married, ſhall, when required, declare the names and additions both of the perſon, who celebrated their marriage, and of the witneſſes to its celebration; and 2) That if, when required, they ſhall refuſe to declare, they ſhall, inſtead of the fines appointed by 1661, *c.* 34. pay, each nobleman 2000 *l.* each baron and landed gentleman 2000 merks, each gentleman and burgeſs 1000 *l.* each other perſon 200 merks *Scotch*, to be applied to pious uſes within the pariſh where they dwell; and 3) That they ſhall be impriſoned, until they declare who celebrated, and who were witneſſes to the celebration of their marriage. For this ſeems to be the true meaning of 1698, *c.* 6. that, if they ſhall, when required, declare the names and additions of the perſons, who either celebrated or were witneſſes to the celebration of their marriage, they ſhall be puniſhed *only*

by

by thoſe puniſhments, which were, before the act 1698, ordained by 1661, *c.* 34. to be inflicted on them; but that, if they refuſe to declare, they ſhall then be puniſhed, not by the pains of 1661, *c.* 34. but by thoſe of 1698, *c.* 6. So that the puniſhment only *inficiando creſcit*. For it would be abſurd to ſuppoſe a heavier puniſhment to be ordained to be inflicted for the refuſal alone than for the principal delinquency. It would be abſurd, therefore, to ſuppoſe it to have been the intention of the Legiſlature, that the puniſhment *both* of 1661, *c.* 34. *and* of 1698, *c.* 6. ſhould be inflicted on one, who did no more than add this to his former delinquency.

Having thus ſhewn, 1) What perſons may lawfully enter into the ſtate of marriage, and 2) How perſons, intending to marry each other, enter into that ſtate; it is time to proceed, in the third place, to ſhew the effects which marriage has during its ſubſiſtence (§ 169.).

TITLE IV.

Of the Effects, which Marriage has during its Subſiſtence.

§ 201. THE primary end of marriage is the procreation of children; its ſecondary end is the mutual happineſs, comfort, and enjoyment of the ſpouſes (§ 169.). Therefore, the effects of it muſt reſpect either the perſons, or the patrimonial intereſts of the married perſons.

'Tis not perhaps methodical, but it may not be improper to treat, *firſt* of thoſe effects which are dependent on the ſecondary end of it, and concern the eſtates of the married perſons: for the others, concerning their perſons, it will be more proper to explain immediately before the doctrine 'of the diſſolution of marriage.'

TITLE V.

Of the conventional Effects, which Marriage may have on the Eſtates of married perſons.

§ 202. IN order to underſtand the effects which marriage has on the patrimonial intereſts of the married perſons, two caſes muſt be diſtinguiſhed. For,

Perſons intending to marry one another either do or do not determine by contract before marriage the effects which their marriage ſhall mutually have on their eſtates. In caſe they determine them by contract, it muſt regulate the effects of the marriage, and the rights of both parties. For the procreation of children is the primary end of marriage. Therefore, the Law allows the parties to agree about their pecuniary intereſts, and to determine them before marriage, as they beſt can. But mankind are frequently precipitated by paſſion to marry, without deliberation (§ 196.), and are often unmindful to make agreements beforehand. Therefore, the Law has wiſely taken care to determine the effects of marriage, the rights of married perſons, and the intereſt which they ſhall have in each other's eſtate. Its determinations are founded on principles, which appear to it to be moſt conducive, upon the whole, to the happineſs of ſociety. It preſumes, therefore, that all thoſe, who neglect to enter into ante-nuptial contracts, and to determine by them the effects of their marriage, are willing to acquieſce in the

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deciſions of the public Law, and to hold themſelves contented with the proviſions made by it.

§ 203. The power, which a bride and bridegroom have of determining the effects which their marriage ſhall have on their eſtates, is moſt extenſive: for they may enter into any articles of agreement, which they pleaſe, and which are not repugnant to the primary end and to the idea of marriage.

Thus a man may ſettle either all, or a part of his eſtate on his bride, and may determine the order of the ſucceſſion to it, according to his pleaſure. If ſhe agrees to the terms propoſed by him, and enters into a ſolemn ante-nuptial contract concerning them, the contract will ſtand good; neither the man, nor the woman will be reſtored againſt it, no matter, whether the woman brought a great or a ſmall portion, or no portion at all: provided the bridegroom had full power to diſpoſe of his eſtate, or had at leaſt power to do that, which he has done.

In the ſame manner, a woman, who has the free diſpoſal of her eſtate, may make over either all, or a part, or none of it to the bridegroom; or ſhe may provide him to no more than an yearly revenue out of it during the marriage, or to a jointure, payable after the diſſolution of it: and theſe things may be done without regard to the rank, dignity, eſtate, or condition of the ſpouſes.

Again, a man may, by an ante-nuptial agreement, renounce all thoſe rights, which are, by the Law of Scotland, comprehended under the appellation of *jus mariti*, *D. Huſband and wife*, 23d *June* 1730, *Walker.*— *Campbell.*—*Fa.* 5th *Feb.* 1745, *Truſtees of Mrs. Murray* *. Therefore, he may effectually renounce all right, intereſt, or title, both to the moveable eſtate of his wife, and to the adminiſtration of her heritable one; to both which he is, in conſequence of his marriage, by the Law of Scotland, entitled, unleſs he makes a ſpecial renunciation of them, or to the proviſions, which the Law makes for him, in caſe he ſhall ſurvive her. In ſhort, he may exclude himſelf from having any management of any part of her eſtate, and from intermeddling in any ſort with it.

After the ſame manner, a woman may effectually exclude herſelf from any right, which, unleſs her huſband takes care to get her to renounce it by a particular proviſo, ſhe would have in conſequence of her marriage.

§ 204. However, tho the Law has allowed a bridegroom and a bride to determine the effects which their marriage ſhall have on their eſtates, it has in ſome particulars circumſcribed their powers. It hinders them from making any agreement, which it apprehends to be eſſentially contradictory to the primary end and to the nature of marriage, (§ 203.) and, in caſe ſuch articles are made, it holds them *pro non ſcriptis* and to be void. For marriage introduces a ſort of partnerſhip between huſband and wife; the family becomes, as it were a *Company* or *univerſitas*, conſiſting of a man and woman. But one of the partners being a man, and the other a woman, and nature being thought to have given the males a pre-eminence above the females; the Law has therefore given the huſband dominion and ſuperiority over his wife, and has enjoyned her to obey and to ſubmit to his will, *R. M. l.* 2. *c.* 16. § 13.—*l.* 3. *c.* 17. § 2.—*Q. A. c.* 12. § 6.—*c.* 20.—*ſt. W. c.* 19. § 1. 8.—Gen. *c.* iii. *v.* 16. The huſband, ſays St. Paul, is the head of the wife. Therefore, Wives ought to be ſubject to their own huſbands, Epheſ. *c.* v. *v.* 22, 23, 24. Coloſſ. *c.* iii. *v.* 18. Tit. *c.* ii. *v.* 4, 5. 1 Peter *c.* iii. *v.* 1. *&c.* Since, therefore, both the Law and the Goſpel have made the huſband the head of the family, he cannot renounce the rights, which flow from his ſuperiority, are held by Law to be eſſential to the nature of marriage, and are inſeparable from the Idea of it. Of courſe, he muſt always continue to have

* It was otherwiſe in antient times, *St.* 30th *June* 1670, *Græg*—*H.* 668. — *F.* 14th *July* 1709, *Vallange.* The reaſon was ſubtile. The right, which the wife acquired by the renunciation, was itſelf held to fall under the *jus mariti.*

the adminiſtration of *the family*, and of every thing which belongs to it: for he is the maſter of it. 'Tis true, the parties may determine the parts of their ſeparate eſtates, which ſhall belong to the univerſity, and ſhall not fall under communion; but, if any thing is allowed actually to fall under it, the huſband muſt alone have the adminiſtration of it. So that every renunciation of thoſe rights, which he has as head of the *univerſitas*, is *ipſo jure* null and void, *St.* 9th *Feb.* 1667, Lord *Collinton:* nor is what was ſaid above, to wit, that the huſband may renounce his right not only to the perſonal eſtate, but alſo to the adminiſtration of the heritable eſtate of his wife, contradictory to this doctrine: for an heritable eſtate, belonging to a woman, does not, as we ſhall ſee afterwards, fall under that community of goods, which is conſequent on marriage.

But the Law has, further, limited the powers of a bridegroom and a bride, and hinders them from making any agreement, which is *contra bonos mores*, or is contrary to good manners: for every agreement which is *contra bonos mores*, is rejected by it. Of courſe, every article of agreement, which a bridegroom and a bride make contrary to them, is held *pro non ſcripto*, is not obligatory, and is void. Suppoſe them, for inſtance, to agree between themſelves, and to make it an article of their marriage-contract, 'that the bridegroom ſhall not be bound 'to maintain his family;' 'that the wife ſhall not be obliged to take care of 'her houſhold;' 'that donations made by them to one another during their 'marriage, ſhall be irrevocable;' theſe, and all other articles, which are *contra bonos mores*, it is not in their power to make. Therefore, in caſe they make them articles of their contract, they are held *pro non ſcriptis*, are ineffectual, and are void. The reaſon is, becauſe they cannot, by their conſent, either cancel the obligations, under which they lie to do their duty, or make it lawful for them to neglect to do it, *l.* 5. § 1. *l.* 22, 28. *ff. de pact. dotal.*

But tho the powers of a man and a woman of determining by an ante-nuptial contract the effects, which their future marriage ſhall have, are thus circumſcribed by Law, they are, in other reſpects, moſt ample and moſt extenſive. So that their agreements and determinations, when they are clear and expreſs, muſt take place. When they are, from the words of the contract, obſcure and ambiguous, the import of them muſt be determined from connecting the ſpirit of the Law with that, which appears, upon the whole, to be the ſpirit of the contract and the intention of parties.

TITLE VI.

Of the legal Effects of Marriage; and firſt, of the Rights, which the Huſband acquires in the moveable Eſtate of his Wife.

§ 205. IN caſe the parties themſelves entered not into a contract before marriage, the determinations of the Law muſt take place, and the married perſons will, each of them, have thoſe rights which Law has ſaid they ſhall have. I ſhall explain, firſt thoſe which the huſband acquires in the eſtate of his wife, and ſecondly thoſe, which the wife has in the eſtate of her huſband.

Marriage, it has been ſaid (§ 169.), is entered into by a man and a woman; it is intended for the production of certain effects; theſe effects muſt be produced by the united endeavours of the perſons, who enter into it. Of courſe, it is, as it were, a contract which is made between them, that they may aſſiſt one another in accompliſhing the ends of it.

One of theſe ends is the procreation of children, (§ 169.). Therefore, the huſband and wife muſt live in one family and in one houſe together, *l.* 1. § 15.

§ 15. *ff. de ſenat. ſil. l. 5. ff. de ritu nupt.* The conſequence is a fictitious unity of *perſons* between the ſpouſes, (§ 176.)—*Gen. c.* ii. *v.* 21, 22, 23.

But the man is by nature ſuperior to the woman (§ 204). *Major dignitas eſt in ſexu virili, l. 1. p. ff. de ſenat.* She, therefore, ought to ſubmit to him, and to enter into his family. Thus, his houſe is that, in which the family ought to live, and is therefore called by POMPONIUS, *l. 5. ff. de ritu nupt. domicilium matrimonii;* and every thing, belonging to it, falls under his denomination. Of courſe, the unity of perſons, which ſubſiſts between huſband and wife, muſt make that of the woman yield to the ſuperior dignity of the man, and be held to be *abſorbed* in his perſon.

Since the perſons of both the ſpouſes are abſorbed in that of the huſband alone, it follows, that the perſonal eſtate of both of them muſt belong to him alone. Therefore, the property of the perſonal eſtate of the wife muſt accrue to him. For, her perſon being abſorbed in his, that part of the eſtate, which accompanies her perſon, *quæ ſequitur perſonam*, muſt become his property. But thoſe things, which are moveable (§ 160.), are ſaid to accompany the perſon of their proprietor. Therefore,

'The huſband acquires, in conſequence of the marriage, the property of all 'the moveable eſtate, which his wife either 1) has at the time of her entrance 'into marriage, or 2) acquires during its ſubſiſtence,' *arg. Q. A. c.* 20. By her moveable eſtate are underſtood all thoſe things, and thoſe things alone, which are reckoned, by the Law of Scotland, moveable *quoad jus mariti et uxoris*, (§ 160.). For inſtance, bonds, granted to a wife for money lent by her, or to which ſhe has come to have right, bearing intereſt, are not comprehended under it. Conſequently, they do not fall under the *jus mariti*, *St.* 28th *June* 1665, *Pitcairn*—4th *July* 1676, *Rollo.* For ſo are called all thoſe rights, which a huſband acquires, by Law, to the property and to the adminiſtration of the eſtate of his wife.

§ 206. I ſay, the huſband acquires the property of all the moveable eſtate of his wife: for his right is full and complete. 'Tis indeed common for the writers on the Law of Scotland to ſay, that marriage introduces a *ſociety* or partnerſhip between a huſband and his wife, and that certain ſorts of goods fall under *communion* in conſequence of the marriage. But this is not to be underſtood, as if a real partnerſhip was the conſequence of it; as if the rights of both ſpouſes were the ſame; or as if the wife had the ſame power which the huſband has over thoſe goods which are ſaid to fall under the communion. 'Tis much otherwiſe*; they are ſaid to fall under communion, becauſe the affection, which a man is ſuppoſed to have for his wife, makes her uſe to call every thing belonging to him hers; beſides, on the diſſolution of the marriage, there is a diviſion of the moveables belonging to the huſband, made between the wife and his repreſentatives, or the huſband and the repreſentatives of the wife, different according to the different circumſtances, which happen to exiſt at that time. But, during the marriage, the rights of the ſpouſes are very different; their moveable eſtates become, in no ſort, common; and the wife has, by no means, rights equal to thoſe of her huſband. For by her marriage ſhe *loſes the property* of her whole moveable eſtate; it becomes, immediately, wholly and entirely the property of her huſband; he acquires *all* the rights, and may *alone* exerciſe *all* the powers, which by Law belong to the proprietor of any thing, *arg. R. M. l. 2. c. 36. § 7. 8.* Hence marriage is called a legal aſſignment made by a wife to her huſband of all her moveable eſtate. For it is, by the Law itſelf, veſted in him, without any intimation, delivery, or apprehenſion of poſſeſſion.

From hence it follows, that moveable debts, due by the huſband to the wife, are extinguiſhed and cleared by the marriage. Thus, money, due by his bill to her, is cleared by it; becauſe the bill, or right depending on it, being a part of

* See DIRLETON's doubts, *legitima liberorum.*

of her moveable eſtate, becomes, by the marriage, the property of the huſband. So he becomes both debtor and creditor. Of courſe, the debt is extinguiſhed *confuſione*.

§ 207. The huſband acquires, in conſequence of his marriage, the abſolute property of the moveable eſtate of his wife (§ 205.), and has power to exerciſe all thoſe rights, which proprietors may exerciſe over their property. Conſequently, he may ſell, exchange, barter, abuſe, deſtroy, or make preſents either of all or of any part of it, at his pleaſure. In ſhort he may diſpoſe of it capriciouſly, either for onerous or for gratuitous, for rational or irrational cauſes. Of courſe, if a moveable debt is due to his wife, he, and he alone, is entitled to demand payment, and to grant an acquittance of it.

Nay, her moveable eſtate becomes his property ſo fully and ſo abſolutely, as to be liable to be attached by his creditors for payment of the debts, which he owes them.

Theſe powers he may exert arbitrarily, provided he do it, 1) by a deed *inter vivos*, 2) during his *liege pouſtie*. I ſay, 1) by a deed *inter vivos*: for he cannot hurt the *jus relictæ*, the right, which the Law gives his widow to a certain determinate ſhare of his moveables, either by a teſtamentary, or by any ſort of deed *mortis cauſâ*. If, therefore, he makes a deed of this ſort, during his *liege pouſtie*, it cannot be effectual againſt the right of his widow. The reaſon is, becauſe it cannot take effect till the death of the teſtator. But at that time the right of the widow is already become abſolutely complete, *ipſo jure*, without the neceſſity of any act to conſtitute it. For the ſame reaſon, no deed whatever, which is not granted for a true onerous cauſe, tho it be not only made during *liege pouſtie*, but be alſo of the nature of a deed *inter vivos*, can hurt the *jus relictæ*, in caſe it appears to be intended fraudulently to defeat it; for inſtance, if its effect is ſuſpended till the death of the huſband. Such a deed muſt, in competition with the *jus relictæ*, be held to be fraudulent; and can never diminiſh it. The widow's ſhare, therefore, muſt be eſtimated in the ſame manner, as it would have been, in caſe it had not been made, *St.* 8th *Dec.* 1675, *Thomſon*—10th *Jan.* 1679, *Grant*. 'Tis true, after the ſhares both of her and of the children, if any are alive, who are entitled to a legitim, are deducted, the deed may, like a legacy, be effectual againſt the remainder, againſt that part of the moveables, belonging to the huſband, of which he is by Law allowed to diſpoſe by a deed of any ſort, *etiam in ipſo articulo mortis*, *R. M. l.* 2. *c.* 37. § 1. 2. 3.

For the ſame reaſon it muſt follow, that a huſband has no power to do any deed *inter vivos*, during his *liege pouſtie*, which is not granted for an onerous cauſe, to take effect at ſo diſtant a time, as renders it altogether improbable, that he will be alive at it. Suppoſe, for inſtance, a man 80 years old, in health, and of ſtrength ſuperior to his age, to grant a gratuitous bond, payable 30 years after its date, and to die before the time of payment, it would have no effect to diminiſh the right of the widow, the *jus relictæ*. Therefore it would not be computed among thoſe moveable debts due by the huſband, which are charges on the whole executry, and affect all the moveables indiſcriminately which belong to him at the time of his death; becauſe it could not avoid being held to be a fraudulent contrivance to defeat the intention of the Law, and to deprive the widow of that portion of her huſband's moveable eſtate, to which ſhe is legally entitled: ſince it is altogether improbable, nay almoſt impoſſible, for a man of eighty to live thirty years longer. Indeed, if he ſurvives the time of payment, the caſe is altered; becauſe he had then full power, *jure communi*, to make a gratuitous alienation of the ſums, for which he granted the bond: for he remains at every point of time during his *liege pouſtie*, the full and abſolute proprietor of the moveable eſtate, and may diſpoſe of it as he pleaſes.

But 2) The powers he has, as abſolute proprietor to diſpoſe of it, laſt during his *liege pouſtie* alone: for, as ſoon as he loſes it, he loſes thoſe powers which he has

has as proprietor. *Liege pouſtie* ſeems to be a corruption of *liege in poteſtate, liege able to ſerve his* Lord; it ſignifies a ſtate of health, and is oppoſed to death-bed. Conſequently, one is ſaid to loſe his *liege pouſtie*, 'when he loſes his health, and is on death-bed.' One is held by Law to have loſt his health and to be on death-bed, 'as ſoon as he is ſeized by that ſickneſs, which hinders him, during its continuance, from going both to the Church and to the market about his affairs, and ends in his death.' Indeed, the moment one has loſt his *liege pouſtie*, and has begun to be on death-bed, he is held, by Law, to be, as he were already dead *. Therefore, as ſoon as he is confined by ſickneſs of this kind, he loſes thoſe powers, which he had before, of doing deeds, by which the right of his widow might have been either diminiſhed, or perhaps, entirely defeated; for a dead man cannot either have or exerciſe any power, *arg. R. M. l.* 2. *c.* 18. § 7. 8. 9—*c.* 37. § 1. 2. 3. However, if one lives 60 days after he makes a deed, the exception of death-bed is totally excluded, tho he may have been confined, and may not have gone either to church or to the market, during all that, or even a longer time, 1696, *c.* 4.

But the huſband continues *always* to have power to do equal onerous deeds; becauſe, when a deed is onerous, there is ſomething equivalent ſurrogated into the place of that, which is alienated. Conſequently, a wife can never be injured by a deed of this kind: becauſe, if ſhe has not her ſhare of that very thing, which her huſband has alienated for a valuable conſideration, ſhe has always that which is equivalent to it, her ſhare of that value, which is ſurrogated into its place.

§ 208. A huſband, it has been ſaid, acquires, in conſequence of his marriage, right to all the moveable eſtate of his wife. But this rule admits of two exceptions.

Firſt; The *paraphernalia* of a wife do not become the property of her huſband, but continue the property of the wife herſelf, *C. June*, 1582, *Gray—Fo.* 4th *Dec.* 1696, 15th *Jan.* 1697, *Dick. Paraphernalia* is a word originally Greek, uſed by the Roman Lawers to ſignify 'every thing belonging to a wife παρα φερνην, *præter dotem*, beſides the dowry, portion, or fortune, which her huſband got by her, in order to enable him to bear the burdens of marriage.' Therefore, it comprehended among the Romans, even ſuch an eſtate as would by us be reckoned to be heritable. But it is, by the Law of Scotland, applied to cloaths, ornaments, and trinkets alone, and ſignifies 'thoſe moveables the property of which is not, by the marriage, tranſmitted to the huſband, but remains with the wife,' *l.* 8. *C. de pact. con.* In order to underſtand the doctrine concerning *paraphernalia*, it is neceſſary to remark, that 1) Some things are *ſuâ naturâ* paraphernal, 2) Others are not by their own nature, but are capable of becoming paraphernal, 3) Other things are wholly incapable of becoming paraphernal. I call thoſe things paraphernal by their own nature, 'the property of which is not tranſmitted to the huſband, but belongs to the wife, unleſs ſhe makes a ſpecial ante-nuptial renunciation of her right to them.' Thoſe things are ſaid to be capable of becoming paraphernal, 'which require to be ſpecially appropriated by the huſband to the wife, in order to make them become paraphernal, and are not paraphernal without a ſpecial appropriation.' Thoſe things are ſaid to be incapable of becoming paraphernal, 'the

* Matrimonio durante, rerum communium non ſolum *adminiſtratio* ſed *dominium* eſt penes maritum, et *poteſtas diſponendi haud aliter quam de ſuis*: nec ut communio iſta cedat, opperiendum eſt ut conjux emoriatur et penitus ito defunctus ſit, ſed confeſtim ut mori incipit, poteſtas illa legitima (vulgo *liege pouſtie*) definit, et communio ffectum ſortiri incipit. Mori vero incipit, imo civiliter pro mortuo habetur, poſtquam morbus invaſit lethalis t ſonticus, qui cuique rei agendæ impedimento ſit; adeo ut nec domo proreptare poſſit, nec negotiis, uti ſolitus rat, ſupereſſe, eundo ad templum *aut* forum et loca publica ubi plerumque ſalus animæ et negotio procuratur: quamdiu enim animus ergaſtulo corporis coercetur et ejus miniſterio et organis neceſſario utitur, vix fieri poteſt ut orpori ægro mens ſana ſit: accedit, quod ubi cadaver ibi aquilæ, et moribundis adſunt et advolant plerumque amici ut videri volunt ſed) corvi et heredipetæ, ut captent et eblandiantur aliquid; nec id difficile eſt: ægri quidem tam corpore quam animo infirmo, et aſſiduis eorum, quorum opera tunc opus habent, officiis et blandiis impares et obnoxii, facile dant et jactant quæ propediem ſua haud futura ſunt. Ex eo tempore igitur quo eger ſeſe domi abdidit, nec amplius in propatulo, foro aut eccleſia ſui copiam facit, licet ex morbo non decumbat ento fortaſſe eoque magis periculoſo, dicitur eſſe *lecto ægritudinis* et in extremis agere. DIRLETON's Doubts, itle, legitima liberorum.

'property of which is, in virtue of the marriage, tranſmitted to the huſband, 'unleſs he makes a ſpecial ante-nuptial renunciation either of his *jus mariti* alto-'gether, or his right to them in particular.' Of the firſt kind are, 1) all the cloaths and wearing apparel of the wife, the *veſtis muliebris* *; no matter, whether ſhe ever did, or did not actually uſe them, provided ſhe had them to be uſed, if occaſion required. 2) All the *ornamenta muliebria*; by which are meant, 'all thoſe trinkets, which are uſed by women merely for adorning their 'perſons, which are not comprehended under the word *cloaths*, and which 'are ornaments proper for *women alone*;' *omnia quibus* mulier *ornatur*. Such are ear-rings, neck-laces, bracelets, gum-flowers, breaſt-jewels, ribbands, *&c. l.* 25. § 10. *ff. de auro, argento, mundo, ornamentis, unguentis, veſte vel veſtimentis, et ſtatuis legatis, N.* 54.—*Ha.* 27th *June* 1610—*H.* 363. 364—*Fo.* 4th *Dec.* 1696—15th *Jan.* 1697, *Dicks.*— For the ſame reaſon, 3) That preſent which is uſually, on the ſale of a landed eſtate, made by the buyer to the wife of the ſeller, and is commonly called *the Lady's gown*, is paraphernal, falls not to the huſband, and excludes the *jus mariti*, *F.* 26th *July* 1709, Lady *Pitfirran*. The reaſon is, it is a preſent made to the Lady herſelf, is a gratification given her for conſenting to the ſale of the land; and is intended to be applied by her towards purchaſing a gown, or ſome other thing for herſelf, according to her fancy. Therefore, like the *veſtimenta* and *ornamenta muliebria*, it muſt be paraphernal, *ſuâ naturâ*.

The Things of the ſecond ſort, to wit, thoſe, which are not by their own nature, but are capable of becoming paraphernal, are 1) The *mundus muliebris*; that is, *omne id, quo mulier fit mundior*, and may be all comprehended under the appurtenances of her toilet and dreſſing-box. Such are combs, bruſhes, nail-cutters, dreſſing-mirrour, *&c.* which are commonly adjoined to her dreſſing-box, *l.* 25. § 10. *ff. eod. tit.* 2) Such things, as are not proper for the uſe of women alone, but may be uſed indiſcriminately by men as well as women, ſuch as watches, rings, medals, ſeals; theſe are not *ſua natura* paraphernal. But they may become paraphernal, that is, they may become the property of the wife, by being appropriated to her. Therefore, they become ſo only, in caſe they are preſented to the wife, and appropriated to her uſe by the huſband either before or on the day of the marriage. For, if they are preſented to her after the day of the marriage, they are, like all gifts *inter virum et uxorem*, revocable at any time during the life, not indeed of the donor, the huſband, but of the donee, the wife. I ſay, not of the huſband; for *ſuch* donations, *as uſe to be given* to brides before, or on the day of their marriage, are not, like other donations *inter virum et uxorem*, revocable at any time during the life of the donor, after as well as before the death of the donee, *Fo.* 4th *Dec.* 1696.—15th *Jan.* 1697, *Dicks;* but are revocable during the life of the donee, the wife alone, and become irrevocable at her death.

Paraphernalia of the firſt ſort, thoſe, to wit, which are *ſuâ naturâ* paraphernal, remain always paraphernal, and are, therefore, at all times, the property of the wife, in whoſe poſſeſſion they are found. Her poſſeſſion is alone requiſite to prove her to be the proprietor of them, no matter whether before or after her marriage. But thoſe of the ſecond ſort, thoſe, to wit, which are made paraphernal by appropriation, continue to be paraphernal during the life of that huſband alone, by whoſe appropriation they became paraphernal. By conſequence, if the wife marries a ſecond huſband, they fall to him like the other moveables belonging to her, and are, in no ſort, paraphernal, unleſs they are, of new, appropriated to her by her ſecond huſband, *Fo.* 4th *Dec.* 1696, 15th *Jan.* 1697,

* *Veſtis muliebris* is not taken in this place, in a ſenſe ſo extenſive, as that, which it has, when we ſpeak of *veſtimenta legata*: for here it ſignifies 'ſuch cloaths alone, as are proper for clothing the body;' whereas when it is applied to a legacy, it has a much more extenſive ſignification, at leaſt in the Roman Law, and ſignifies 'omnia, quæ in-'duendi, præcingendi, amiciendi, inſternendi, injiciendi, incubandive cauſa parata ſunt; et quæ his acceſſionis 'vice cedunt,' *l* 23. § 1. *ff. de auro, argento, mundo.* Conſequently, it comprehended bed-cloaths, *&c. l.* 25. § 1. 3. *eod.* But neither bed-cloaths nor any others, except ſuch as are uſed *veſtiendi corporis cauſâ*, are paraphernal.

1697, *Dicks.*— 8th *July*, 1709, *Lady Rankeillour.*—27th *June* 1712, *Counteſs of Bute.*

The things, which are ſaid to be incapable of becoming paraphernal, are all other moveables than thoſe of the kinds above mentioned: for all other things become the property of the huſband, unleſs he makes a ſpecial ante-nuptial renunciation of his right to them. For inſtance, houſhold furniture of all ſorts, ſuch as beds, tables, chairs, cabinets, coffers, and even the things which the the wife has for holding her *paraphernalia.* For they are not paraphernal, *Fo.* 4th *Dec.* 1696.—15th *Jan.* 1697, *Dicks.*

Since the property of *paraphernalia* remains with the wife, it follows, 1) That a wife has full power not only to employ them to thoſe uſes, for which they are intended; otherwiſe they would be uſeleſs to her: but alſo 2) To do acts of *ordinary* adminiſtration concerning them, *without* either the conſent or the concurrence of her huſband; for we ſhall ſee, that it muſt be lawful for her to do acts of *ordinary* adminiſtration concerning them without it, becauſe it is impoſſible for her to get it to theſe.

But the huſband is the curator of his wife. Therefore, 3) She cannot do any act of *extraordinary* adminiſtration concerning them; of courſe, ſhe cannot ſell, alienate, pawn, diſpoſe of them, or do any deed, by which ſhe diveſts herſelf of the property of them, without her huſband's conſent: for ſhe cannot do any deed, which is inconſiſtent with that curatorial power, which every huſband has by Law over his wife, *L. A. c.* 21. § 3 *.—*D. Huſband and wife*, 11th *July* 1735, *Gemmil.*

Since the property of them is not, like that of the reſt of the moveable eſtate of the wife, tranſmitted to the huſband, it is plain, 4) That he cannot either alienate or diſpoſe of them, for one cannot diſpoſe of a thing, which does not belong to him; 5) That they muſt both concur in diſpoſing of them: for the alienation muſt be made by her with his conſent.

A fortiori, 6) They cannot be attached by his creditors for payment of debts due by him to them: for effects belonging to one cannot be attached for debts due by another, *Ha.* 23. 27th *June* 1610.—*H.* 364.

The ſecond exception to the general rule is, that a huſband does not acquire right either to an *alimentary* proviſion granted to his wife, or to the ſucceſſive profits yielded by it, *Ha. pen. Nov.* 1622, *Edmonſtone.*—*Du.* 4th *July* 1637, *Tenant.*—*Fo.* 27th *Jan.* 1709, *Dick.* For an alimentary proviſion is perſonal to her, for whoſe maintenance it is intended. Therefore, it is not, *ipſo jure*, tranſmitted to another. By conſequence, it is not attachable by the creditors of the huſband; for, beſides that no *alimentary* proviſions are attachable by creditors, it is not the property of the huſband, *Du.* 27th *March* 1627, *Laird of Weſtniſbet*—*B.* 21.

'Tis otherwiſe, in caſe it is not alimentary, *Du.* 8th *March* 1639, *Kilkadron.*—*St.* 22d *Dec.* 1676, *Dick.*—*Fo.* 26th *Nov.* 1697.—12th *Jan.* 1698, *Creditors of Pankaitland*—27th *Jan.* 1709, *Dick.*

TITLE

* I cannot, on this occaſion, omit remarking the inaccuracy of Sir JOHN SKENE's tranſlation of the *Regiam Majeſtatem*, *Quoniam Attachiamenta*, and other books contained in this collection. Beſides tranſlating the word *Paraphernalibus* by the Scotch word *Tocher*, he has tranſlated this chapter ſo as to make one believe, that a wife can diſpoſe of that, which he calls her tocher, without the leave of her huſband. For the third paragraph of the chapter, as it is tranſlated, muſt relate, not to the ſecond but to the firſt; elſe the tranſlation is contradictory to itſelf. But on looking into the Latin original, you will find the word *tamen*, which makes it evident, that the third paragraph muſt neceſſarily be connected with the ſecond. Thus, the doctrine of this chapter is made conſiſtent both with itſelf, and with the principles of the Law of Scotland. A ſimilar error is committed in the tranſlation of *R. M. l.* 2. *c.* 16. § 2. 'Tenetur autem unuſquiſque tam de jure canonico quam jure *ſeculari*, 'ſponſam ſuam dotare tempore deſponſationis.' The words of the tranſlation are, 'Be the Canon Law, and 'Civil Law, all men are obliſſed to indow and give ane dowrie to his wife, the time of the marriage.' One would think from the word *Civil*, that the Roman Law was here underſtood in the *R. M.* whereas that uſed in the original ſhews it was the *ſecular* or *civil*, as oppoſed to the *canon*, *eccleſiaſtical* or *religious* Law. From hence, by the by, an anſwer occurs to an argument uſed in 'Eſſays concerning Britiſh antiquities,' Eſſay I. againſt the antiquity of *R. M.*

TITLE VII.

Of the Rights which a husband acquires, by his Marriage, in the heritable Estate of his Wife; and of the Effects of his curatorial Power.

§ 209. 'TIS one's *moveable* estate, which is alone said to be *personal* to him (§ 205.); heritage is not, by any lawyer, said to *follow* the person, *sequi personam*, of its proprietor. Of course, the heritable estate * of a wife is not, like her moveable one, by marriage, transmitted to her husband. The *property* of it remains with herself.

§ 210. But a husband, it has been said, becomes, by the marriage, absolute proprietor of *all* the moveable estate which his wife either has at the time of the commencement of the marriage, or *acquires during its subsistence*, (§ 205.) Of course, he must acquire the property of all the fruits, profits, and emoluments, which are, at successive times, during the marriage, yielded by her heritable estate: for the fruits of every thing, which is heritable, indeed, the fruits of every thing, be it heritable, immoveable, or moveable, are themselves moveable (§ 152.). Besides, a husband is, as we shall see, bound to maintain his wife, his children and his family; but they can be maintained with moveables alone; the fruits, yielded by immoveables, will be useful in helping to do it. The husband, therefore, becomes the proprietor of the fruits, yielded by the heritable estate of his wife, at every successive point of time, at which they are yielded by it, *C. June* 1582, *Pennicook.*—*St.* 28th *June* 1665, *Pitcairn.*---4th *July* 1676 *Rollo.*---21st *Feb.* 1679, *Cockburn.*

Hence, tho he acquires not the property, he is entitled to the *administration* of her heritable estate: for he is the proprietor of all the fruits yielded by it. Therefore, he must be entitled to *reap* those fruits; his property would not otherwise avail him.

But, if he is entitled to reap them, he must, by consequence, be entitled to do every thing, which is necessary for reaping them. Therefore, he must have a right to *raise* them; otherwise he cannot have it in his power to reap them.

By consequence, he must have a right to do every thing, which is necessary for making the fructiferous body produce them; that is, he must have a right to *cultivate* and to *use* it.

A husband, therefore, acquires, by his marriage, a right to manage the heritable estate of his wife; that is, 'he is the lawful administrator of it:' for one, who is entitled to do every thing, which is necessary for making a fructiferous body produce its fruits, and to reap them, it is plain, must have the management, that is, is the lawful administrator of it.

§ 211. But one, who has the power of managing the *estate* of another, is called his *Curator*. '*Curatela est potestas administrandi bona et rem familiarem* †.' Hence it is said, *Curator datur rei*. Therefore, 'a husband is, by Law, held 'to be the *Curator* of his wife,' and is, by his marriage, vested with *curatorial* powers over her.

Indeed, it could not well, consistently with the principles of Law, be otherwise. For 1) A wife retains the *property* of all her heritable estate (§ 209.) Therefore, every deed concerning *it* must be done by her. But her husband is proprietor of all the *fruits* of it (§ 210.) Therefore, every deed, affecting it, may either hurt or affect his interest in it. By consequence, she cannot be allowed to do any deed, by which it may be affected, without his *consent*. His consent,

* By her heritable estate I mean all those things, which are by the Law of Scotland held to be heritable *quoad jus mariti et uxoris*.

† HEINNEC. Instit. § 266.

conſent, therefore, is neceſſary, in order to give validity to every deed, which is done by her, and relates to it: for one cannot do any thing, by which another may be hurt, without his conſent.

Beſides, 2) That ſuperiority, which, it has been ſaid, (§ 205.) man has vindicated to himſelf, entitles the huſband to ſay, that his conſent ought to be aſked to every deed done by his wife, and that it is neceſſary in order to give it validity. But one, whoſe *conſent* muſt be aſked, and whoſe office it is to give it, is called a *Curator:* for a curator *gives his conſent*. Therefore, 'a huſband muſt be the curator of his wife,' *R. M. l.* 2. *c.* 16. § 13.—*l.* 3. *c.* 17. § 2. 3.—*Q. A. c.* 20. 22.

§ 212. Since he is not *proprietor* of her *heritable* eſtate, (§ 209.) it is plain, 1) That he cannot, alone and by his own authority, alienate and diſpoſe of it either for an onerous or for a gratuitous cauſe: for one cannot convey to another the property of a thing, which does not belong to himſelf, *l.* 54. *ff. de rer. jur.*—*R. M. l.* 2. *c.* 17. § 3.—*c.* 29. § 5.—*Sk. notes on d.* § 5.—*Q. A. c.* 20.—*Sk. n.* 2) That he cannot grant diſcharges of heritable debts due to her; for they are a part of her heritable eſtate: 3) That he cannot do any deed relating to it, other than one neceſſary for making him reap the fruits of it; becauſe he is proprietor of no more than them. Of courſe, he cannot grant a wadſet of it, an annual-rent out of it, an infeftment upon it in ſecurity, or any wiſe charge it: 4) That it cannot be attached by his creditors for debts due by him; for it is not his property (§ 208.): 5) That he cannot grant leaſes of it to laſt longer than his marriage, or his right to reap the fruits.

Every deed, therefore, by which either the property of it is alienated, or it is charged, in ſhort, every deed, other than one neceſſary for making him reap the fruits of it, muſt be done by his wife: for ſhe is the proprietor of it.

But the Law has veſted a huſband with a curatorial power over the eſtate of his wife (§ 211.). Therefore, ſhe cannot, alone and by her own authority, do any deed, by which her heritable eſtate may be affected during her life: for her huſband, being her curator, is the lawful adminiſtrator of all her affairs; his conſent is neceſſary, in order to give validity to every deed done by her. Beſides, his right to reap the fruits of it may be hurt, at leaſt may be affected by every deed relative to her heritable eſtate. But one is not by Law allowed to do any deed hurtful to the right of another. Every deed, therefore, which is done by a wife, and by which her heritable eſtate may be affected either during her own life, or during the continuance of the right which her huſband has to reap the fruits of it, muſt be done by her with his conſent, *R. M. l.* 1. *c.* 30. § 6.—*l.* 2. *c.* 16. § 13.—*Q. A. c.* 20. And ſhe may with his conſent do with her eſtate every thing, which every other proprietor can: ſhe can even alienate it gratuitouſly. *A fortiori*, her power muſt, in every reſpect, be unlimited. *Non debet, cui plus licet, quod minus eſt, non licere, l.* 21. *ff. de reg. jur.*

§ 213. From hence it follows, that every deed concerning it, done either by the huſband alone without the concurrence of his wife, or by the wife without the conſent of her huſband, is *ipſo jure* void, and is, of courſe, liable to be ſet aſide: for it is done by one, who has not power to do it.

§ 214. Therefore, 1) A wife cannot, without the conſent of her huſband, alienate or diveſt herſelf of the property either of all or of a part of her heritable eſtate, either for an onerous or for a gratuitous cauſe: 2) She cannot grant a wadſet of it, an infeftment of annual-rent out of it, or an infeftment upon it in ſecurity: 3) She cannot any wiſe burden it: 4) She cannot grant leaſes of it: 5) She cannot receive payment, and grant an acquittance of an heritable debt due to her; for, by every deed affecting it, the intereſt either of herſelf, of her huſband, or of both may be hurt. She may make a bad bargain, may let her eſtate for too low a rent, and may miſemploy money paid her.

I ſay, every deed, by which her heritable eſtate may be affected either during her own life, or during the right of her huſband, muſt be done by her with his

conſent; elſe it is null. For ſhe can, without his conſent, do any deed concerning it, which is not to become effectual till her death, provided his intereſt is not hurt by it; for inſtance, ſhe can make a ſettlement of it, determine the ſeries of perſons to whom it ſhall deſcend, fix the order in which each of them ſhall ſucceed, and limit the powers which each of its ſucceſſive proprietors ſhall have over it; becauſe ſhe cannot hurt herſelf by doing ſo. Indeed, by making a ſettlement of her affairs, ſhe diſcharges a duty, which ſhe owes to herſelf and to her relations.

§ 215. A huſband is the curator of his wife; therefore, his conſent is neceſſary to give validity to deeds done by her. But it may happen, that he cannot give it; he may be deprived of the uſe of his reaſon; he may be abroad; he may be attainted for treaſon; he may be ſentenced to die for a capital crime. In ſhort, a thouſand accidents may make it impoſſible for him to give it. But neceſſity has no Law. Therefore, in all caſes, in which it is impoſſible for him to give it, Law diſpenſes with the neceſſity of getting it, and holds a deed done without it to be valid, *Fo.* 18th *June* 1680, *Bailie.*—*D. huſband and wife,* 21ſt *June* 1729, *Bridget Bold.*—29th *June* 1733, *Dall;* provided it is not hurtful to the intereſt of the huſband: for ſhe cannot hurt him. Therefore, every one, who accepts a deed from her without his conſent, does it *cum periculo.* For the huſband has a right to get it ſet aſide, in caſe it is hurtful to him.

'Tis true, it has been adjudged, that a wife may, in all caſes, do deeds concerning that, which remains her ſeparate property, without the conſent of her huſband, whether they be deeds of ordinary or of extraordinary adminiſtration, *D.* I. 401. *Fo.* 21ſt *Feb.* 1679, *Cockburn.*—*D. huſband and wife,* 11th *July* 1735, *Gemmil.* I am not acquainted with the particular circumſtances, which diſtinguiſhed theſe judgments. But they ſeem to be wrong: for it is hardly conſiſtent with the principles of Law to ſay, that a deed, done by a wife without the conſent of her huſband, can ever be valid, except in a caſe of neceſſity. The curatorial power of the huſband was introduced not only *ex neceſſitate* for his benefit, but alſo for the good of the wife; ſhe is in duty bound to take the advice of her huſband. Therefore, ſhe is deprived of the power of diſpoſing of her own affairs without it. In caſe ſhe does not take his advice, ſhe may hurt herſelf. Of courſe, every deed done by her without taking it, that is, without his conſent, is held, *præſumptione juris et de jure,* to be hurtful to her, and to be null.

The only caſes, therefore, in which deeds done by her without it can be valid, muſt be thoſe, in which neceſſity requires her to act without it. Such are, beſides thoſe, which have been already mentioned, thoſe of buying victuals, of purchaſing cloaths, of ſelling corn, or of giving verbal orders about ſuch of her affairs as uſe to be done upon them. To theſe it is impoſſible to get her huſband's conſent on every trifling occaſion. Therefore, the Law cannot require it. But if ſhe were to grant a leaſe, or to make a conſiderable bargain, his conſent would be neceſſary; becauſe it is a matter of importance, and ought therefore not to be done without his advice, if it can be got. Indeed, if ſhe is ſeparated from him, and has a ſeparate maintenance allowed her, his conſent is not neceſſary to give validity to any deed reſpecting it. For ſhe may diſpoſe of it as ſhe pleaſes, be it land, houſes, money or any other thing.

§ 216. I ſaid (§ 210.), that a huſband acquires, by his marriage, the property of *all* the fruits yielded by the heritable eſtate of his wife, at every point of time, at which they are ſucceſſively, during the ſubſiſtence of the marriage, yielded by it; that he is, therefore, entitled to do every thing neceſſary for reaping thoſe fruits; and that he is the lawful adminiſtrator of her heritage.

From hence it follows, that he either may himſelf make the natural uſes of it, or may let it out for rent to others *. Thus, if his wife is proprietor of a landed eſtate,

* From hence, by the by, you ſee another reaſon, for which a wife cannot grant a leaſe of her eſtate: for ſhe cannot, by any deed done by her, hinder him either from retaining the natural poſſeſſion of it, or from letting it out to others, ſince he is alone entitled to the fruits of it. But he would be deprived of his option, in caſe leaſes, granted by her, were to be effectual againſt him.

ſtate, he may, if he pleaſes, retain it in his own poſſeſſion, and cultivate it himſelf*; and he may labour it as he pleaſes. If ſhe is proprietor of a houſe, he may live in it; if of a mill, he may employ it for grinding. In ſhort, he may employ every part of the heritable eſtate of his wife to its natural uſe. But he muſt do it, *ſalvâ ſubſtantiâ;* he cannot deſtroy the ſubſtance itſelf: for one, who is proprietor, has alone a right to deſtroy the ſubſtance of it. But he is not proprietor of the eſtate of his wife. Therefore, he cannot ſquander money due upon heritable (§ 209.) ſecurities to her: for he is *proprietor* of no more than the intereſt of it; he acquires not the property of the principal ſum (§ 205.). Of courſe, the principal ſum he cannot ſpend. If he gets payment of it, he is bound to preſerve it, ſo that it may be a ſum laid out on good ſecurity, and bearing intereſt at the diſſolution of the marriage: for he is not bound to have it laid out during its ſubſiſtence; becauſe, being proprietor of the intereſt which it would yield, he hurts none but himſelf by neglecting to lay it out in this manner.

But inſtead of making himſelf the natural uſe of the heritable eſtate of his wife, he may let it out to others, that they may make the natural uſe of it. Of courſe, he may grant leaſes of it to continue not, indeed, for a determinate time, but either for one year, or during the ſubſiſtence of his right to make the natural uſe and to reap the fruits of it: and theſe he may grant alone, without the concurrence of his wife; becauſe he has himſelf a right to uſe the eſtate of his wife. He may be incapable, for he may be ignorant of the methods of making the natural uſe of it. Of courſe, it may be *neceſſary* for him to let it out for rent to others. But the Law preſumes, that he will not make any bargain, which will be hurtful to his wife. Beſides, enmities may ſubſiſt between him and her; ſhe may be ſeparated from him; and ſhe may refuſe to concur with him in granting a leaſe upon reaſonable terms. Therefore, it muſt be lawful for him alone, without her concurrence, to grant leaſes of her heritable eſtate to laſt during the ſubſiſtence of the marriage, or, rather of his right to make the natural uſe of her eſtate. It was for this reaſon, I ſaid, (§ 212.), that he could not, without her concurrence, do any deed relating to it, other than one neceſſary for making him reap the fruits of it.

But he cannot grant a leaſe to laſt longer than his own right, *l.* 54. *ff. d. r. j.* Therefore, he cannot, without the concurrence of his wife, grant one to laſt for a determinate time; becauſe every leaſe, granted by him, muſt become void upon the determination of his right; for he is not proprietor. In caſe he grants one for a long time, it will be good againſt himſelf; but it will not be good againſt his wife or her heirs, in caſe his right ſhall determine before the expiration of it. In order to make it effectual againſt her, it muſt be granted by her with his conſent (§ 212.).

A huſband being, *pleno jure*, proprietor of all the fruits of the heritable eſtate of his wife, it is plain, that he can alone grant diſcharges for them to thoſe, who rent it. For they, or the rent ſurrogated into their place, are debts properly due to him alone. Therefore, he can grant acquittances, 1) For rent due by thoſe, who tenant her lands, her houſes, her mills, or her other heritages, 2) For the intereſt of money due by thoſe who owe her debts, which are heritable or are excluſive of his *jus mariti*, becauſe 3) He can grant them for all moveable debts due to his wife, (§ 207.). Her concurrence is not neceſſary; diſcharges, granted by him alone, will be good againſt her.

§ 217. It remains to be remarked, that his acquiſitions muſt be proportionable to his right. If her eſtate yields fruits *de die in diem*, he continues to acquire perpetually and in every inſtant, till the actual determination of his right; and that, which he acquires, becomes, ſucceſſively, a part of his moveable eſtate at every

* This muſt be underſtood, in caſe it is not tenanted by others, who cannot be cauſed to remove from it.

every time, at which it is acquired. For instance, if it is a house, he is entitled either to live in it, or to draw the rent of it, till the very day, on which his right determines, because houses may be inhabited, and rent payable for them runs *de die in diem*. If it is money due by personal bonds, and heritable *quoad* him, he is, for the same reasons, entitled to the interest of it to the very day of the expiration of his right.

But if it be land, or mills, or any other thing which yields fruits, and for which rent is due, only at regular and successive distances of time, the Law enquires, whether he held the natural possession of it, or it was rented by others. In case he held the natural possession of it, he or his representatives are entitled to reap the fruits raised by his industry; for instance, to reap a crop of corn, of hay, or of grass sown by him. It is, therefore, held to be a part of his moveable estate, and belongs to those to whom it devolves; no matter, whether his right determined before or after the 26th of May, before or after the 22d of November: for he, who sows, ought also to reap; and that, without paying any rent for the power of reaping, in case he had a right to sow without it, *St.* 25th *July* 1671, *Guthrie.—Fa.* II. 9. Indeed, if it was not sown, before his right determined, he has no right to sow it afterwards; because he has no right to possess.

But if it was rented by others, his right is measured by the legal terms, (§ 155.). In case it survives the 26th of May, he has a right to the rent, which becomes due at that time; in case it survives the 22d of November, he has a right to the rent, which becomes due at it, no matter whether it is or is not demandable at that time: and it becomes a part of his moveable estate, and passes to those, who succeed to it, *Go.* 23d *July*, 1668, *Carnegie—arg. Du.* 21st *Jan.* 1629, Lady *Ayton—St.* 12th *Jan.* 1681, *Trotter*.

The case is the same with *annui reditus*, *rents* payable out of land, or infeftments of annual-rent: for they, like other rents, become due at the legal terms, *arg. Du.* 8th *Jan.* 1624, *Hendersons—ult. Nov.* 1627, Tenants of *East-houses—Sp. annualrent*, 10th *March* 1630, *Lindsay—n.* 81.

§ 218. A husband is not proprietor of the estate of his wife: but he is the *administrator* of it; he is her curator; and she is *clothed* in him. Therefore, he is, in some respects, considered as the proprietor of it; *Q. A. c.* 20. for he has, *quoad jus publicum*, all the rights, which are annexed to it, which a man, if he had been proprietor of it, would have had, but which cannot, because of her sex, be exercised by her. Thus, if it affords a vote at the election of a member of Parliament, her husband is, without being infeft, entitled both to vote at the election and to be himself elected a member of Parliament, *jure mariti*: but apparent heirs, that is, those to whom the succession to an heritable estate has opened, but who have not completed their feudal title to it, are entitled to vote by virtue of their apparency; for they have a right to hold the possession of every thing which their deceased predecessor possessed, and draw the profits of the estate which entitles its owner to vote. Therefore, a husband has a right to vote as well during the apparency of his wife, as after her titles are completed; for the Law gives husbands a right to vote *for the freeholds of their wives*. But a freehold means, in this place, an estate which entitles to a vote, not one in which its owner is seized and which he thereby *actually holds* of a superior; for freeholder is a general name, and signifies 'all those who are entitled 'to vote for a member of the house of Commons.' It is frequently used in this sense, 1681, *c.* 21. In case her estate has jurisdiction annexed to it, he is entitled to exercise it; and, if peerage was at present territorial, he would be entitled to exercise all those privileges, which her sex debarred her from exercising.

§ 219. Since a husband is the curator of his wife, and is the lawful administrator of her estate (§ 210. 211.), her power must necessarily extend to all her affairs, judicial as well as extrajudicial: for the power of every curator does.

Therefore,

Therefore, a wife is not perſonable, ſhe has not *perſonam ſtandi in judicio*, that is, ſhe cannot maintain any Law-ſuit, without the concurrence of her huſband: for there is nothing, which may prove more hurtful to her intereſt, than a precipitate entrance into Law-ſuits. Nothing requires more deliberation; no part of the adminiſtration of her affairs requires more the advice and aſſiſtance of her huſband. So that ſhe cannot, alone, without his concurrence, either ſue or be ſummoned to appear and defend in any action. Her huſband muſt be ſummoned to appear both for his intereſt, and to manage the ſuit as the curator of his wife; and his management is obligatory upon her, *R. M. l.* 3. *c.* 17. *rubric.* § 1. 2. 3.*.

I ſay, a wife cannot maintain any action without the concurrence of her huſband, *C. May* 1581, Lady *Colluthie—Du.* 9th *Jan.* 1623, *Marſhall—St.* 8th *July* 1673, *Hacket.* However, this like many other definitions of the Law, admits of ſome exceptions. For 1) A wife may, on *neceſſary* occaſions, bring an action againſt her huſband†. For inſtance, if ſhe was minor at her entrance into marriage, and was hurt by the contract which ſhe made with her huſband before it, ſhe may, during the marriage, ſue an action in order to get the contract ſet aſide, *Du.* 8th *July* 1642, *Inglis.* In the ſame manner, ſhe may *ex juſta cauſa*, ſue her huſband, in order to compel him to fulfil the articles of her contract of marriage, to do that which he had bound himſelf to do during the marriage, or to ſecure to herſelf the performance of the obligations under which he came at his entrance into it, *Fo.* 17th *Feb.* 1703, *Scot*—18th *Nov.* 1704, *Roſs;* in order to obtain a ſeparate maintenance from him; or in order to get herſelf divorced from him. 2) A wife may, if her huſband either will not or cannot concur with her, ſue without his concurrence, actions at Law, which it is neceſſary for her intereſt to commence: for, tho a huſband is the curator of his wife he has it not in his power to manage her affairs either fraudulently or capriciouſly; he is bound to manage them *integerrimâ fide:* therefore, if he *refuſes* to do any thing, or to commence an action, which it is evident, will tend to the utility of his wife, ſhe muſt, on this neceſſary occaſion, be allowed to act for her own intereſt: for a huſband is, by Law, veſted with a curatorial power over his wife, not for her ill, but for her good, *Fa.* I. 235. If the huſband *cannot* concur, the neceſſity of the caſe muſt give her power to act without his concurrence; the rather, becauſe the Law preſumes, that a huſband is willing to concur with his wife, and to give his conſent to every thing which will be of advantage to her. Therefore, either 1) If her huſband is out of the country, or at a diſtance, ſo that his concurrence cannot be had, *St.* 16th *Nov.* 1667, *Chalmers;* or, 2) If he has become either furious or fatuous, or has been, by the violence of a diſeaſe, deprived of the uſe of his reaſon, ſo as to be incapable of giving his concurrence, *l.* 1. § 2. 3. *ff. de tutel—l. u. C. qui morbo ſe excuſant. l.* 11. 40. 45. § *ult. ff. de excuſ.* or, 3) If he lies under any legal diſability, and has not *perſonam ſtandi in judicio;* for inſtance, if he is baniſhed out of the kingdom, is condemned for a capital crime, or is attainted for high treaſon; in all theſe caſes a wife may maintain actions at Law without his concurrence.

But tho ſhe may ſue them without the concurrence of her huſband, ſhe cannot, while ſhe continues to be *veſtita viro*, do it *alone;* ſhe muſt be allowed to do it by the Court, before which the action is brought, and muſt have a curator *ad litem* given her by it, to authoriſe her in the ſuit, becauſe a woman *veſtita viro* cannot, during her coverture, be admitted to ſue an action without the concurrence of her huſband, till ſhe has firſt made it appear that the neceſſity of her affairs requires it. The Court therefore, will *ex juſta cauſa* give her a curator, and authoriſe her to do it, *Du.* 9th *Jan.* 1623, *Marſhal—St.* 8th *July*

* It is remarkable, that the expreſſion, uſed in *L. B. c.* 33. is *poteſt ſtare in judicio pro eâ.*

† It was once adjudged, that no action lies between man and wife, *Du.* 11th *Jan.* 1625, *Hamilton.*

1673, *Hacket*—*Go. ibid.* 4th *June* 1673, *Wamphray. Fo.* 17th *Feb.* 1703, *Scot*—28th *July* 1708, *Byres. Fa.* I. 235.*.

§ 220. A wife is by Law hindered from appearing not only as purſuer, but alſo as defender in any action, without the authority of her huſband: for every ſuit commenced againſt her may be hurtful both to her and to his intereſt, for both may be affected by it, unleſs it be managed with addreſs. Therefore, he muſt be ſummoned to appear for his intereſt in every action brought againſt her; otherwiſe the Law-ſuit cannot proceed. By conſequence, if a woman happens to be married during the dependence of a ſuit commenced againſt her, the cauſe muſt ſtop, till her huſband be ſummoned to appear for his intereſt, *Du.* 29th *June*, 1627, *Baillie.* If he lives within the territory of the Judge, before whom the action is depending, he may be ſummoned by the authority, warrant, and precept of that Judge alone: but if he lives without it, a bill muſt be preſented to the Lord Ordinary on the Bills narrating the caſe, and praying his Lordſhip to grant warrant, or, if the ſuit is depending before the Court of Seſſion, the Lord, before whom it depends, may grant his warrant, tho he be not on the Bills, for iſſuing a writ, called *Letters of ſupplement*, for ſummoning the huſband to appear for his intereſt in the action depending at the ſuit of the purſuer againſt the defender. The prayer of this bill, it is plain, muſt be granted. Thus, Letters of ſupplement muſt be iſſued, and be duly ſerved upon the huſband. After the day againſt which he is ſummoned to appear is paſſed, the ſuit may proceed.

But this rule muſt alſo admit of exceptions. For 1) A wife may, on neceſſary occaſions, defend herſelf againſt an action brought by her huſband againſt her. Thus, if her huſband commences againſt her an action of adherence, in order to have her decreed to adhere to him and to her nuptial bed; or, if he ſues an action of divorce, in order to have his marriage diſſolved; ſhe may appear in her own defence. For ſince the actions themſelves are allowed by Law, it muſt alſo allow of every thing which is neceſſary for bringing them to an end, is implied in the Idea of them, and is inſeparable from them. It may, therefore, be affirmed, that a huſband and a wife are perſonable, and may appear as judicial adverſaries in every action, which they may bring againſt one another; becauſe the Law muſt approve of the neceſſary conſequences of that ſuit, which it allows to be commenced. *Qui vult finem, media velle præſumitur.* 2) If her huſband either cannot or will not appear in her defence, ſhe muſt, from the neceſſity of the caſe, be allowed to do it herſelf. Thus, if he is furious, is abroad, or is not perſonable, ſhe muſt be allowed to defend herſelf, *S.* 23d *Jan.* 1541, *Craigie.* 3) If ſhe is proſecuted for a crime, ſhe muſt appear, and defend herſelf, whether ſhe will or will not; her huſband cannot be indicted along with her for his intereſt; the libel, accuſation, or indictment muſt be iſſued againſt herſelf alone. For ſhe cannot involve him in the conſequences of her guilt; he cannot be intereſted in her puniſhment; if ſhe is innocent, her innocence will defend itſelf, ſince her proſecutor will not be able to make proof of the crimes charged upon her; and if ſhe is guilty, ſhe ought to ſuffer. Hence, Lawyers ſay, that *in delictis maritalis æque ac tutoria ac curatoria conticeſcit poteſtas.*

§ 221. Since a wife is under the curatorial power of her huſband, and cannot either commence or ſue any action without his concurrence, it is plain that ſhe cannot without it ſue out thoſe writs, which are both iſſued and ſerved according to forms eſtabliſhed by Law for carrying decrees into execution or for making rights effectual; ſuch as letters of horning, of caption and of poinding: For theſe are the means, which the Law employs in the execution of the decrees of Judges. Therefore, they can be employed by thoſe alone, in whoſe favour the decrees are made. But every decree recovered by a wife, is made in favour of her and of

* To prevent unneceſſary trouble, 'tis uſual to name certain perſons in every contract, at whoſe ſuit execution may be made againſt the huſband.

of her huſband. Therefore diligence, conſequent upon it, muſt be iſſued in her name and in that of her huſband. Beſides, if the decrees are obeyed, they and the diligences iſſued upon them muſt be diſcharged. But her huſband muſt concur in every diſcharge granted by her (§ 214.) Therefore, the diligence, writ or proceſs muſt be iſſued in his as well as in her name.

'Tis otherwiſe, in caſe they are uſed not to execute a decree, but to ſecure payment of a debt: ſuch, for inſtance, is a writ of arreſtment or of inhibition. Theſe, tho iſſued in name of the wife alone, without the concurrence of the huſband, will be ſo far ſuſtained, as to be allowed to be the foundation of actions of forthcoming and of reduction, provided the huſband ſhall ratify the employment of them by giving his conſent to the commencement and the ſuing of the actions, *Fo.* 29th *Jan.* 1702, *Hepburn.* The reaſon is, that a wife is allowed, like a minor, to better her condition without the expreſs authority of her huſband: for he is preſumed to conſent to this. Therefore, his ratification operates *retro* to the very time, at which the diligences were iſſued and executed. *Ex paritate rationis* they may be ſuſtained to be made the foundation of actions after his death, even in competition with the diligences of other creditors, who are not preferable to her; becauſe it would be hard to cut off the claim of a juſt creditor for no other reaſon than that ſhe would not, perhaps, harraſs her huſband to concur with her in doing a thing, which it was neceſſary for her to do.

But, tho a wife cannot, without the concurrence of her huſband, do diligence againſt others according to the forms eſtabliſhed by Law, ſhe is, however, allowed to uſe it againſt her huſband himſelf: for it is impoſſible to get, as it would be, indeed, abſurd to require him to give his concurrence to the ſuing out or the doing of diligence againſt himſelf. Nor is it neceſſary, that ſhe have a curator, by whoſe advice and aſſiſtance ſhe ſhall cauſe the diligence to be executed. The reaſon is, that diligences are means eſtabliſhed by Law, and known to every body, for making rights effectual to ſuch as have them, for carrying decrees into execution, and for other determinate purpoſes; the methods of carrying them into execution as are preciſe, certain, and fixed, as the ends for which they are iſſued. 'Tis, therefore, impoſſible for a wife to hurt herſelf by uſing them according to the common and eſtabliſhed forms of Law; nay, it is impoſſible for her not to gain by the uſe of them. Conſequently ſhe muſt, as well as minors, be allowed to do that by which it is ſo far from being poſſible for her to render her condition worſe, that it is impoſſible for her not to better it, *Du.* 13th *July* 1638, Lady *Glenbervie*—*Fo*, 15th *June* 1678, Supplicant—7th *Nov.* 1695, Earl of *Argyle.*

§ 222. Since a wife is under the curatorial power of her huſband, and her perſon is, as it were, united to his; ſince he becomes liable to all her moveable debts, and is the adminiſtrator of her eſtate; and ſince ſhe cannot be ſued or appear in judgment as defender without his concurrence, 'tis plain, that her perſon muſt be, during her coverture, exempted from perſonal diligence, that is, diligence done againſt her body by caption, *Ho. huſband*, 27th *July* 1613, L. *Roxburgh*—*Fo.* 11th *Jan.* 1704, *Gordon:* for diligence may, during her coverture, be done againſt her *eſtate*, in order to make effectual any obligation, with which ſhe is bound; becauſe her marriage ought not to render the condition of her creditors worſe, than it was before her entrance into it. Beſides, the whole eſtate of every debtor is liable to be attached for payment of debts due by him.

But the exemption, which a wife has from perſonal diligence, extends to civil debts alone. For 1) She is liable to all ſorts of diligence for her delinquences, and can plead no exemption, *Ha.* 27th *July* 1613, Lord *Roxburgh*—*Du.* 16th *Feb.* 1633, *Stewart*—*St.* 8th *Jan* 1679, in *Glaſgow* Supplicant; becauſe delinquences are productive of obligations on the delinquent alone, they are perſonal to him alone, and all the effects of them regard him alone: for, like the guilt itſelf, they accompany the perſon of the delinquent, *ſequuntur caput et perſonam*

ſonam delinquentis. So that all the conſequences of them muſt affect and be borne by him alone, *ſt.* WIL. *c.* 19. Indeed if the puniſhment is pecuniary, no perſonal execution can be made againſt her during her coverture, *n.* 105. The exaction of the fine muſt, therefore, be delayed till the diſſolution of the marriage, unleſs ſhe has a ſeparate eſtate, proper to herſelf, and exempted from the *jus mariti*, againſt which execution may be done during its ſubſiſtence, *E.* 2d *July* 1724, *Murray.*

2) If ſhe is bound *ad factum præſtandum*, diligence may be done againſt her in order to force her to do that, which ſhe is bound to do: for an act which one is bound to do, can be done by that perſon alone, who is bound to do it. But the intereſt of her creditor, or of him, in whoſe favour ſhe is bound to do the act, ought not to be hurt by her, when it is in her power to fulfil her obligation by doing that, which ſhe is bound to do, and which can be done by her alone. Thus, if ſhe is decreed to exhibit writs which ſhe has in her cuſtody, diligence may be done againſt her, in order to force her to exhibit them, *Fo.* 16th *Nov.* 1678, *Sibbald.* In the ſame manner, if ſhe is bound to give infeftment to any body, ſhe may, by diligence be compelled to do it. For *facta* are perſonal as much as *delicta.*

§ 223. Since a wife is not only under the curatorial power, but liable to the influence of her huſband, and it might be attended with diſagreeable conſequences, in caſe ſhe ſhould commence actions or *take documents* againſt him, it is plain, that he cannot preſcribe againſt her any rights or actions, which lie to her againſt him, *Ha.* 26th *Feb.* 1622, *Hamilton.*—*St.* 5th *July* 1665, *Macky.* So ſhe cannot loſe any action, which ſhe has againſt her huſband by having not ſued it during her coverture, *F.* 25th *July* 1710, *Chalmers*—*Da.* 128.—*B.* 18. For the *reverentia maritalis*, that reverence, that dread, that aw, ſhe may be preſumed to have of her huſband, is a ſufficient excuſe for her neglect, and puts her in the condition of thoſe, who are ſaid to be unable to act, *non valentes agere*, *arg. R. M. l.* 3. *c.* 17. § 2—*Q. A. c.* 12. § 6—*c.* 20. So preſcription is not allowed by Law to run againſt a wife in favour of her huſband.

But it runs againſt her in favour of every other perſon: becauſe no *reverentia maritalis* hinders her, in this caſe, from proſecuting, during her coverture, her rights. If therefore ſhe neglects to proſecute them, ſhe is juſtly allowed, by Law, to loſe them *in pœnam* of her negligence, *St.* 16th *Nov.* 1675, *Taylor.*

TITLE VIII.

Of the Rights, which a Wife acquires by her Marriage in the Eſtate of her Huſband.

§ 224. IT is not difficult to conclude from the principles, which have been explained in the two foregoing titles, that a wife acquires not, by her marriage, right to any part either of the heritable, or of the moveable eſtate of her huſband. For ſhe loſes the property of her own perſonal or moveable eſtate, (§ 205.). Of courſe, ſhe cannot either hold or acquire that of the moveable eſtate of another. Her huſband acquires not the property of her heritable eſtate; of courſe, ſhe can have no pretenſions to the property of his. She loſes the power of managing her own; it would be abſurd for her to acquire the management of his.

Marriage therefore produces no alteration on the eſtate of the huſband; he continues after it to be, as he was before, the alone and abſolute proprietor of

of it; he has alone the power of managing it; and he has over it the ſame powers, which he would have had, in caſe he had not married. In ſhort, it is held to belong abſolutely to him, and to him alone. Of courſe, it is liable to be attached by his creditors in the ſame way, in which it could have been attached by them before his marriage, *R. M. l.* 2. *c.* 16. § 12. 13. 14. 15.

'Tis true, a communion of moveables is ſometimes ſaid, by Lawyers, to be conſequent on marriage (§ 206.). But I have ſhewn that that is not a real community; for the *property* of all the moveable eſtate belonging to both ſpouſes is veſted in the huſband alone. Community is ſaid to be conſequent on marriage, partly becauſe of the affection, which ought to ſubſiſt between huſband and wife, and makes them be held to be *one* fleſh; partly becauſe the diviſion, which is made at the diſſolution of the marriage, of the moveables *belonging to the huſband*, is made without any regard to the extent of the portion, which belonged to each of the ſpouſes at their entrance into it, *R. M. l.* 2. *c.* 36. § 7. 8.

Thus, having particularized the rights, which a huſband acquires by his marriage, I ſhall next ſhew, firſt, The patrimonial obligations, under which they are reſpectively brought by their marriage, at the very moment at which they enter into it; ſecondly, Thoſe, under which they can bring themſelves and one another during its ſubſiſtence.

TITLE IX.

Of the patrimonial Obligations under which a Huſband is brought by his Marriage.

§ 225. SINCE marriage is entered into for the procreation of children, (§ 169.); ſince the huſband is, in conſequence of his ſex, ſuperior in dignity to his wife (§ 127); ſince her perſon is therefore, as it were, abſorbed in his (§ 205.); 'tis plain, that ſhe ought to follow his domicil, and is bound to live with him, *l. ult. C. de incolis.* Therefore, the houſe of the huſband is very properly called, by POMPONIUS, *l. 5. ff. de ritu nupt. Domicilium matrimonii.* But the huſband is proprietor not only of all the eſtate belonging to himſelf, but acquires by his marriage the property of all the moveable eſtate of his wife (§ 205. 210.), and he is able by his induſtry to make large acquiſitions; he muſt therefore be bound to maintain his wife. For a wife is by the Law conſidered as bound to employ her time rather in managing the houſhold of her huſband, in taking care of his domeſtic affairs, and in attending to the profitable diſpoſal of acquiſitions made by him, than in working with her own hands, in order to make new acquiſitions by her own labour. Beſides, all the funds which ſhe had, all the acquiſitions which ſhe makes, become the property of her huſband; ſo ſhe has nothing, out of which ſhe can maintain herſelf. Therefore he becomes immediately, in conſequence of his marriage, bound to maintain her, *l.* 22. § 8. *ff. ſoluto matrimonio;* no matter 1) Whether ſhe is, or is not ſeparated from him, *B. huſband*, 26th *Feb.* 1561, *Crighton.*—26th *March* 1561, *Logan.*—*Ho. huſband and wife*, 8th *June* 1613, *Ruſſel.*—*St.* 6th *July* 1677, *Allan.* 2) Whether ſhe has, or has not been inhibited by him, *Go.* 23d *June* 1675, *Auchinleck.*—*St.* 25th *July* 1676, *Campbell;* 3) Whether an action for diſſolving the marriage is or is not depending between them, *C.* 23d *March* 1579, *Lady Lennox.*

Of courſe, he is bound to provide her with food, clothes, and lodging: for all theſe are comprehended under her maintenance, *l.* 6. *ult. ff. de. alim. vel cib. legatis*, ſince nobody can live without them, *l.* 43, 44, 234. § 2. *de verb. ſignif.* Without food ſhe would die of hunger; without lodging ſhe would ſtarve of

cold; without clothes ſhe could not appear abroad. Hence *alimenta*, things neceſſary for maintenance, are called, in *l.* 5. *C. de patria poteſtate*, *ſubſidium vitæ*; the word *exhibere* is uſed for *alere*; *uxorem ſuam exhibuit*, ſays PAPINIAN, in *l.* 42. § 2. *ff. ſoluto matrimon.* And the word *exhibitio* is put for *alimenta*. Thus, *exhibitionem uxoris* occurs in *l.* 69. § 3. *ff. de jure dotium.* Indeed, *exhibitio* is ſo frequently uſed in this ſenſe, and ſeems to be ſo expreſſive, that it has been tranſlated into our language, and has now become an Engliſh word: for *exhibition* ſignifies an allowance given for maintenance; *nam exhibere eſt præſentiam corporis præbere*, *l.* 22. *ff. de verb. ſignif.*

A huſband is bound, therefore, to provide his wife with all things, *quæ ad vivendum homini neceſſaria ſunt*, *l.* 43. *ff. d. v. ſ.* Conſequently, if ſhe becomes ſick, he ought to call phyſicians, to buy medicines, and to be at every ſort of expence for curing her, which his fortune can bear, *l.* 13. *C. de neg. geſt.*—*Fo.* 19th *July* 1711, *Lady Kinſawns.*

But a huſband, who is inſolvent, is *unable* to maintain her. Therefore, ſhe can have no claim, in competition with his creditors, for an exhibition out of his eſtate; *Fo.* 10th *Nov.* 1687, *Creditors of Newgrange.*—18th *July* 1700, *Lady Panholes.*—25th *Nov.* 1709, *Turnbull.*—*D. huſband and wife*, *Feb.* 1732, *Gibſon.* For her huſband has, in this caſe, no eſtate, out of which he can maintain her; he is not *in facultatibus*; ſince all the eſtate of every debtor is ſubjected to the diligence of his creditors, may be attached by them, and belongs in ſome ſort to them: and *bona non intelliguntur niſi deducto ære alieno.*

His creditors, therefore, will have acceſs to the portion, if it happens to be unpaid; to the moveable eſtate, and to every thing belonging to the wife, which either became at his entrance into marriage, or has, ſince, become the property of the huſband. Nor ſhe herſelf, nor any body on her part, will have right to retain it from them. Only, if ſhe has, before payment is demanded, been maintained at the expence, not of her huſband, but of that perſon who was to pay the portion, he will be allowed to retain from them ſo much either of it, or of the intereſt of it, as is equal to the ſum, which *has* been ſpent on her maintenance; becauſe ſo much of it was conſumed, and has, by conſequence, no more exiſtence than meat which has been eaten, drink which has been drunk, or clothes which have been worn. Beſides, part of the debt due by him, who was bound to pay the portion, is in truth extinguiſhed *compenſatione*, by the expence, which he has laid out in maintaining the wife, and in fulfilling the obligation, under which the huſband lay to maintain her, *Fo.* 11th *June* 1712, *Robertſon.*

Indeed, if a woman has entered into a ſolemn contract before marriage, the caſe becomes very different: for reaſonable proviſions, which are, in conſequence of expreſs ſtipulations, made for wives in ante-nuptial contracts, become real and onerous debts due to them both in Law and in equity. Conſequently a wife, who ſuſpects her huſband to be becoming unable to make good her contracted proviſions, or to be *vergens ad inopiam*, may uſe diligence againſt his eſtate, in order to ſecure the proviſions againſt not only the huſband himſelf, but alſo his creditors: for her contract of marriage makes her a creditor, as well as any other. By conſequence, ſhe, as well as any other creditor, muſt be allowed to employ thoſe means, and to uſe that diligence, which the Law affords her, for making effectual the rights ſhe has acquired by her contract. If one of theſe rights happens to be a proviſion made for the maintenance of herſelf, of her children, and of her family, payable to her on the event of the poverty of her huſband, and of his inability to maintain them; 'tis plain, that ſhe may, on the exiſtence of this event, do diligence for making effectual theſe proviſions, tho they have been made payable during the life of her huſband, as well as ſuch as are not made payable till his death. For her right of action is, in both caſes, founded on the ſame principle: ſhe is a creditor, and acquires the rights of a creditor in the one, as well as in the other caſe. By conſequence, ſhe may endeavour to make good a proviſion of the firſt, as well as one of the ſecond ſort, by doing

that

that diligence, with which the Law has ſupplied every creditor for making his rights effectual. Indeed, it would be the hardeſt thing in the world, if a woman, who entered into marriage with honeſt views, who has been accuſtomed to live in an eaſy way, who expected to be maintained by her huſband ſuitably to her rank, ſhould, by his misfortunes, indolence, or prodigality, be expoſed to want, be involved in a calamitous dependance, and have no remedy to extricate herſelf from her diſtreſsful condition; and that, tho ſhe has been ſo prudent as to provide, by a ſolemn ante-nuptial contract, againſt the poverty of her huſband, *l.* 73. § 1. *ff. de jure dot. l.* 20, 21, 24. *p. l.* 31. *p. ff. ſol. matrim. l.* 29, 30. *C. de jure dot. Nov.* 97. *c.* 6.

Hence it may be affirmed, that either the wife herſelf, or thoſe who have bound themſelves on her part to make certain articles good to the huſband, *v. g.* to pay him a ſum of money *nomine dotis*, may, if the huſband is unable to fulfil the obligations under which he brought himſelf to his wife, and which he bound himſelf by contract to perform, refuſe to fulfil the obligations under which they brought themſelves, and may *retain* the money which they had bound themſelves to pay, *till* ſufficient ſecurity is given them, either by the huſband or by thoſe his creditors who claim in right of him, that the obligations, under which he brought himſelf to his wife, ſhall be fulfilled and made good to her. Thus, if a huſband binds himſelf to provide his wife with a jointure, and her father binds himſelf to give a portion to the huſband; the creditors of the latter will not have right, if he becomes inſolvent and unable to fulfil his obligations, to compel the wife's father to pay the portion to them. He will have right to retain it; unleſs they offer good ſecurity to him, that her proviſions ſhall be made good to her, *Du.* 21ſt *Nov.* 1623, *Logan.*—28th *June* 1637, *Galbraith.*—*Fo.* 23d *Dec.* 1703, *heirs and creditors of Chalmers.*—*K.* 29.—*H.* 346. 372.—*F. m.* 2d *Feb.* 1714, *Pagam.*—4th *July* 1732, *creditors of Watſon.*—*n.* 94. and the caſes there quoted. The reaſon is plain; a contract of marriage infers mutual obligations, thoſe under which the huſband, and thoſe under which the wife bring themſelves; theſe are mutual cauſes of one another. Therefore, if the one party becomes unable to fulfil its obligations, the other cannot be forced to fulfil the contract on its part; becauſe nobody, neither the principal party, nor any one in his right, who either has not himſelf fulfilled his part of a contract, or is not at leaſt willing to fulfil it, or to give ſecurity that it ſhall be fulfilled, can get another decreed to fulfil his part of it. 'Tis true, the property of the whole moveable eſtate of a wife is, *ipſo jure*, conveyed to the huſband, without any limitations, in caſe there was no ante-nuptial contract. But, if there was one, the caſe becomes different; becauſe the property is then transferred, as it were, under certain conditions; the wife is preſumed to have excluded the *jus mariti*, and the huſband to have renounced it, till and unleſs he performs the obligations, under which he brought himſelf. Therefore, the property may, in ſome ſort, be ſaid not to be conveyed, or at leaſt to be in abeyance, till the huſband perform his part of the contract; and till then, his right may be ſaid not to be a right of property, but to remain *in nudis finibus obligationis.*

The doctrine, which is above laid down, is true, if the huſband, or thoſe who claim in his right, will not find caution *: for if they will find caution to fulfil the huſband's part of the contract, the wife muſt pay them, and cannot delay to fulfil her part of it; becauſe all, which ſhe can demand either from her huſband or from any other, is good ſecurity, that the proviſions made for her ſhall be made effectual at the times, at which each of them becomes due to her, *N.* 16.—*Fo.* 11th *June* 1712, *Robertſon.*—*Du.* 28th *June* 1637, *Galbraith.*

§ 226.

* But it muſt be remarked, that this doctrine regards the wife alone, and not her children. She, or thoſe bound for her, cannot refuſe performance of their part of the contract, to the creditors of her huſband, aſking it from her, on pretence that the articles regarding the children are not fulfilled, *Fo.* 23d *Dec.* 1703, *Heirs and creditors of Chalmers.*—*Da.* 169. For that is *jus tertii* to her; the father is as much as the mother, nay more than ſhe, concerned in the fate of his children; and their intereſt may, in moſt caſes, be ſafely truſted with him.

§ 226. A husband becomes, by his entrance into the state of marriage, bound to maintain not only his wife, but also his children: for the family is by Law considered as belonging not to the wife, but to the husband; he is the head of it; and the profit of the labour of the children, as long as he *continues obliged* to maintain them, *l.* 5. § 7. *ff. de agnosc. et alend. lib.* as well as of the wife, belongs to him alone, *l.* 1. *p.* § 15, 19. *l.* 4, 5. *p. ff. de ventre in possess. mittendo. l.* 1. § 13. *l.* 5. *p.* § 1, 2, 3, 7, 8, 9, 10, 12. *ff. de agnosc. et alend. lib. l.* 3. 4. C. *de alend. lib.* Hence, one, who refuses to maintain his children, is in Law said to murder them, *Necare videtur non tantum is qui partum perfocat, sed et is qui abjicit; et* qui alimonia denegat; *et is qui publicis locis misericordiæ causâ exponit, quam ipse non habet, l.* 4. *ff. de agnosc. et alend. lib.*

§ 227. Nothing can be more equitable than that principle of the Roman Law, by which the advantages and the disadvantages, the benefit and the hurt, arising from any thing to one and the same person, are made to be reciprocal. One ought, in all cases, to bear a loss proportionable to the profit which he makes, *l.* 10, 149. *ff. de reg. jur.* But it has been said, (§ 205.) that a husband acquires the property of all the moveable estate of his wife. Therefore, he becomes liable to *all* the moveable * debts which are due by her at her entrance into the state of marriage. *Ex qua persona quis lucrum capit, ejus factum præstare debet, l.* 149. *ff. de r. j.* Indeed, her moveable estate cannot be said to amount to more than remains after payment of her moveable debts; for they are, strictly speaking, a burden upon it. Therefore, it passes to the husband *cum suo onere*, that is, with the burden of *all* the moveable debts of his wife, *Home, Dec.* 1682, *Simpson.*—*B.* 84. No matter, whether they do, or do not exceed the value of her moveable estate.

§ 228. But he does not acquire the property of her heritable estate (§ 209.). Therefore, he does not by his marriage become liable to her heritable debts, that is, 'to such, as, in case they had been due *to* her, would not have fallen under 'his *jus mariti*.'

§ 229. But he acquires, by his marriage, the property of all the fruits, profits, and emoluments yielded by her heritable estate (§ 210.). Of course, he must be liable for *all* the fruits, profits, and emoluments, which heritable debts due by her have yielded to her creditors before her marriage, that is, he is liable to *all* the arrears of interest due by her at the time of her marriage, for her heritable debts: for these are, in truth, moveable debts due by her (§ 155.), *Fo.* 10th *Jan.* 1696, *Osburn.*—12th *Feb.* 1696, *Hay.*—11th *Jan.* 4th *Feb.* 1704, *Gordon.*—13th *July* 1708, *Gordon.*

§ 230. Since he becomes, by his marriage, liable to all the moveable debts of his wife (§ 227, 229.), it is plain, that diligence may be done by her creditors, both against his person, and against his estate heritable as well as moveable, for recovering payment of them: for every one, who is liable to pay a debt, must be liable to be compelled by those means, which the Law affords for compelling him to do it. Therefore, not only his body, but his *estate*, must be liable to be taken in execution for them: for all his estate, both heritable and moveable, must be liable to be attached; since he, its proprietor, is liable to pay the debts.

For the same reason, he must be liable to be sued for them in his own forum, tho it should be one, in which his wife is not convenable: for, tho he is not, as we shall have occasion to observe, the principal debtor, he is, however, liable to pay *every farthing* of them.

§ 231. But he does not become liable to her heritable debts (§ 228.). Therefore, diligence cannot be done either against his person, or against his estate for payment of them. Of course, it cannot be done against that, which was, before her

* By her moveable debts I mean 'all those, and those alone, which would have fallen under the *jus mariti*, 'and would have accrued to him, in case they had been due to her.' For they are alone moveable *quoad jus mariti et uxoris* (§ 157. 160.).

her marriage, the moveable eſtate of his wife; for the marriage makes it become his property.

§ 232. I ſay, a huſband becomes, by his marriage, *liable* to the moveable debts of his wife: for he becomes not the *debtor*, by whom they are due; the wife remains and continues after the marriage the proper debtor, as ſhe was before it; her huſband becomes *liable*, becauſe her perſon being concealed under his, ſhe becomes, in ſome ſort, incapable of being liable to pay a perſonal debt. Therefore, as ſoon as her perſon is diſtinguiſhable from his, ſhe alone becomes liable to be ſued for them; the huſband is liable for them during the ſubſiſtence alone of the marriage; after its diſſolution, he ceaſes to be liable. Therefore, diligence cannot regularly be uſed againſt him after it; for her moveable debts are due not by him, but by his wife. Therefore, he is bound to pay them, only becauſe of the benefit which accrues to him *jure mariti*, and of the acquiſition which he makes by the marriage, of all the moveable eſtate of his wife. Of courſe, he cannot remain liable after the diſſolution of the marriage, after he is deprived of the benefit which he got by it, after the moveable eſtate is divided, and after their lawful ſhare of it has fallen to the repreſentatives of the wife. From whence it is plain, that payment of a debt, due by the wife, muſt, after the diſſolution of the marriage, be ſought not from the huſband, but either from the wife herſelf, or from her repreſentatives: for her huſband does in no ſort repreſent her; he is not either her heir, or her executor.

§ 233. But it has been ſaid, (§ 230.) that diligence may be done both againſt his perſon, and againſt his eſtate for recovering payment of them. Therefore, if it is *completed* againſt his *eſtate* before the diſſolution of the marriage, he muſt, *ex neceſſitate*, remain liable to pay *thoſe* debts, for which *complete* diligence is done; or, rather, the diligence, which is *completed* againſt his eſtate, transfers the property of it *in ſolutum* to the creditor. Of courſe, that property he cannot recover, unleſs he redeems it, in caſe he has a right to do ſo.

I ſay, *completed* againſt his *eſtate;* for he ceaſes to be liable, unleſs it is both 1) *completed*, and 2) completed againſt his *eſtate*.

Diligence is ſaid then to be completed, 'when the *laſt* ſtep of it is taken,' or 'when the utmoſt, which can be done, is done.' Therefore, diligence, done againſt one's moveable eſtate, is held to be complete, either 1) When his moveables are actually poinded; or 2) When a decree of forthcoming on an arreſtment is obtained; becauſe the property is, in both caſes, really transferred by the diligence to the creditor. By conſequence, if neither his moveables have been poinded, nor a decree of forthcoming on an arreſtment recovered during the ſubſiſtence of the marriage, the huſband becomes immediately free; and payment of a debt, due by his wife, cannot be demanded from him, after the marriage is diſſolved either by a ſentence of divorce or by the death of the wife, *St.* 23d *Jan.* 1678, *Wilkie*.

From hence it follows, 1) That, if a marriage ſhall happen to be diſſolved, during the dependence of an action brought againſt a woman and her huſband for his intereſt, for a debt due by the wife, the ſuit cannot, after the diſſolution of the marriage, proceed againſt the huſband, and be brought to a concluſion; becauſe he was not the proper debtor (§ 232.). He was ſued only, *qua* huſband, for his intereſt. As ſoon, therefore, as he ceaſes to be huſband, the relation, which he bore to his wife, is at an end; the intereſt, which he had in her eſtate, is no more. Conſequently, there is no longer any *medium concludendi*, or of awarding decree againſt him, *St.* 11th *July* 1664, *Dumbar*. 2) That, if a decree has been recovered either againſt a woman before her marriage, or againſt a wife and her huſband for his intereſt during its ſubſiſtence, and the marriage happens to be diſſolved before the decree is put in execution, execution cannot, after the diſſolution of the marriage, proceed againſt the huſband; *Du.* 20th *March* 1627, *Knows*.—*Ha.* 23d *June* 1612, *Kinloch*.—*St.* 23d *December* 1665, *Burnet*. Nay,

3) That, if not only decree has been recovered, but a charge of horning has been given, and a denunciation has followed upon disobedience of the charge; and the marriage happens to be dissolved *pendente cursu diligentiæ*, execution must stop; it can proceed no farther against the husband. Consequently, he becomes immediately free from all farther diligence; he cannot be thrown into prison; and his moveables cannot be poinded, *Du.* 20th *March* 1627, *Knows.* 4) That, if a marriage is dissolved, after arrestment has been used in the hands of one, who owes an arrestable debt to the husband, but before a decree of forthcoming has been obtained on this arrestment, an action of forthcoming cannot proceed, or a decree be obtained after the dissolution of the marriage, *St.* 23d *January* 1678, *Wilkie.*

Ex paritate rationis it seems to follow, that diligence is then said to be completed against an heritable estate, 'when a decree of adjudication of it is obtained;' because the thing adjudged, and the property of it is, in some sort, transferred to the creditor: for the debtor has then no more than the legal right of redemption during the time allowed him by Law. From hence it follows, that, if a decree of adjudication of a thing which is adjudgeable, and belongs to an husband, is, during the subsistence of the marriage, recovered against him by one, to whom his wife owed a moveable debt; he will not have access to the thing adjudged from him, unless he redeem it by paying, during the course of the *legal*, the sum, for which it is redeemable; no matter at what time the marriage happens to be dissolved, whether before or after the expiration of the legal time of redemption: because the thing, which is adjudged, becomes, by the decree of adjudication, bound to the creditor, who recovered it, by a *nexus realis*, which it is incumbent on the husband to loose, before he can have access to his property. But he cannot loose it otherwise, than by redeeming the estate from the adjudger, during the time allowed him to redeem, according to Law; because the creditor, to whom the estate has been adjudged, has, by the decree of adjudication, acquired a right to it, which the Law has declared to be defeasible only in case he shall, during the legal, receive payment of all, which is due to him. Therefore, such an adjudication does not fall with the dissolution of the marriage *.

From hence it must follow, that a husband ceases to be liable to be sued for debts due by his wife, in case the marriage happens to be dissolved, before decree of adjudication is obtained. Consequently, tho a summons of adjudication should have been served upon him, tho steps should have been taken in the cause, unless it has been brought to a conclusion by the recovery of an actual decree of adjudication *before* the dissolution of the marriage, the husband is no longer liable either to the debt originally due by his wife, or to be sued for it.

In the same manner, if inhibition has been served upon him by one, to whom his wife owed a moveable debt, during the subsistence of the marriage, it cannot be the foundation of an action of reduction; it cannot vest any right in the inhibitor; it cannot produce any effects, unless it has not only been founded on, but produced all the effects which it could ever produce, before the dissolution of the marriage.

But diligence, *completed* against his *estate*, does not make him remain liable *universally* to all the debts due by his wife; it makes him liable to those *alone*, for which *complete* diligence is done. He is immediately, upon the dissolution of the marriage, free from being liable to any others. The reason is plain; complete diligence makes him remain liable *ex necessitate*: for it not only creates a *nexus realis* upon his estate, but transfers the property of it to him, by whom the diligence is done; and in some cases he has a right to recover his property by redeeming it. Therefore, he cannot be liable to those debts, for which complete diligence is not done; because his property is not transferred, but remains with him. So he lies not under any necessity of redeeming it.

A hus-

* This question was debated but not decided, *Fo*, 16th *Nov.* 1698, *Bryson.*

A husband, as has been said, ceases to be liable to debts originally due by his wife, unless diligence is not only completed, but completed against his estate before the dissolution of the marriage: for no diligence used against his person, however complete, can perpetuate the obligation. The reason is, because he is not the *proper*, since he was not the *original* debtor; he is only liable to be sued for payment. Consequently, neither horning nor caption can be used against a husband, after the dissolution of his marriage, for a debt originally due by his wife: so that, 1) If decree has been recovered against him, he cannot, in case his wife dies before a charge is given him, be, after her death, charged by horning; 2) If not only decree has been obtained against him, but a charge of horning has been given him, he cannot, in case his wife happens to die either before the expiration of the days of the charge or before he is actually either denounced rebel or committed to prison, be either denounced rebel, or imprisoned after her death; 3) If not only decree has been obtained against him, a charge of horning given him, and a denunciation * made against him for his civil rebellion, but also a caption been executed upon him, his body seized and actually committed to prison, he must, in case his wife happens to die, be immediately liberated from prison, and is no longer liable to the debt, *Ha.* 26th *Feb.* 1623, *Douglass.*

§ 234. The creditors must, in all cases above-mentioned, betake themselves to the representatives of the wife their deceased debtor, or to her estate, if it is the only representative which she has; these are *eadem persona* with her. If, after having sued her representatives, and having done diligence against her estate, their endeavours to recover payment of the debts due to them shall have been fruitless; they may then have a *subsidiary* recourse upon the husband of their deceased debtor, in case he has been *lucratus* by the marriage.

I call the recourse, which they have upon the husband, *subsidiary;* because he is, after the dissolution of the marriage, liable, not *primo loco*, but only *subsidiariè*, to the moveable debts due by his wife: for he does not succeed to her estate; he is not either her heir or her executor. Since, therefore, he does not represent her, any right, which her creditors have to demand payment from him, can be no more than *subsidiary*. Consequently, he is entitled to the *beneficium ordinis* or *excussionis;* that is, he cannot be sued for debts due by his wife, till her own proper representatives have been discussed; till diligence hath been done against her estate heritable as well as moveable; and till it shall have appeared, that payment could not be recovered from them. Then, and not till then, may her creditors sue the husband, who is, in the next place *subsidiariè* liable to debts due by his wife, *St.* 23d *Jan.* 1678, *Wilkie*—*N.* 54.

But the husband is not, after the dissolution of the marriage, liable even *subsidiariè* in all cases: he is liable in those cases alone, in which he is *lucratus* by the marriage. If therefore, he is not *lucratus* by it, he is not liable even *subsidiariè*. A husband is said to be *lucratus*, or to *gain* by a marriage, when he gets by his wife a greater fortune than is suitable to his circumstances, proportionable to his rank, or equal to his condition. For one, who gets no more than people of his rank, circumstances, and condition, might reasonably expect, and do commonly get, is not held by Law to be *lucratus* by his marriage, *St.* 23d *Dec.* 1665, *Burnet*—27th *Jan.* 1674, *Spreul.*—*F. MS.* 22d *Jan.* 1714, *Lockhart.*

Since a husband is, after the dissolution of the marriage, liable *subsidiariè*, only in case he is *lucratus* by the marriage, it is plain, he must be liable not *in solidum*

* If a husband has, upon his disobedience of the charge given him, been actually denounced for it, this denunciation must produce its legal effects, and make the rebel liable to the pains the Law has inflicted on him for his rebellion. Consequently, when escheats fell on such denunciations, the escheat, that had once fallen, did not, like the obligation to pay the debt, become void by the death of the wife, *St.* 25th *Feb.* 1665, *Laird Almond*—23d *Dec.* 1673, *inter eod* But now, the denunciation is ineffectual: for he recovers his *personam standi in judicio*, and becomes personal upon the dissolution of the marriage; because he ceases to be liable. Of course, he is instantly entitled to be relaxed: for we shall see, that, if he had been imprisoned, he would have been entitled instantly to be liberated, without payment.

ſolidum of all which he received, but only *in quantum lucratus eſt.* The *lucrum* which he made, and for which he is liable, is the difference between the portion which he did actually receive, and that which people of his condition commonly get, ſo that it is only the exceſs, which is *lucrum. St. ibid.*

Since a huſband is, after the diſſolution of his marriage, liable *ſubſidiariè* for the profit, which he has made by it, to the creditors of his wife; 'tis plain, that it is of no importance to him, whether he pay it to thoſe to whom ſhe owed heritable or to thoſe to whom ſhe owed moveable debts. Conſequently, tho a huſband is not liable to the heritable debts of his wife (§ 228.); yet, if any creditor, to whom ſhe owed an heritable debt, ſhall not, after having done diligence againſt her heritable as well as her moveable eſtate, recovered payment of the debt due to him, he may have recourſe upon the huſband, in order to get payment of it out of this *lucrum*, *Fo.* 23d *Jan.* 1708, *Leſlie.* For it is agreeable to the principles both of Law and of equity, that thoſe who are *in damno vitando*, ought to be more favoured than ſuch, as are *in lucro captando.* Therefore, a huſband ought not to be allowed to retain *lucrum* which he has made by his wife, at the ſame time that her creditors are deprived of payment of debts juſtly due to them.

§ 235. From the foregoing doctrine the following concluſions may be deduced: 1) That a huſband, ſince it is becauſe he acquires, by his marriage, the property of *all the moveable eſtate* belonging to his wife, that he is by Law made liable to *all* her *moveable debts*, will be liable to all her *heritable* as well as moveable *debts*, if he gets an univerſal right, and acquires the property of *all* her *heritable* as well as moveable *eſtate*; for it would be unjuſt to allow one to ſeize on the whole fund, out of which creditors can get payment, and to refuſe, at the ſame time, to pay the debts due by them. Beſides, one's eſtate is computed after deduction of debts, *bona* are never underſtood *niſi deductis debitis.* Of courſe, one, who gets an univerſal right to *all* the eſtate belonging to another *per averſionem*, really acquires right to no more than to that ſurplus, which remains after payment of the debts, *D. huſband and wife*, 24th *Jan* 1738, *Dick.*

But it ſeems not to be true converſly, 2) That a huſband, who grants a total renunciation of his *jus mariti*, and of every pecuniary advantage which he *may* reap from it, is not liable to *any*, either heritable or moveable debts due by his wife. 'Tis true, it may be ſaid, he hurts not her creditors, ſince he leaves all her eſtate entire to them; and he is not obliged to render himſelf liable to her debts by acquiring rights to it. But, by marrying her, he withdraws her body from perſonal diligence; beſides, ſhe is bound to employ her time in taking care of his domeſtic affairs, he acquires the profits of her labour, and by her œconomy conſiderable additions may be made to his eſtate.

§ 236. A wife acquires not, by her marriage, right to any part either of the moveable or of the heritable eſtate of her huſband (§ 224.). Of courſe, ſhe does not become liable to any debts, either moveable or heritable, due by him; he continues alone to be liable to them all. The obligations under which ſhe is brought by her entrance into the ſtate of marriage, reſpect not her eſtate, but her perſon.

TITLE X.

Of the patrimonial Obligations, under which married Perſons may bring themſelves and one another during the Subſiſtence of their Marriage.

§ 237. THE obligations, under which married perſons may bring themſelves during the ſubſiſtence of their marriage, may be reduced to four claſſes; 1) Thoſe under which the huſband may bring himſelf; 2) Thoſe, under which he may bring his wife; 3) Thoſe, under which the wife may bring herſelf; and 4) Thoſe, under which ſhe may bring her huſband.

§ 238. A huſband continues after marriage to enjoy the ſame powers, which he had before it (§ 224.). Of courſe, he may after it bring either himſelf or his own eſtate under obligations, the ſame way as he could do before. Theſe obligations, tho granted after his marriage, by himſelf alone, without either the knowledge or the conſent of his wife, will be as valid and as effectual, as they would have been, in caſe either they had been granted before marriage, or he had always continued ſingle. The rights which he has over his eſtate, and the powers which he has of charging it by granting either perſonal or real, either moveable or heritable obligations, are, in no ſort, altered or impaired by marriage. The condition of a huſband may be bettered; it is never rendered worſe by it: he may and commonly does acquire, but he never can and never does loſe rights by it: for Law devolves on him, in conſequence of his marriage, ſeveral new powers reſpecting both the perſon and the eſtate of his wife, which he had not; but it does not deprive him of any which he had over his own eſtate before it, *R. M. l.* 2. *c.* 16. §. 13. 14. 15.

§ 239. A huſband cannot, after marriage, by himſelf alone, without the concurrence of his wife, bring her under any obligation, under which ſhe did not lie before it: for he is not proprietor of her eſtate; he is no more than her curator. Of courſe, his office conſiſts not in granting deeds for her, but in giving his conſent to thoſe granted by her. By conſequence, every obligation, under which a huſband wants to bring his wife, muſt be granted by herſelf with his conſent; elſe it is null, (§ 210, 211, 212, *ſqq.*).

§ 240. A wife is, by her marriage, brought *ſub cura mariti*, *R. M. l.* 2. *c.* 16. § 12, 13—*Q. A. c.* 12. § 6. *c.* 20—*ſt. W. c.* 19. § 1. 8. Conſequently, ſhe cannot, after marriage has veſted her huſband with a curatorial power over her, by herſelf alone, without his conſent, grant any obligation, either perſonal or real, either moveable or heritable. Every obligation, therefore, under which ſhe brings herſelf during her coverture, becauſe every deed which ſhe does, without the conſent of her huſband, is null. Therefore, every written obligatory deed, granted by her without his conſent, is *ipſo jure* null and void; and produces no effects.

Nay, not only is every written obligation, granted by a wife without the conſent of her huſband, but even ſome ſorts of obligations, tho granted *with* it, are null.

For the Law has been ſo careful to protect wives from the influence of their huſbands, as to declare all *perſonal* written obligations, granted by a wife, tho with the conſent of her huſband, to be null and void, *Ha.* 12th *June* 1611, *Wood.*—*Du.* 24th *March* 1626, *Greenlaw*—19th *Dec.* 1626, *Matthew.*—*F.* 15th *Nov.* 1705, *Duncan.* Perſonal obligations are 'thoſe, by which not her eſtate, 'but her perſon is bound.' Or they are, 'thoſe, by which the creditor ac-'quires a perſonal right, immediately affecting not the eſtate, but the perſon of 'his debtor.' They are conſtituted by words like theſe, 'I bind and oblige my-

'ſelf, heirs, executors, and ſucceſſors.' For we muſt accurately diſtinguiſh thoſe rights or obligations, which we call perſonal, from ſuch as are called moveable. A perſonal right or obligation is not always moveable; it may be heritable. Thus a bond, granted by one for a ſum of money, payable to another and to his heirs, but expreſsly excluſive of his executors, creates an heritable right to the creditor, but a moveable obligation on the debtor; yet the right of the creditor, which is heritable, is perſonal, as well as the obligation of the debtor, which is moveable; becauſe the perſon of the debtor is alone bound.

But in order to make an obligation be, in this caſe, held to be perſonal, it is not enough, that the perſon of the wife be alone obliged: for a woman may, with the conſent of her huſband, oblige herſelf to do ſomething relating to an eſtate, which ſhe has exempted from the *jus mariti;* and the obligation, tho it may be perſonal on her, may be effectual and valid. Therefore, that an obligation may be, in this queſtion, called perſonal, it is neceſſary, not only that the perſon of the wife be alone bound, but that the obligation be perſonal *merely*, and *in all reſpects*, that it be general, and that it relate not to any particular eſtate or thing, which is proper to herſelf and is exempted from the *jus mariti*. In ſhort, it muſt be, what Lord STAIR, *l.* 1. *t.* 4. § 16. very properly calls, 'an 'obligation for debt.' For we ſhall ſee that a wife, who has a ſeparate eſtate, either moveable, or heritable, exempted from the *jus mariti*, may grant valid and effectual obligations, provided they have a ſpecial reſpect to it.

The reaſons, for which the Law of Scotland has been ſo careful to protect wives as to declare all *perſonal* obligations granted by them to be null, are, 1) That they might not, by the frailty of their ſex, be injured by their huſbands, to the influence of whoſe perſuaſive language and inſinuating behaviour they are continually expoſed; 2) Becauſe perſonal obligations are productive of perſonal diligence, from which wives are, by Law, exempted during their coverture; 3) Becauſe perſonal obligations, as we underſtand them here, regard chiefly the *perſonal* eſtate, that eſtate which follows the perſon of its owner, and is therefore called moveable. Therefore, they cannot be granted by a wife, and, if granted by her, cannot be effectual, becauſe ſhe has no perſonal, no moveable eſtate. Any which ſhe had at her entrance into marriage, devolves, all of it, to her huſband in conſequence of his *jus mariti*, *Du.* 19th *Dec.* 1626, *Matthew.*

Since then all perſonal obligations, granted by a wife, are *ipſo jure* null, whether they be granted with or without the conſent of her huſband, it is plain, 1) That *all* perſonal bonds, bills, promiſſory notes, or other deeds of that kind, granted by her, are null. They are null, 2) Whether they be principal, ſubſiſting by themſelves, or be only acceſſory to others; 3) Whether they be or be not ratified by her on oath made judicially out of the preſence of her huſband, *G.* 63—*St.* 18th *Feb.* 1663, *Birch.*—*Newbyth*, 27th *Jan.* 1665, *Fiſher*—*Di.* 371—*Fo.* 11th *Feb.* 1707, *Broomfield;* 4) Whether thoſe, in whoſe favour the obligations are granted, are or are not willing to bind themſelves from uſing perſonal diligence upon them, and to limit the effects of them ſo as to make them be the foundation of real diligence alone againſt a ſeparate eſtate, belonging to the wife, exempted from the *jus mariti*, *Du.* 19th *Dec.* 1626, *Matthew.*—*D.* I. 398. *July* 1730, *Lithgow;* 5) Whether they be granted by wives to their children, or to others; whether they be bonds of proviſion or of other ſorts, *C.* 20th *Dec.* 1579, *Primroſe.*—*St.* 22d *July* 1680, *Baillie.*—*D.* I. 399. *Feb.* 1720, *Colquhoun;* 6) Whether they be, or be not granted for debts due by the wife before ſhe granted the obligation: for a bond, tho the conſideration for which it is granted, be a debt due by the wife, has no effects; it produces no ſort of change on the nature, quality, or extent of the debt; and does not even afford evidence of the truth and reality of it. No diligence can, at any time, be done upon it. Indeed, perſonal diligence cannot be done againſt her, during the ſubſiſtence of the marriage, even for the original debt itſelf, for which the bond is granted, becauſe the burden of her moveable debts devolves, upon her marriage, by

by Law, to her huſband. Conſequently, perſonal diligence can be done againſt him alone. On its diſſolution, the creditor, to whom the debt was due before the obligation was granted by the wife, may go to her, and demand payment of it: for her obligations are not totally extinguiſhed by marriage; ſhe continues after it to be the proper, as ſhe was before it the original debtor. If, therefore, the debt has not, during the marriage, been cleared either by payment or by ſomething equivalent to it, ſhe remains ſtill bound, and may be ſued after the diſſolution of it. But ſhe is liable to be ſued not for the debt, for which ſhe granted her obligation, but for that, which ſhe was really owing before ſhe granted it, and which would have been due by her, in caſe ſhe had not granted it. For the bond is not evidence of the truth, reality, or extent of the debt; it is not even ſufficient for founding a preſumption againſt the woman, and for laying her under the neceſſity of proving, that it was granted for a debt not due by her: Law preſumes in her favour, ſince the bond appears *ex facie* to be a perſonal one, granted by her during her coverture, and therefore to be null. Therefore, it is incumbent on the creditor to prove *aliunde* the ſubſiſtence of the debt. 'Tis true, that action has, in ſome caſes, been found to lie on ſuch bonds; but it is alſo true, that they were in theſe very caſes held to be void in themſelves, and that action was ſuſtained upon them only, 1) *In quantum* a debt was *aliunde* proved to have been due, before the date of the bond; 2) To ſave the trouble, the expence, and the neceſſity of a new action, *Ha.* 13th *Jan.* 1610, *Primroſe.*—14th *March* 1623, *Douglas.*—*Fo.* 8th *Nov.* 1677, *Sinclair.*

If a perſonal obligation, granted by a wife during her coverture be *ipſo jure* void, all which follows upon it, muſt be alſo void: for that, which is *ipſo jure* null, can have no effects. Conſequently, diligence, if any has been done on it againſt her eſtate, is void; if an appriſing has followed it, it muſt be void; *Ho. huſband*, 3d *Feb.* 1616, *Douglas.*—*Du.* 24th *March* 1626, *Greenlaw.*—30th *Jan.* 1635, *Mitchelſon;* if an adjudication has been obtained on it, it is null, *Da.* 144.—*B.* 96.—*D.* I. 399. *July* 1725, *Irvine.* In ſhort, every ſtep, every form, and every ſort of diligence, which has been done on it, muſt be void; ſince it was raiſed on a foundation which is *ipſo jure* null, and on a debt, which is *ipſo jure* not due.

§ 241. Since perſonal obligations, granted by wives, are declared by Law to be void, becauſe the wives have no perſonal eſtate, proper to themſelves, and exempted from the *jus mariti;* it muſt follow, that, when this ceaſes to be the caſe, the foregoing diſpoſition of the Law muſt alſo ceaſe, and one different from it muſt take place, becauſe it muſt be accommodated to the circumſtances of that caſe, which really exiſts. Conſequently, if ſhe has an eſtate either heritable or moveable, proper to herſelf and exempted from the *jus mariti*, ſhe can, provided ſhe does it with conſent of her huſband, and according to Law, grant obligations ſpecially relating to it, *Di.* 6.—*G.* 181.—*H.* 878.—*Fo.* 3d. *Feb.* 1686. *Somervel;* becauſe ſhe may, with his conſent, diſpoſe of it according to her pleaſure, either for valuable conſideration or by gift (§ 210. *ſqq.*). *St.* 21ſt *Jan.* 1674, *Ridpath. l.* 21. *ff. de reg. jur.*

Since an obligation granted by a wife, relating to her ſeparate eſtate, is valid and effectual, provided it be granted in a legal and formal manner, 'tis plain, that the validity of the obligation cannot be hurt, tho a perſonal one, which is *ipſo jure* null, be granted by the ſame deed, in which that, relative to the ſeparate eſtate, is granted, *St.* 15th *Dec.* 1665, *Elleis.*—*H.* 878.—*Fo.* 3d *Feb.* 1686, *Somervel.*

I ſay, the obligation which ſhe grants, muſt be relative to her ſeparate eſtate. It may relate either to her heritable or to her moveable eſtate. If it relates to her heritage, it is ſufficient, if both the nature of the obligation, and the eſtate to be affected be ſo accurately deſcribed, as to be diſtinguiſhed from every other. If it relates to her moveable eſtate, that part of it, which ſhe has proper to herſelf, and exempted from the *jus mariti*, to which the obligation relates, as well as the obligation itſelf, muſt be particularly deſcribed. Thus, ſhe may bind herſelf

ſelf to grant an *aſſignment* of a *particular* moveable debt due to her. But if the obligation, which ſhe grants, be a general one, referring to her moveable eſtate in general, it is *merely* perſonal. Therefore, it muſt be null, tho ſhe ſhould have a moveable eſtate exempted from the *jus mariti*. For Law will preſume it to have been granted not voluntarily, but out of fear of her huſband.

But an obligation, which appears *ex facie* to be perſonal merely, will be ſuſtained, provided the creditor has, *at the time of its conſtitution*, bound himſelf by a deed, and hath declared, that he will uſe it only to do diligence againſt the heritable eſtate, proper to the wife: for that deed changes, in ſome ſort, the nature of the perſonal obligation, ſince it renders it effectual, not againſt the moveable, but againſt the heritable eſtate alone, *St.* 23d *Jan.* 1678, *Bruce.* I ſay, the back-bond ought to be granted by the creditor at the ſame time, at which the perſonal obligation is granted by the wife: for, if it is granted afterwards, it can be of no effect, ſince it is *ab initio* a perſonal obligation. Therefore, it is null *ab initio*, and cannot be rendered effectual by any deed ſubſequent to its own conſtitution. If the wife wanted to bring herſelf under a valid and effectual obligation, the creditor ought to have agreed, that the original perſonal obligation ſhould be, in the firſt place, cancelled; that a new one of the ſame tenor with the cancelled one, but of the ſame date with the back-bond, ſhould be written, and granted; that thus, the one might refer to the other, *D.* I. 398. *July* 1730, *Lithgow*.

§ 242. I ſaid, perſonal obligations granted by wives are null (§ 240.), when conſtituted by writ: for ſuch, as are conſtituted without it, and ariſe from their actions, are frequently brought by the Law upon them.

Thus, 1) A wife can oblige herſelf *delinquendo;* all obligations, ariſing from delinquencies committed by her, affect not, in any ſort, either the perſon or the eſtate of her huſband; they are good againſt her own perſon and her own eſtate alone. *ſt. W. c.* 19. § 7, 8. For diligences proceed from the malevolence of the delinquents alone. Therefore they can be productive of obligations on them alone. *Delicta tenent ſuos auctores.* Conſequently, if a wife has committed one, her huſband neither can nor ought to be puniſhed for it *; ſhe muſt herſelf ſuffer that puniſhment, which is ordained by Law to be inflicted on ſuch as are guilty of the crime committed by her, *Du.* 2d *Feb.* 1628, *Scot.* If it is death, ſhe muſt be put to death; if it is a corporal puniſhment, ſhe muſt ſuffer it; if it is one which detracts from her character, ſhe muſt ſubmit to the conſequences of it, tho they ſhould amount to infamy, or a total deprivation of her good name, *A. wife*, 23d *Jan.* 1634, *v.* If the puniſhment is pecuniary, the fine cannot be levied from her huſband; for he cannot be made, in any ſort, to ſuffer for the delinquency of his wife, *Ha.* 31ſt *May* 1610, *Bell.*—*A. wife*, 23d *Jan.* 1634, *v.* Payment of it can be demanded from the wife alone. By conſequence, it cannot be levied during the ſubſiſtence of the marriage, in caſe ſhe has no eſtate belonging to herſelf, and exempted from the *jus mariti;* becauſe there is not, during that period, any fund, out of which payment can be got: for if the huſband was compelled to pay it, he would be made to ſuffer for a delinquency committed by his wife, *n.* 105. The execution of it muſt therefore be ſuſpended till the diſſolution of the marriage; unleſs ſhe has a ſeparate eſtate either heritable or moveable, belonging properly to herſelf, and exempted from the *jus mariti:* for in that caſe there is a fund, out of which the fine may be levied, *E.* 2d *July* 1724, *Murray*.

'Tis otherwiſe, in caſe the huſband has been acceſſary to the delinquency of his wife, has had that which the Law of Scotland calls *art* and *part* in it, or has been an accomplice of her guilt; he muſt, in that caſe, according to the common rules of Law, ſuffer along with her. But he ſuffers not for her fault; he ſuffers

* It was otherwiſe, in ſome caſes, before 1688. See 1670, *c.* 5.—1685, *c.* 6. &c. But theſe Laws were thought to violate the rights of mankind, 1689, *c.* 13. and were therefore repealed, 1690, *c.* 27.

ſuffers the puniſhment of his own delinquency. Beſides, the intimate connection which he has with his wife, the opportunity he has of knowing her intentions, the facility with which he may be aſſiſting to her, and the power which he has of hindering her from tranſgreſſing, will make him be more eaſily than others preſumed to have been partaker of her guilt, *ſt. W. c.* 19. § 4, 5, 6, 7. —*Da.* 149.

2) A wife may, during her marriage, bring herſelf under *conventional obligations* without the conſent of her huſband, in caſe the abſolute neceſſity of her own affairs requires it, and her own intereſt is thereby promoted; for inſtance, if he is abſent, is abroad, is believed to be dead, or is deprived of the uſe of his reaſon. Thus, if a woman ſhall, during the abſence of her huſband, betake herſelf to an employment, in order to enable her to maintain her family, and ſhall, in the exerciſe of it, contract debt, ſhe will be obliged to make payment of this debt, and may be ſued for it as well before as after her huſband's return. If ſhe is ſued before his return, decree will immediately be recovered againſt her; for it would be unjuſt, that a creditor, to whom ſhe is owing a juſt debt, ſhould be obliged to wait for his payment till the uncertain return of the huſband, *Ha.* 6th *July* 1610, *Euſtachius's wife.*—19th *Jan.* 1611, *Hog.*—*Du.* 19th *March* 1629, *Ruſſel.*—*G.* 83.—*St.* 19th *Dec.* 1667, *Gairns* *. If her huſband returns, or if payment may be recovered out of his eſtate during his abſence, it ſeems to be agreeable to the analogy of Law to ſay, that ſhe is not, during the marriage, liable to be ſued; *Sp. Huſband and wife*, 18th *March* 1631, *Howieſon.*—*Du.* 21ſt *Dec.* 1629, *Aiton.*—12th *March* 1630, *Scougal.* For the profit, if ſhe has made any, accrues to him; and whether ſhe has or has not made any, he was bound to maintain her, and became thereby liable to a legal debt. At any rate, he is in Law liable to all the moveable debts of his wife, and execution cannot *ordinarily* be made againſt her perſon, during her coverture.

I ſaid her own utility muſt be promoted by the negociation, in order to bring her under an obligation. For if the condition, not of herſelf, but of her huſband, is bettered by it, not ſhe, but he is the perſon, who is alone obliged; becauſe the whole advantage, ariſing from it, is in *rem verſum* of him, *Fo.* 12th *Feb.* 1703, *Deans.*

3) A wife, who has a ſeparate fund allowed her for her maintenance, is bound for thoſe debts which ſhe contracts. But we muſt diſtinguiſh between a fund granted her by a perſon different from her huſband, excluſive of his *jus mariti*, and one granted by the huſband himſelf. In the firſt caſe, when ſhe has a ſeparate fund, granted to her by an extraneous perſon different from her huſband, and excluſive of his *jus mariti*, ſhe is liable only *ſubſidiariè*, after the huſband: for he is, in all caſes, bound to maintain her and his family, whether ſhe has or has not a ſeparate eſtate; whether her ſeparate eſtate, if ſhe has one, is or is not deſtined for the maintenance of her and her children: but, if the creditor ſhall not have been able by doing diligence againſt the huſband, to recover payment, the wife becomes *ſubſidiariè* liable, and may be ſued by him; ſince nothing can be ſaid to be *magis in rem verſum mulieris* than that, which is employed on the maintenance of herſelf and her children. It is much more reaſonable, that a mother, who is *in facultatibus*, and is bound by nature to maintain her children, ſhould pay for the means of preſerving them in life and in health, than that a creditor, who has no connection with them, ſhould be deprived of payment of a debt juſtly due to him, and be thereby obliged to pay for their maintenance. In the other caſe, when the wife has got a ſeparate maintenance ſettled on her by her huſband, ſhe is herſelf *immediately* liable; becauſe the huſband ought not to be obliged to pay for her maintenance, when he gives her a ſeparate allowance for it, *Ha.* 6th *July* 1610, *Euſtachius's wife.*—*St.* 19th *Dec.* 1667, *Gairns.*

* In all caſes, in which ſhe is made to pay debts contracted for the maintenance of the family, ſhe will have action reſerved to her againſt her huſband or his repreſentatives; becauſe theſe are truly debts due by the huſband, *Du.* 20th *Nov.* 1630, *Rutherfoord.*

Gairns.—23d *Feb.* 1672. *Nielſon.*—*H.* 890. And he ſeems not, in this caſe, to be liable even *ſubſidiariè*, *Du.* 21ſt *June* 1634, *Hamilton.*

4) An obligation granted by a wife during her coverture is valid, provided it is not to become effectual till her death: for ſhe can hardly be hurt by a deed of this ſort. Beſides, this is really a deed *mortis cauſa*, of a teſtamentary nature, by which ſhe diſpoſes of her eſtate after ſhe is dead, *D.* I. 399. *Colquhoun.* For the ſame reaſon it ſeems that one, which is not to become effectual againſt her till the diſſolution of the marriage, is good. 'Tis true, ſhe may, in both caſes, be influenced by her huſband to grant them: but they cannot for this reaſon be held to be void; elſe every deed made by her, even a ſettlement of her affairs *mortis cauſa*, would be ſo too. For he may direct her both to the perſon to whom ſhe ſhould leave her eſtate, and about other matters concerning her ſucceſſion, *arg. Du.* 19th *Dec.* 1626, *Matthew.*

§ 243. A huſband, it has been ſaid (§ 205.), acquires the property of all the moveable eſtate, which his wife either has at the time of the perfection of the marriage, or acquires during its ſubſiſtence; and he becomes proprietor of *all* the fruits, which are at ſucceſſive times, during the marriage, yielded by her heritage (§ 210.). Of courſe, he muſt be liable for *all* the fruits, which heritable debts, due by her, yield to her creditors during its ſubſiſtence; that is, he is *ipſo jure* liable to the intereſt, which becomes, at every ſucceſſive point of time, during the ſubſiſtence of the marriage, due by her for her heritable debts (§ 229.): for his burdens ought to be proportionable to the profits, which he makes (§ 227.), *F.* 13th *July* 1708, *Gordon.*

The doctrine concerning thoſe moveable debts, which become due ſucceſſively during the marriage, is the ſame with that, which has been delivered (§ 227.), concerning ſuch as were due by her at her entrance into it. Since he is *liable* to pay them, diligence may be done by her creditors both againſt his perſon and againſt his eſtate, for recovering payment of them (§ 230.). But he is no more than *liable* to be ſued for them; he is not the proper debtor, by whom they are due. Therefore, he ceaſes to be *liable to be ſued* for them upon the diſſolution of the marriage (§ 232.). Diligence, *completed* againſt his *eſtate*, *during* its ſubſiſtence, is that, which alone creates a *nexus realis* upon it, or, rather, tranſfers the property of it to the creditor, by whom it is uſed. Of courſe, the huſband is not, after the diſſolution of the marriage, entitled to get his property reſtored to him. If it is transferred redeemably, he is entitled to no more than to *redeem* it; if the conveyance is irredeemable, he can *never* recover it (§ 233. *ſqq.*)

§ 244. The primary end of marriage, it has been ſaid, is the procreation of children. In order to accompliſh it married perſons muſt live in one houſe and in one family together (§ 169, 201, 205.). Therefore, they muſt have a common intereſt: for the intereſt of the one muſt be that of the other; ſince that of them both is united in the intereſt of their children (§ 166.). Hence, they are in duty bound to promote the intereſt of one another; and it has been ſaid (§ 169, *ax.* 5.), that a huſband and a wife are bound to aſſiſt each other in the management of their common affairs. But women ſeem to be intended by nature for domeſtic life (§ 127.). Hence the management of the houſhold is accounted a province peculiar to the wife; for Law preſumes, that the huſband, who is obliged to be frequently abſent from home, is chiefly employed in buſineſs abroad, and has not either time or inclination to attend minutely to œconomical matters, devolves on his wife the power of managing the family, and of taking care of his domeſtic affairs. Conſequently, a wife is *preſumed* by Law to be, by her huſband, *præpoſita negotiis domeſticis*; and to be inveſted with the powers which are neceſſary for managing the houſhold.

Since ſhe is preſumed to be the factor of her huſband, and to have inſtitorial powers committed to her; 'tis plain, 1) That he muſt be bound by all thoſe deeds, negociations, and contracts done by her, and by thoſe alone, which relate to

to her factorſhip, and are comprehended within the powers committed to her. He is bound *inſtitorio nomine, tot. tit. ff. de inſt. act.* Therefore, every act of her domeſtic adminiſtration, relative to œconomical affairs, muſt be productive of an obligation on her huſband, *Di.* 310. Of courſe, thoſe, with whom ſhe deals, have him bound to them for debts contracted by her in theſe; no matter, whether ſhe was or was not provided *aliunde* by him; nay, whether her dealings were or were not extravagant. For they were *in bona fide* to deal with her in conſequence of her preſumptive *præpoſitura;* ſince every huſband may, as ſoon as he begins to ſuſpect his wife of profuſion or extravagance, have recourſe to that remedy, which he has by Law, of depriving her of her *præpoſitura*, of putting others *in mala fide* to deal with her, and of hindering himſelf from being obliged by her deeds, *H.* 871. Therefore, he muſt become bound by her deeds, till he thinks proper to uſe that remedy, which will deprive her of her *præpoſitura.*

The power, which a wife has to bring her huſband under obligations to others, is founded on a preſumption alone. Therefore, 2) It can extend no farther than the preſumption, on which it is founded; and 3) Muſt ceaſe altogether, when the preſumption ceaſes; when there is no reaſon for the preſumption.

The *præpoſitura* of a wife extends to ſuch matters alone, as may be called *domeſtic* affairs; the management of the houſhold is her proper province. By conſequence, every thing, belonging to it, is under her direction. Things, which belong not to it, fall not under her department. Therefore, her dealings about matters which are not œconomical, cannot bind her huſband, ſince thoſe, with whom ſhe deals, are not *in bona fide* to deal with her about them. For it is plain, from the *nature of the buſineſs* itſelf, that her *præpoſitura* extends not to them. Of courſe, they knew, that ſhe was not *præpoſita* over them by her huſband: ſo they cannot have him bound; for one is bound, *inſtitorio nomine*, in thoſe caſes alone, in which the inſtitor exceeds not the commiſſion given him. *Non tamen omne, quod cum inſtitore geritur, obligat eum, qui præpoſuit; ſed ita, ſi ejus rei gratia, cui præpoſitus fuerat, contractum eſt, l.* 5. § 11, *ſqq. l.* 11. § 5. *ff. de inſtit. act.*—*C. June* 1582, *Lady Boyd.*—*June* 1587, *Pittarrow.*—*St.* 3d *June* 1680, *Buchanan.*—*Fo.* 19th *Nov.* 1698, *Arnot.*

Therefore, if a wife does any thing which cannot be referred to domeſtic affairs, her huſband is not obliged by it, unleſs ſhe appears to have had power to do it founded on ſomething ſtronger than the preſumption of her *præpoſitura:* for it extends to houſhold affairs alone. Conſequently, the huſband cannot be obliged, unleſs he either 1) Hath given her a mandate to act, or 2) Hath ratified that, which ſhe had taken it upon her to do without one.

The nature of the mandate neceſſary for impowering a wife to do ſomething, which is not comprehended under her proper domeſtic department, muſt be different according to different caſes. Of courſe, it muſt be arbitrarily determined by the judge according to circumſtances. Sometimes a written one is neceſſary; for inſtance, a written one is neceſſary to impower a wife to raiſe money due to her huſband by bond, *St.* 3d *June* 1680, *Buchanan.*—*Fo.* 19th *Nov.* 1698, *Arnot.* Sometimes it is ſufficient, if he knows that ſhe acts after ſuch or ſuch manner, and by his ſilence approves of her actions. Thus, if a wife carries on a trade with the knowledge of her huſband, he is liable for debts contracted by her in the management of this negociation, not only becauſe he is preſumed to have *continuo et ſingulis momentis*, perpetually and in every inſtant, given her a mandate; but alſo becauſe he ought to bear the loſſes, which muſt be borne, and to pay the debts which muſt be contracted, in order to make that profit which he is alone entitled to reap, *l.* 1. *ff. de inſt. act.*—*Ha.* 23d *Nov.* 1609, *Muirhead.*—*Di.* 319.

But tho the wife has not a mandate, *before* ſhe acts, the huſband is obliged, in caſe he ratifies and approves of that which ſhe does. For ratification is equivalent to a mandate, *l.* 60. *ff. de reg. jur.*—*F.* 26th *Dec.* 1711, *Brown.*

I ſaid,

I ſaid, the power, which a wife has to oblige her huſband, ceaſes altogether, when that preſumption, on which it is founded, ceaſes. Therefore, a wife, who has ſeparated from her huſband, and lives in a houſe different from that in which he dwells, loſes the power of obliging him, becauſe ſhe is deprived of the management of *his* houſhold. He will not, therefore, be bound by her deeds, ſince ſhe cannot be either ſaid or preſumed to be *præpoſita negotiis*, and to act with an inſtitorial power. So he will be obliged only ſo far, as he would have been in caſe the Law had never made the preſumption, *v. g.* for her maintenance; *St.* 6th *July* 1677, *Allan.*—*Du.* 21ſt *June* 1634, *Tradeſmen v. Hamilton.*

Since a wife is poſſeſſed of her inſtitorial power by virtue of the *preſumed* will of her huſband, her power muſt ceaſe, as ſoon as her huſband removes this preſumption: for a huſband is not bound to intruſt the management of his affairs to his wife. He has the ſame right to deprive her, which every other perſon has to deprive thoſe, to whom he has committed the management of his affairs, of the power of adminiſtration. If the huſband, in a public and legal way, deprives his wife of her *præpoſitura*, ſhe immediately ceaſes to have the power of obliging him. But, becauſe the preſumption of her *præpoſitura* is ſtrong, it is neceſſary, that her deprivation be made public, in order to put the world *in mala fide* to deal with her, and to let them know, that, if they do it, they do it at their own riſk, and are not to have recourſe on the huſband, *l.* 11, § 2, 3, 4, 6. *ff. de inſt. act.*

For this purpoſe the Law of Scotland hath invented a ſort of prohibitory diligence, by which the wife is prohibited to do any thing to the hurt of her huſband, and the lieges are prohibited from dealing with her. 'Tis therefore, called *inhibition.* In order to inhibit a wife, 'tis neceſſary, in the firſt place, that a bill be preſented to the Lords of Seſſion, that is, to the Lord Ordinary on the bills, narrating the profuſion and extravagance of the wife, and praying the Lords to grant warrant for iſſuing letters of inhibition at the ſuit of the huſband againſt the wife. On this, the Lords, *ſine cauſæ cognitione*, grant the deſire of the bill. It is done *ſine cauſæ cognitione;* becauſe a huſband may *capriciouſly* deprive his wife of her *præpoſitura*, without aſſigning any reaſon for doing it, ſince he is not by Law obliged, unleſs he pleaſes, to commit the management of even his domeſtic affairs to her, *Fa.* I. 201, 209. Purſuant to the order made on the petition, letters of inhibition *, which muſt be written by a writer to the Signet and muſt paſs the Signet, are iſſued, and muſt be ſerved as well upon the wife either perſonally or at her dwelling houſe, as upon the reſt of the lieges by publiſhing them at the market-croſs of the head-borough of the County, within which the perſon inhibited dwells, and by regiſtring them in the books belonging to that juriſdiction, in the ſame manner with inhibitions of other ſorts †.

After the completion of this diligence, a wife ceaſes to be *præpoſita negotiis*, and loſes the power, which ſhe had, of providing for the family of her huſband as well as of obliging him. Conſequently, he is not bound by any of her dealings which are poſterior to the execution of the inhibition, *Ni.* Inhibition, 26th *July* 1620, *Kincaid.*—*Go.* 23d *June*, 1675, *Auchinleck.*

But a huſband continues always to be bound to maintain his wife (§ 225.). Therefore, he muſt, even after ſhe is inhibited, be liable to debts neceſſarily contracted by her for her maintenance; unleſs he can prove, that he provided her, *Go.* 23d *June* 1675, *Auchinleck.*—*St.* 25th *July* 1676, *Campbell;* as well as for thoſe which he empowered her to contract, *F.* 5th *July* 1709, *Ker.* But he is not liable for any other ſort of debt.

§ 245. Thus, I have explained the patrimonial rights, which both ſpouſes acquire by marriage, and the patrimonial obligations, under which they may be brought

* The tenor of them may be ſeen in DALLAS, *p.* 482. But his ſtyle is greatly antiquated.

† The ſolemnities, required in the execution, publication, and regiſtration of inhibitions, ſhall be explained below, title, *inhibitions.*

brought by it. It remains to treat concerning two ſubjects, which could not, with propriety, be introduced into any of the foregoing titles: and theſe are, *firſt*, the doctrine concerning donations between man and wife; *ſecondly*, that concerning judicial ratifications. It will not be improper to beſtow a ſeparate title on each of them.

TITLE XI.

Of Donations between Huſband and Wife.

§ 246. MARRIED perſons uſually bear a ſtrong affection, and may expreſs it by making preſents to one another. Thus, one of them may, out of fondneſs for the other, ſpoil himſelf of his eſtate.

It ſometimes happens, that a ſelfiſh perſon is matched with one of a ſoft natural temper. But the intimate connexion, which ſubſiſts between a man and his wife, puts it in the power of either of them to make the other unhappy, by teaſing, harraſſing, and vexing him inceſſantly. Thus, the one may *extort* preſents from the other: for he may be, as it were, *forced* to give them, in order to purchaſe peace for money.

Beſides, the principal attention of married perſons ought to be directed towards the procreation and education of children; they ought not to look on marriage, as a mean by which the one may make money of the other.

The Law of Scotland, attending to thoſe many inconveniencies, which would ariſe, if married perſons were allowed, during their marriage, to ſpoil one another of their property, hath, after the example of that of the Romans *, prohibited donations between huſband and wife, and declared them to be revocable at any time, during the life of the donor, *R. M. lib.* 2. *c.* 15. § 10. 11.— *l.* 1. 2. 3. *p. ff. de donat. int. vir. et uxor.*

A donation or gift may be defined to be 'ſome valuable or pecuniary liberality, 'given for nothing by one to another, and accepted by him, to whom it is offered.' I. A donation, therefore, is a pecuniary liberality, *i. e.* it is a liberality either conſiſting of money, or worth money. So that it muſt be ſomething which is capable of being bought and ſold and valued by money. II. It muſt be given for nothing, *i. e.* the perſon, to whom the donation is given, muſt not give to the perſon, who makes it, any thing in return or in ſatisfaction for the gift, as a mutual valuable conſideration for it. III. It muſt be given by the donor, and accepted by the donee.

§ 247. I. then, Donations are prohibited to be made between *huſband* and *wife*. II. *All* donations and *donations alone* are ſo far prohibited, that III. they are *revocable* at any time during the life of the donor. But IV. they become irrevocable at the death of the donor, if they are not revoked before it.

§ 248. Donations are prohibited between *huſband* and *wife*, (§ 247. *ax.* 1.) By huſband and wife the Law, in this place, underſtands not only ſuch as are ſo truly

* MONTAIGNE aſſigns, in his chapter 'Of friendſhip,' a very ingenious as well as very philoſophic reaſon for the prohibition. He derives it from that ſtrict and perfect friendſhip, which ought to ſubſiſt between a huſband and his wife. One of the antients, I forget his name, called a friend *another ſelf* αλλος εγω; and hence it is ſaid, that all things are *common* among friends (See CICERO *de amicitia, cap.* 21.). But a huſband and wife ought to be bound into the moſt perfect unity of heart, of affection, of deſire, and of will. Of courſe, they muſt have every thing as it were in common, and *can* have nothing to give one another.

But the reaſons aſſigned by the Roman Lawyers, were more natural. 'Moribus apud nos receptum eſt, ne 'inter virum et uxorem donationes valerent. Hoc autem receptum eſt, *ne mutuato amore invicem ſpoliarentur*, do- 'nationibus non temperantes, ſed profuſâ erga ſe facilitate: nec eſſet eis ſtudium liberos potius educendi. 'SEXTUS CÆCILIUS et illam cauſam adjiciebat; quia ſæpe futurum eſſet ut diſcuterentur matrimonia, ſi non 'donaret is, qui poſſet; atque ea ratione eventurum, ut venalicia eſſent matrimonia. Hæc ratio et oratione Im- 'peratoris noſtri ANTONINI AUGUSTI electa eſt. Nam ita ait, "Majores noſtri inter virum et uxorem dona- "tiones prohibuerunt, amorem honeſtum ſolis animis æſtimantes, famæ etiam conjunctorum conſulentes, ne "concordia pretio conciliari videretur: neve melior in paupertatem incideret, deterior ditior fieret," l. 1. 2. 3. p. ff. de donat. int. vir. et uxor.

truly and ſo effectually joined to one another by the bond of wedlock, that they muſt ever continue to be married perſons, cannot ſeparate from one another, and marry others, till their marriage is diſſolved, or themſelves divorced from one another either for wilful deſertion or for adultery; but alſo all thoſe, whoſe marriage, tho they may have been formally married, may have been believed to be married perſons, and may have *appeared* in all reſpects to be huſband and wife, is at all times liable to be declared to have been *void* from the *beginning*, either for impotence, for madneſs, for ideotiſm, for propinquity of blood, for the precontract of one of the parties, or for any other reaſon (§ 170. *ſqq.*). Donations between ſuch perſons, tho they are not really married, and cannot be ſaid to be huſband and wife, are revocable like other donations *inter virum et uxorem*; 1) Becauſe they, as well as others, *appear* to be huſband and wife, and are held to be ſo, till their marriage is found to have been null; 2) Becauſe all the bad conſequences, which would follow the allowance of an unbounded liberty to thoſe, whoſe marriages are valid, of giving gifts to one another, would have place in the caſe of thoſe, whoſe marriages are void. For it is obvious, that if the marriage was liable to be declared to be null for madneſs, ideotiſm, or imbecillity of mind, that perſon, who laboured under theſe misfortunes, would be expoſed to the deceit, to the impoſitions, and to the practices of the other: if it was liable to be declared null for impotence of body, the impotent perſon might be willing, and be brought to give any thing to the other rather than bear the reproaches and the brawlings to which he might be expoſed, and have his infirmities laid open to the ridicule of the world. 3) Becauſe it would be hard, if perſons in theſe circumſtances ſhould have powers more ample and more unlimited than thoſe, to which perſons lawfully and validly married are entitled. *Fas non eſt, eas donationes ratas eſſe; ne melior ſit conditio eorum qui deliquerunt, l.* 3. § 1. *ff. de don. int. vir. et uxor.* 4) Becauſe all, that follows on a marriage, which is declared to have been null *ab initio*, falls with the marriage itſelf*. Conſequently donations, which have been made between huſband and wife, and which muſt therefore be preſumed to have proceeded from the view of the marriage, muſt be liable to revocation, as ſoon as it is declared to have been null.

But donations are prohibited between huſband and wife *alone*. Therefore, 1) A bridegroom may give gifts to his bride, or a bride to her bridegroom: for a bridegroom and a bride are not married perſons; they do not become huſband and wife, till they are actually married (§ 179.) *l.* 27. *ff. de don. int. vir. et uxor. St.* 23d *Jan.* 1680, *Home—H.* 364. 888. 2) Donations, made either by a huſband, or by a wife, to a third perſon, are not revocable; becauſe they are not donations *inter virum et uxorem*, and the right, which the third perſon acquires by the donation, cannot be taken from him; no matter, whether the donee, the perſon to whom the donation is made, be or be not related to the ſpouſe, the huſband or the wife, of the donor, *Sp. Huſband, Dec.* 1591, Laird *Heiſled—St.* 19th *Feb.* 1663, *Muir*—15th *Jan.* 1669, *Hamilton—Fo.* 3d *Feb.* 1686, *Somervell;* provided he be not fraudulently interpoſed, in order to defeat the intention of the Law, and to conceal a donation *inter virum et uxorem* under the maſk of another appearance, *St.* 17th *July* 1677, *Paterſon*—15th *Feb.* 1678, *Gordon—D.* I. 410. 1ſt *Feb.* 1728, *Sanders, l.* 3. § 9, 12, 13. *l.* 4, 5. *p.* § 2. *ſqq. ff. donat. int. vir. et uxor. l.* 29, 30. *ff. de leg.* 3) But, if one of the married perſons reaped advantage from a donation made by the other to a third perſon, tho the deed is irrevocable in ſo far as it regards this third perſon, it is revocable in ſo far as it is a donation *inter virum et uxorem, in quantum alter conjux locupletior factus eſt;* provided the gain, which is made by one of the ſpouſes, proceeds from the free will and intention of the other. If it is a neceſſary conſequence of the principal donation, and is inſeparable from it, it muſt be irrevocable, ſince its principal is ſo: for a thing which proceeds not from the will and intention of the giver, however lucrative

* See above, Book IV. Tit. II.

ive it be, cannot be called a donation, *l.* 5. § 2. *ff. de don. int. vir. et uxor.* 4) Donations made by one to the person, to whom he had been married, are valid; because they are not, after the dissolution of their marriage, any longer husband and wife. So that, if a marriage is dissolved either for non-adherence or for adultery, it is lawful for the persons, who are divorced, to give gifts to each other as freely, as if no such relation had ever subsisted between them, *l.* 64. *de donat. int. vir. et uxor.*

§ 249. *All donations* between husband and wife are prohibited (§ 247. *ax.* 2.). A principal point, therefore, which is to be considered in this matter, is the *truth* of the donation. For every thing, which is *in reality* a donation *inter virum et uxorem*, is revocable; no matter, how it be cloked, what mask it wears, or by what contrivance the husband and wife endeavour to conceal their real intention and design. Contrivances, however artful, can be of little or no avail, because they alter not the real nature of the thing. They can never make that not be a donation, which in reality is one. Besides, being invented for defrauding the Law, they cannot avail any more than actions directly done in violation of it. They cannot subsist as transactions of that kind, of which they appear to be; because they are not really that, which the parties pretend they are: and they cannot subsist as donations, which they really are; because donations *inter virum et uxorem* are revocable by the donor.

So that, let married persons give any name they please to that which they are doing, let them call it a sale, a loan, an exchange, or let them cloke it under the name and appearance of any other contract, transaction, or negociation; if they intend not to do that which they pretend to do, but to give gifts to one another, the matter is not the less a donation. Of course the donor ceases not to have the right of revoking it: for the *animus* of the parties ought to be principally regarded in this affair.

Therefore, if they meant really and *ab initio* to make a donation, the whole business, transacted between the husband and the wife, will be liable to be totally anulled by the revocation of that person, who made the donation, and may therefore be very properly called the donor. But if they had not the *animus donandi*, if they had a serious mind and intention to enter into an onerous contract, if they meant not to defraud the Law by concealing a donation, that which really passed between them, under the appearance of some other dealing, and if a donation happened accidentally to be made on this occasion, the transaction will be partly valid. It will subsist in so far as it is not a donation; for so far, as it is really one, it is revocable *in quantum alter conjux locupletior factus est*, *l.* 5. § 5. *l.* 7. § 6. *l.* 31. § 3. *l.* 32. § 24, 25. *l.* 49. 52. *ff. de donat. int. vir. et uxor.* *l.* 38. *ff. de contrah. emptio.*

I said, *all* donations *inter virum et uxorem* are prohibited. But this principle is not to be so rigorously understood, as not to admit of the smallest latitude: 'Tis much otherwise. That conjugal affection, which ought to subsist between married persons, ought to unite their hearts, and ought to hinder them from counting strictly with one another (§ 246.), will not allow them to regard as a donation every trifling advantage. *Non amarè, nec tanquam inter infestos jus prohibitæ donationis tractandum est; sed ut inter conjunctos maximo affectu, et solam inopiam timentes*, *l.* 28. § 2. *ff. de don. int. vir. et uxor.* Hence, every inconsiderable present, bestowed by one married person on the other, ought not to be held to be subject to revocation: for the Law is like the Prætor, *minima non curat.* Examples of donations of this kind may be seen in *l.* 7. § 1. *l.* 18. *l.* 21. *p. l.* 28. § 1. *l.* 31. § 8, 9, 10. *l.* 53. § 1. *ff. de don. int. vir. et uxor.* some of which, because of the peculiar manners of the Romans, cannot be applied in the Law of Scotland, *H.* 363. 364.

§ 250. But donations *alone* are prohibited (§ 247. *ax.* 2.). Consequently, 1) All mutual onerous contracts, which married persons make with one another, are

are effectual and valid; ſuch as a ſale or an exchange: for donations are *liberalities* merely gratuitous; the perſon, to whom the donation is made, muſt not give to the perſon, who makes it, a mutual valuable conſideration for it; he muſt get it for nothing *. *Ha.* 21ſt *Feb.* 1606, *Stewart—Du.* 14th *March*, 1634, *Gib—D.* I. 411. 13th *July* 1733, *Shearer.*

If other mutual contracts, much more muſt poſt-nuptial contracts of marriage be irrevocable, *St.* 22d *Nov.* 1664, *M'Gill—R. M. l.* 2. *c.* 15. § 1, 2, 3.

Bargains concerning mutual ſucceſſion, *de* αλληλοκληρονομια, by which it is agreed between the ſpouſes, that the longeſt liver ſhall enjoy all which belongs to both, may be irrevocable. For they may, in ſome caſes, be rational onerous deeds. The eſtates of the married perſons, their proſpects of life, the remoteneſs of the relation of their heirs at Law, and the ſmallneſs of their concern about them, may be nearly equal, *B. m.* 31ſt *July* 1716, *Stirling—D.* I. 411. 13th *July* 1733, *Shearer.* But it would be abſurd to make them, in all caſes, irrevocable. 'Tis true they are mutual contracts; the effects of them are ſuſpended till the death of one of the ſpouſes; and it is uncertain, which of them ſhall ſurvive to reap the benefit of them. But they may be irrational; the eſtates of the married perſons may be unequal; one of them may have a proſpect of longer life than the other; and may have relations, who ought to be preferred to him. Thus, all the evils, which are dreaded in other caſes, may have place in this. Therefore, *pacta de* αλληλοκληρονομια ought to be revocable, in caſe either 1) The eſtates of the married perſons are not nearly equal; or 2) One of them has a proſpect of living much longer than the other; or 3) The one of them has relations ſo near, that he ought naturally to have a ſtronger affection to them than to the other, and to prefer them to the ſucceſſion to his eſtate; for inſtance, if one of them has, and the other wants children. In theſe, and in other caſes, circumſtances may make the agreements very irrational; and the ſpouſes may be laid under ſtrong temptations to extort them. Therefore, they ought not, in all caſes, to be held to be irrevocable; that the ſpouſes may not be deprived of the power of diſpoſing of their eſtates.

For the ſame reaſon, voluntary contracts of ſeparation, made between huſband and wife, are ſuſtained always till they are revoked: for they are mutual, and in ſome ſort onerous bargains; ſince the huſband is bound to maintain his wife (§ 225.), *St.* 6th *Feb.* 1666, *Livingſton—Fo.* 7th *Nov.* 1695, Earl of *Argyle—F.* 12th *Feb.* 1713, *Forbes—B.* 62. But the huſband is not bound to give his wife a *ſeparate* maintenance, in caſe he is willing to receive her into his own family, and to uſe her well. Therefore, every voluntary contract of ſeparation is revocable at any time. Beſides, in caſe the wife ſaves any part of her allowance, it muſt belong to her huſband, and may be claimed by him, becauſe all the moveables, acquired by her during the ſubſiſtence of the marriage, accrues to her huſband (§ 205.), *Du.* 11th *Feb.* 1634, *Drummond.* 'Tis otherwiſe, in caſe ſhe ſaves part of a ſeparate maintenance, allowed her by a proper court, upon a judicial ſeparation obtained by her. For a ſeparate maintenance allowed her judicially, is perſonal to herſelf, and like an eſtate excluſive of the *jus mariti.*

I ſay, mutual contracts, made by huſband and wife, are irrevocable, in caſe they are *onerous:* for, if they are not, they muſt be revocable in *ſo far* as they are not onerous, becauſe in ſo far they are donations, *St.* 20th *Nov.* 1662, *children of Woolmet.*

§ 251.

* *Vide* VOET *ad tit. ff.* § 8. *de don. int. vir. et uxor.* However, when we ſpeak of a huſband and wife, and of their entrance into contracts with one another, it muſt always be underſtood, *poſitis terminis habilibus.* So that 1) They muſt have ſeparate eſtates, about which they can contract; 2) They muſt contract *legitimo et ſolemni modo*; and 3) The contract, into which they enter, muſt be one, into which they are not prohibited by Law to enter. For, if it is productive of obligations, which are rejected by Law, and are declared by it to be void, it muſt be void. Thus, if a man ſhould lend his wife a ſum of money, and ſhe ſhould grant him her perſonal bond for it, the contract, tho it be mutual and onerous, muſt be void; becauſe a perſonal obligation granted by a wife during her coverture for money, is *ipſo jure* null.

§ 251. Donations, I ſaid, (§ 246.) are liberalities merely gratuitous. Therefore, remuneratory gifts are irrevocable; becauſe the one, who gets the remuneratory donation gets no more than the value of that, which is given the other. So that he can hardly, in this caſe, be ſaid to get a donation, *l.* 7. § 2. *de don. int. vir. et uxor.*—*Du.* 29th *June* 1630, *Cochran*—25th *March* 1635, *L. Lawriſton*—*G.* 93.—*St.* 23d *Nov.* 1664, *Halyburton*—26th *Jan.* 1669, *Chiſholm*—*D.* I. 411. 11th *July* 1735, *Creditors of Brownlie.* Of courſe if that, which is given in remuneration, be plainly either greater or leſs than that, in remuneration of which it is given; it becomes in ſo far a donation, and is revocable *quoad exceſſum* by that one of the ſpouſes, who has received the leaſt value.

§ 252. A donation is a liberality not only *merely* gratuitous; it is alſo exerciſed by the donor, not becauſe he lies under a natural obligation, but becauſe he has a capricious inclination to exerciſe his munificence and liberality. *Dona propriè ſunt, quæ nullâ neceſſitate* juris, officii, *ſed ſponte præſtantur; quæ, ſi non præſtentur, nulla reprehenſio eſt; et, ſi præſtentur, plerumque laus ineſt, l.* 214, 194. *ff. de verb. ſig.* He, therefore, is ſaid *donare*, to give a gift, *qui propter nullam aliam cauſam facit, quam ut liberalitatem et munificentiam exerceat, l.* 1. *p. l.* 29. *p. ff. de don.* Conſequently one, who does no more than he lies under a natural obligation, and it is therefore his duty to do, can hardly be ſaid *donare*, to make a donation. Thus one, who beſtows ſome boon on a poor creature, is ſaid to give not a gift, but charity; becauſe every one lies under a natural obligation to do, what he can afford, to relieve the diſtreſſed.

From hence it may be inferred, that a deed, by which a married perſon does no more than fulfil a natural obligation, is not revocable; becauſe one, who does no more than it is his duty and he ought to do, ought not to have it in his power to undo, by revoking that which he has done. 'Tis true, if he does more than fulfil the natural obligation, under which he lies, the deed will be revocable *quoad exceſſum*, becauſe it is *quoad exceſſum* a donation *inter virum et uxorem.* Hence, a proviſion, made for a wife by her huſband, is not revocable as a conjugal donation, provided it be ſuitable to the circumſtances of parties, *R. M. l.* 2. *c.* 15. § 1. 5, 6, 7.—*G.* 21—*Fo.* 1ſt *Dec.* 1687, *Carmichael.* For, if it is more than ſuitable to them, it is revocable *quoad exceſſum;* becauſe in ſo far it is a donation, *R. M. l. c.* 15. § 5, 6, 7.—*St.* 23d *Nov.* 1664, *Halyburton.*—27th *June* 1677, *Short.*—*B.* 78.

But a proviſion, made for an huſband by his wife is, like ſimple donations between married perſons, revocable by the wife at any time during her life; becauſe ſhe is not held by Law to be bound to provide for the maintenance of her huſband, *St.* 22d *Jan.* 1673, *Watſon.*—28th *June* 1673, *Arnold,*—15th *Dec.* 1676, *Inglis.*—*H.* 883.

§ 253. It was a maxim of the Roman Law, that thoſe donations, which make not either the donor poorer or the donee richer, than either of them was before, are not prohibited, and are therefore not liable to be revoked, *l.* 5. § 8. 16. *ff. de don. int. vir. et uxor.* becauſe the inconveniences, ariſing from conjugal donations, can have little place in thoſe caſes. Married perſons are not either invited by the ſame views to aſk, or actuated by the ſame motives to refuſe preſents of this ſort, which induce them both to aſk, and to refuſe donations of other kinds. They are not led, in order to obtain them, to employ the ſame means, which they will employ to obtain lucrative donations; becauſe one, who is not to be made poorer by giving a gift, will hardly be ſo invidious as, out of mere *emulation*, to refuſe it to another, with whom he is intimately connected. Beſides, the chief reaſon, for which conjugal donations are prohibited, *ne conjuges mutuato amore invicem ſpoliarentur*, really ceaſes in this caſe. For one can never be either ſpoiled himſelf, or led to ſpoil another of a thing, by giving or receiving which he is not to become either poorer or richer than he was.

One alternative of this maxim ſeems, like other parts of the doctrine of the Roman Law, concerning conjugal donations, to have been received into the Law

of Scotland. For it is eſtabliſhed, that ſuch donations, as do not make the donor poorer, tho they may make the donee richer, are irrevocable, *Du.* 21ſt *Dec.* 1638.—30th *Jan.* 1639.—19th *Feb.* 1639, *L. Craigmiller*; becauſe the donor, in this caſe, beſtows on the donee only an *innoxia utilitas*; does good to another without doing ill to himſelf; and does by one, with whom he has the moſt intimate connection, no more than it is his duty, and he is by nature bound to do by all mankind, even by thoſe who are altogether unknown to him. *Una in re ſatis præcipitur, ut, quidquid ſine detrimento poſſit commodari, id tribuatur vel ignoto. Ex quo ſunt illa communia, 'non prohibere aquam profluentem; pati ab igne ignem 'capere, ſi quis velit; conſilium fidele deliberanti dare:' quæ ſunt iis utilia, qui accipiunt; danti non moleſta, Cic. l. 1. c. 16. de offic.* Hence, if a huſband makes a preſent to his wife of a thing which belongs to another, the donation is irrevocable. The property, if the preſent is made by the conſent of the proprietor, is immediately acquired by the wife. If it is made without his conſent, the wife acquires the right of preſcribing the property of it *pro donata*; and the huſband cannot revoke it, becauſe it does not belong to him: Therefore, if the huſband appears to be, tho he be not in reality the true owner, he muſt have it in his power to revoke the donation, as much as if he was, *l.* 25. *l.* 38. *ff. de don. int. vir. et uxor.*

But the Law of Scotland ſeems not by any means to have adopted that other part of the maxim, by which it is ſaid, that ſuch donations, as do not render the donee richer, tho they make the donor poorer than he was, are not liable to revocation: elſe all proviſions, made for a huſband by his wife, to become effectual after the death of the donor, would be, what it has been ſaid they have been adjudged not to be, irrevocable. Beſides, there is the greateſt reaſon to apprehend, from donations of this kind, the ſame bad conſequences, which are apprehended from donations of other ſorts. The huſband and wife may ſpoil one another, for the donor is, *ex hypotheſi*, rendered poorer; differences, heats, and other calamities, may diſturb their conjugal felicity. Hence, every donation, by which the donor is made poorer than he was before it, is revocable. Thus, if one of the married perſons ſhall repudiate an inheritance, a legacy, or other bequeſt, to which he is called, in the firſt place, to ſucceed; and ſhall, by his repudiation, make way for the ſucceſſion of the other, who is, either by the Law or by the will of the teſtator, called only in the ſecond place, to ſucceed in default of the firſt; the repudiation ſeems to be revocable as well as any other donation between huſband and wife. For one, who refuſes to accept of a conſiderable gain which he has it in his power to make, or repudiates an inheritance to which he may ſucceed, gives the perſon, who is next called to it, a gift, preciſely equivalent to the profit which he reaps by the addition made to his eſtate. 'Tis true, this doctrine is different from that of the Roman Law; but it is agreeable both to the principles and to the practice of the Law of Scotland. Indeed, many of the deciſions of the Civil Law, concerning conjugal donations, ſeem to be contradictory to the principles, diſagreeable to the ſpirit, and inconſiſtent with the reaſon of it. For the moſt ſimple, the moſt general, and the moſt reaſonable principle of it is, that donations, and donations alone, made by a huſband to his wife, or by a wife to her huſband, are revocable by the donor at any time during his life. If, therefore, we govern all our deciſions of particular caſes by it, we ſhall bring back, ſo to ſpeak, both the Roman and the Scotch Law to their original principles, and make our determinations of particular caſes more agreeable to Law, more conſiſtent with common ſenſe, and more harmonious to one another than they have ever been.

§ 254. Donations *inter virum et uxorem*, are not *ipſo jure* void; they are revocable at any time during the life of the donor (§ 247. *ax.* 3.); but they are valid and effectual, till they are revoked. Therefore, the donee becomes, and is by Law held to be the owner of the *res donata*, as much as of any thing belonging to him; provided the donation be made in that ſolemn, formal, and legal

gal way, which is required by Law for conveying property from one to another: for the method of conveying the property must, in all cases, vary with the nature of the gift. Since the donee is, by Law, considered as the proprietor of the gift, he must be entitled to exert every act of property, which any other proprietor is entitled to exert with regard to his property. Of course, he acquires all the fruits which it yields, and he consumes, before he knows it is revoked. I say, which he *consumes:* for, if they are not consumed, they must be restored along with the *res donata*, in case it is revoked. It is not enough that they are *reaped:* for *bona fides* cannot, in this case, secure the property of the fruits to him, who reaps them. But the donor must refund to the donee the expence, which he has laid out in raising them. He has a right to improve it to the best advantage, to appear in law-suits concerning it, and to alienate it for an onerous, or a gratuitous cause.

But donations *inter virum et uxorem* are revocable at any time during the life of the donor. Therefore, the donee cannot have the right of acquiring, by prescription, the property of the *res donata* of the gift, during the life of the donor. The donee does not prescribe the property of it, tho the donor happens not to revoke it, before all that time, which is required by Law for the acquisition of property by prescription, is completely run. The donor may, notwithstanding, revoke at any time during his life; because the right of revocation is a faculty, which it is in the power of him, who has it, at any time to exert. *Rei meræ facultatis nunquam præscribitur, Fo.* 15th *Jan.* 1697, *Turnbull.* Indeed, if the donor dies without revoking, the donee has the right of acquiring the property of it, by prescribing it *pro donata;* and all the time, that has past since he received the gift, will be counted to make up the time of prescription: for he either was himself proprietor, or, at least, succeeds to one, who was proprietor during all that time.

But, donations being liable to revocation, the donor may, as soon as he pleases, revoke a gift given by him.

§ 255. He may do it either expressly or tacitly; because revocation implies a declaration of the will of the donor.

A donation is revoked expressly, by *any* express, either written or verbal, declaration made by the donor; no matter of what kind the *res donata* be, whether it be heritable or moveable. *C. Earl of Eglington.—Ho. husband,* 17th *March* 1615, *Earl of Angus,* provided the revocation be the last will of the donor. For in this, as in several other cases, he may alter his will at any time during his life. So that it is alterable till the very last breath of his life; and it is his last will which is alone regarded, *l.* 32, § 2, 3, *ff. de don. int. vir. et uxor.* I say, *verbal* declaration; for one may revoke it by making a conveyance of it to another. Of course, he may revoke it verbally, since he cannot make a conveyance of it in favour of himself alone; he resumes possession.

It is revoked tacitly either 1) By any deed of the donor, which is inconsistent with the donation, and, therefore, implies a revocation of it; or 2) By any deed of the donee, from which the Law presumes the donor to have revoked it, because it presumes that the donor, if he had known the donee had done it, would have revoked the donation.

1) It may be tacitly revoked by deeds of the donor, which are inconsistent with the donation. Thus, if the donor conveys the property of it to a person, different from the donee, *l.* 12. *C. de don. int. vir. et uxor.* either by a special deed relative to the gift, or by a general one containing a clause which must be held to imply a special revocation of the donation, *Du.* 25th *March* 1635, *L. Lawrieston.—F.* 17th *Feb.* 1708, *Hall.* I say, a clause, which must imply a revocation: for one, who, after he has made a donation to the other married person, makes a *general* settlement *omnium bonorum,* is not presumed to have revoked, *Fo.* 7th *Feb.* 1699, *Handiside. In toto jure generi per speciem derogatur, l.* 80. *ff. d. r. j.* Therefore, a *general* conveyance, settlement, or, as it is called in Scotland,

land, *Diſpoſition*, will not be preſumed to comprehend things, which have already been diſpoſed of, *Du.* 8th *March* 1626, *Traquair*. *Semper in dubiis benigniora præferenda ſunt*, *l.* 56. *ff. d. r. j.* The caſe of the donee is more favourable than that of the donor. Therefore, a clauſe, which neceſſarily implies revocation, is required. If it is uncertain, whether the donation has or has not been revoked, it ought to be adjudged not to be revoked, *l.* 32. § 4. *ff. de don. int. vir. et uxor.*

In general, every deed of the donor, from which it appears that he altered his mind, will be ſufficient for revoking it. Hence it muſt be preſumed to be revoked, if the donor has not left enough to pay his debts: for, if he has left enough for the payment of all his debts, his creditors have no power either to revoke it, or to get it ſet aſide, *H.* 868.—*A. Huſband*, 21ſt *July* 1631, *Lady Huttonhall.*

A donation may be revoked by deeds of the donor either totally, as in the caſes above mentioned, or partially, if he does a deed, which is not totally ſubverſive of the donation, but may ſubſiſt along with it, the one not being deſtructive of the other, *St.* 20th *Nov.* 1662, *Children of Wolmet*. Thus, an annual-rent out of the *res donata*, granted after the donation, is not a total revocation of it: for both the donation and the annual-rent ſubſiſt, *St.* 15th *Dec.* 1674, *Kinloch.*—*Ha.* 4th *Feb.* 1607, *Marjoribanks*. In the ſame manner, if the donor grants a leaſe of the *res donata*, after he hath made a donation of it, the leaſe is valid, as is alſo the donation, in caſe the donor allows the rent to go to the donee.

For the ſame reaſon, a donation is not revoked totally, tho the donor grants a right in ſecurity on the *res donata* to his creditor: for it may ſubſiſt, the *res donata* may be poſſeſſed by the donee, notwithſtanding; *l.* 32. § 5. *ff. de don. int. vir. et uxor.*—*Nov.* 162. *c.* 1.—§ 12. *I. de leg.* 'Tis true, the right in ſecurity muſt be good to him, in whoſe favour it is granted; and he may have recourſe to it, as ſoon as neceſſity requires. But the donee will retain the poſſeſſion, till it is taken from him by the donor, *Du.* 25th *March* 1635, *L. Lawrieſton.*

It muſt depend on the terms of the reverſion, whether a wadſet of the *res donata* implies a revocation of it. If the right of reverſion is taken to the donor, his heirs, and aſſigns, it muſt be held to be revoked. Indeed, it muſt be held to be revoked in all caſes, in which the reverſion is not expreſsly taken to the donee: for reverſions are *ſtricti juris.*

Donations *inter virum et uxorem* may be revoked by deeds of the donee, as well as of the donor. For, if the donee does an action, from which it is improbable, that the donor, in caſe he had known it, would not have revoked, the donation muſt be held to be revoked. Thus, if the donee has been unfaithful to the nuptial bed, *Ho. de don. int. vir. et uxor. Douglas;* has made attempts on the life of the donor, or has actually murdered him, the donation will be preſumed to be revoked: for it is impoſſible to believe, that the donor, if he had known the ill-will borne, or injury done him, would have continued his liberality to the donee. Therefore, if the donor did actually know, that it was done him, and did not revoke the donation, but ſeemed, from his ſilence, to forgive the injury, the preſumption ceaſes, and the donation cannot be ſaid to be revoked, ſince the donor gave no indications of a change of mind, *l. ult. C. de revoc. donat.*

But it is a general rule, that in all caſes, in which revocation is to be inferred from preſumptions, the donation ought not to be preſumed to be revoked, unleſs it appears clearly, that the donor changed his mind. If the matter is either doubtful or obſcure, the donation ought to be ſupported, becauſe it ought not *in dubio* to be preſumed to have been revoked. *Si in obſcuro ſit, proclivior eſſe debet judex ad comprobandam donationem*, *l.* 32. § 4. *ff. de don. int. vir. et uxor.*

It deſerves to be further remarked, that a donation muſt in all caſes, in which revocation is preſumed from deeds of the donee, be held to be *totally* revoked. The nature of the thing makes it impoſſible to be otherwiſe.

§ 256.

§ 256. Conjugal donations may be revoked by the donor at any time during his life, as well after as before the death of the donee. If it were otherwiſe, the donee might, by the ſame baſe means, which he had uſed to obtain the donation, hinder the donor from revoking it, *Du.* 22d *March* 1634, *Glasford.*—*St.* 15th *Dec.* 1676, *Inglis.*—17th *July* 1677, *Paterſon.* And they may be revoked as well after as before a judicial ratification made by the donor upon oath, *St.* 15th *Feb.* 1678, *Gordon.*—*Fo.* 16th *July* 1696, *Leiſhman.* For judicial ratifications were introduced by Law for ſecurity not of huſbands, but of others who had dealings with married women, and for hindering wives from impeaching deeds ratified by themſelves judicially on oath, as extorted from them by force, or granted by them out of fear of their huſbands.

§ 257. As ſoon as a donation *inter virum et uxorem* is revoked by the donor, his right to it revives; the *res donata* returns to him, and becomes his property as much and as abſolutely, after he has made revocation, as it was before he made the donation. Conſequently, no regard is had to the deeds of the donee concerning it; theſe fall all of them with the right of the donee, with which they are connected, and on which alone they depend. For the donee had only an uncertain, a dependent, and a temporary right. So he could not tranſmit to another an abſolute, an independent, and a perpetual right, which himſelf had not: for nobody can either give another the property of a thing which does not belong to himſelf, or tranſmit to him a right, which he himſelf has not. *Nemo dat quod ipſe non habet*, is good Law as well as good philoſophy, *l.* 54. *ff. d. r. j.* Conſequently, if the donee has endeavoured to convey the property of the *res donata*, the effect of the conveyance continues always, like the right of the donee, to be in abeyance, during the whole time of the life of the donor, *l.* 5. § 9. *l.* 11. § 9. *h. t.* For the donor may revoke the donation at any time during his own life. So if he does revoke it, a conveyance, made by the donee, becomes, after the revocation, void; and the donor may lay claim to the *res donata* as his own, becauſe the donee could not convey to another that property, which himſelf had not, *l.* 3. § 10. *l.* 5. § 9. *l.* 11. § 9. *ff. de don. int. vir. et uxor. l.* 20. *p. l.* 31. *p. ff. de acq. rer. dom.* It matters not whether the alienation was made for a gratuitous, a rational, or for an onerous cauſe, *St.* 15th *Dec.* 1676, *Inglis.*—17th *July* 1677, *Paterſon.* For every perſon, who enters into any contract with another, ought to know the condition and the rights as well of the thing concerning which, as of the perſons with whom he is about to contract, *l.* 19. *ff. d. r. j.* Therefore, it is of no conſequence whether the alienation made or the deed done by the donee, be intended to give an abſolute and a perpetual, or a limited and temporary right; whether they give a right, which makes the perſon, to whom it is granted, entirely independent, or one, that makes him partly to depend on the donor. For, after the revocation, no account is made of the deeds of the donee; no regard is had to them. The right, whether real or perſonal, of the donor revives. Thus, leaſes granted by the donee become void. Therefore, the tenant will be liable to be obliged to remove from his farm at the Whitſun-tide term, which follows next after the revocation; provided the revocation be made in ſuch time, as makes it poſſible to warn the tenant according to the forms appointed by Law, and he be duly warned accordingly: for nobody can be obliged, unleſs he is formally warned, to remove. In the ſame manner, wadſets, made by the donee, become void; the right of the wadſetter becomes null; and the donor may return to his poſſeſſion juſt as if no donation had been made by himſelf and no wadſet by the donee. *Nam reſoluto jure dantis reſolvitur jus accipientis.*

In caſe the *res donata* has been conſumed by the donee, or has periſhed, before it is revoked, the donor has a right to the value of that profit, gain, or advantage, which the donee either has actually made, or has fraudulently hindered himſelf from having made at the time, at which an action is commenced for it. *In*

quantum donatarius locupletior factus eſt tempore litis conteſtatæ, l. 5. § 18. *l.* 6, 7. *p.* § 3. *l.* 16. *l.* 28. *p.* § 3. *l.* 29, 33. § 1. *l.* 39, 50. *vel dolo ejus factum eſt quo minus locupletior eſſet, l.* 37. *ff. de don. int. vir. et uxor. l.* 131, 150, 157. § 1. *ff. d. r. j.* Conſequently, if the gift has periſhed *ſine dolo donatarii*, or has been conſumed by the donee, without any fraudulent intention to prevent the effects of the revocation, the donor, tho he may revoke the donation, muſt revoke it in vain. For he is not, in this caſe, entitled to get any thing in its ſtead from the donee, who was at every point of time, before he knew the donation to be revoked, *in bona fide* to conſider and to uſe the *res donata* as his property, and who has not done any thing with a wicked and deliberate purpoſe, to defeat the effects of that right, which the Law gives to the donor, of revoking the donation.

§ 258. Conjugal donations may be revoked at any time during the life of the donor; and, if they are actually revoked by the donor himſelf, either he himſelf or his heirs have right to do every thing which Law ſays may be done for recovering them, either from the donee, or if he is dead, from his repreſentatives. For the heirs and repreſentatives of every body ſucceed to every right, which the perſon whom they repreſent had, and are ſubjected to every obligation with which he was bound. So they are regarded as *eædem perſonæ cum defunctis*. But, if the donation is not revoked by the donor before his death, it becomes irrevocable, and cannot, after it, be revoked by any one, *R. M. l.* 2. *c.* 15. § 11. Therefore, neither the heir, nor the executors, nor the ſucceſſors of the donor, can impeach it, as being a donation between huſband and wife, provided it be valid and effectual in other reſpects, and be not liable to be ſet aſide for ſome other reaſon; becauſe the faculty of revoking is perſonal to the donor, belongs to him alone, and is not allowed to his heirs, *l.* 32. § 2, 4. *ff. de don. int. vir. et uxor.* If he does not exerciſe it, the donation becomes valid, and the right conveyed by it becomes abſolute.

TITLE XII.

Of the judicial Ratifications of Wives.

§ 259. WIVES, it has been often remarked, are liable to the influence of their huſbands, and may thereby be conſtrained to grant deeds, to which they are very averſe. Beſides, they may *pretend* to have been forced to grant even ſuch, as they granted voluntarily. Thus, they may create uneaſineſs to thoſe, who have had dealings with them, by commencing ſuits in order to get the deeds, which they have done, ſet aſide. For the Law of Scotland makes all deeds, granted out of fear, or extorted by force, liable to be ſet aſide. In order, therefore, to render ſecure third parties, in whoſe favour wives have done deeds, it hath invented *judicial ratifications;* by which wives do, out of the preſence of their huſbands, judicially *ratify* on oath the deeds granted by them, and ſwear never to impeach them to have been granted out of fear of their huſbands. The conſequence of the judicial ratification is, that the wife can never afterwards deny the validity of a deed, which ſhe has ratified on oath, or endeavour to get it ſet aſide *ex capite viris et metus*, as elicited by force, or granted out of fear of her huſband, *R. M. l.* 2. *c.* 16. § 16.—1481, *c.* 83. So that a judicial ratification of a wife may be defined to be 'an oath, made by 'a wife, before a judge, and out of the preſence of her huſband, by which ſhe 'ratifies a deed done by her before, in favour of ſomebody different from her huſ'band, ſwears never to deny its validity, and is thereby incapacitated from get'ting it ſet aſide, as having been granted out of fear of him.'

§ 260.

§ 260. I. Therefore, it is an oath *, for the ratification derives much of its force from hence, that the woman ſwears as in the preſence of Almighty GOD; becauſe ſuch is the ſacredneſs and awfulneſs of an oath, that the Law holds 1) That the woman will not ſwear what is not true, and will not affirm a deed to have been granted voluntarily, which ſhe was really compelled to grant. Therefore, 2) It does not allow her afterwards to affirm that to be falſe which ſhe ſwore to be true, and to impeach a deed which ſhe ſwore never to call in queſtion.

§ 261. II. The oath muſt be made by the wife herſelf: for 1) No other can ſwear, becauſe no other can know, that the deed was voluntary: 2) She cannot be obliged by that, which any other either ſays, does, or ſwears; ſince the deed of one cannot either bind or affect another.

§ 262. III. It muſt be made before a judge; for it is not enough to ſwear before a private perſon, who is not veſted with authority; becauſe a private perſon has no authority to take the oath, to certify that it was made, or to ſee that it be done voluntarily.

But it is of no importance, before what Judge it be made, whether he be a Sheriff, a Commiſſary, a Juſtice of the Peace, a Magiſtrate of a Burrough, or what he be. Nor is it neceſſary, that it be made when the Judge is ſitting in judgment, *pro tribunali;* becauſe the judicial ratification of wives is an act of voluntary juriſdiction, which may be done before any Judge, in any place, and at any time, *Fo.* 3d *Feb.* 1688, *Cochran.*—*Du.* 8th *July* 1642, *Grant.*

§ 263. IV. It muſt be made out of the preſence of the huſband; becauſe it ought both to be, and to appear to be voluntary. Now, the evidence required by Law to prove it to have been ſo, is, that the wife ſwear out of the preſence of her huſband, that the deed which ſhe is ratifying, was not done by her out of fear of him.

In caſe ſhe makes oath, ſhe is barred from getting it ſet aſide, tho not only the deed, but the ratification was really granted out of fear of her huſband, or elicited by force, *Du.* 8th *July* 1642, *Grant;* becauſe the Law preſumes, *præſumptione juris et de jure*, that both the deed and the ratification were voluntary, if the oath was made in the preſence of a Judge, when the wife was protected by Law, was ſecure from all danger, and, if ſhe dreaded any harm for telling the truth, might be defended againſt it, as ſoon as ſhe ſhould make her fears known to the Judge; out of the preſence of her huſband, when free from the impreſſions, which the appearance of him might have upon her.

§ 264. V. The wife muſt ſwear that the deed is voluntary, that it was not extorted from her by her huſband, and that ſhe will never deny it to be good, or endeavour to get it ſet aſide: for it is on this part of the oath, that the uſefulneſs of judicial ratifications depends; becauſe VI. from hence ariſes an obligation, by which the wife is incapacitated from impeaching the deed as granted by her out of fear of her huſband; no matter, whether ſhe was or was not forced, whether ſhe did or did not make either the deed, the ratification, or both, out of fear of him; her judicial, juratory ratification precludes her from all right, or title to call it in queſtion, or to endeavour to get it ſet aſide, *Du.* 8th *July* 1642, *Grant*—1481, *c.* 83.

§ 265, I ſay, her ratification hinders her from impeaching it as granted out of fear of her huſband. For the Law of judicial ratifications ſeems to regard huſbands alone: therefore, if a deed was forcibly extorted from a wife by a perſon different from her huſband, ſhe is entitled to get it ſet aſide, tho ſhe hath judicially ratified it on oath. For the Law of ratifications ſeems to have been introduced to protect wives not from the violence of third perſons, with whom they are not connected, and to whoſe barbarity they are not expoſed, but from the influence of their huſbands,

* It was not neceſſary, in antient times, to ratify by oath. It ſeems to have been ſufficient, if the wife made a judicial acknowledgment, not upon oath, *R. M. l. 2. c.* 16. § 16.

huſbands, with whom they are forced to live, and to whoſe brutality they are continually expoſed. It is true, it was invented alſo in order to ſecure thoſe, who deal with her; but it is alſo true, that it was invented to ſecure them, not in caſe ſhe was forced or frightened by themſelves, but in caſe ſhe was forced and frightened by her huſband. This appears from the very words of the act of Parliament 1481, *c.* 83, which ſeem to ſuppoſe the wife to have alledged, that ſhe was compelled by her *huſband*; from the language, which all Lawyers hold concerning judicial ratifications of wives, for they always ſpeak of the fear of *no other* than the *huſband;* and from the form of the oath itſelf, by which a wife, out of the *preſence of her huſband*, ſwears that ſhe was not compelled by *him*, and that ſhe will not call in queſtion the deed which ſhe has granted, as having been granted by her out of fear of *him*. Therefore, if ſhe has been compelled not by her huſband, but by ſome other perſon, and has afterwards judicially ratified on oath the deed which ſhe was forced to grant, ſhe may, notwithſtanding her judicial juratory ratification, get it ſet aſide in thoſe caſes, in which ſhe was forced not only to grant the deed, but alſo to make the ratification: thus, ſuppoſe a man of a fierce and barbarous diſpoſition, one who uſes to put his threats in execution, *homo ſævus, qui minas exequi ſolet*, not only to extort a deed from a woman, but alſo to threaten that he will aſſuredly put her to death, unleſs ſhe ſhall, before a certain day, have judicially ratified the deed which ſhe has been forced to grant, and ſhall have ſworn never to impeach it; ſuppoſe the woman, terrified by theſe threats, to ratify it; ſhe is, notwithſtanding her oath, entitled to get it ſet aſide; becauſe, as ſoon as we put the fear of the huſband out of the queſtion, the matter returns to common Law, and falls to be determined according to the rules of it. Therefore, the wife comes into the ſame caſe with one who has been forced, *vi et metu*, to grant a deed, and muſt therefore be reſtored againſt it according to the common rules of Law; for it does not alter the matter, that ſhe is cloathed with a huſband. Indeed, there is a very great difference between the caſe of a huſband and that of others. A huſband has much opportunity to abuſe his wife, and to compel her to do every thing, which is agreeable to his humour, tho he may, at the ſame time, conduct his barbarity with ſuch cunning, as to render it difficult to be detected. Therefore, the Law, in order to know whether his wife has or has not been forced by him, has introduced the ſolemnity of judicial ratifications, by which ſhe appears and makes oath before a judge, that ſhe granted the deed voluntarily, and will never impeach it, as granted out of fear of her huſband. From whence it introduces a preſumption, *juris et de jure*, that ſhe was not forced by him, and that ſhe granted it voluntarily: therefore, it excludes her from the faculty of reduction. But others, with whom ſhe is not obliged to have ſo much intercourſe, have not ſo conſtant and ſo ſecret opportunities of abuſing her. Therefore, the common Law muſt take place in her dealings with them: ſo every thing, which ſhe has been forced by them to do, whether it was to grant the deed or to ratify a deed granted by her, muſt be liable to be ſet aſide; becauſe *omne, quod vi metuſve cauſâ geſtum eſt, ratum non habetur*. So a ratification, muſt, if *it* has been extorted, be liable to be avoided, as well as any other deed, which has been extorted *vi et metu*. Of courſe, in caſe the deed, which is ratified, was itſelf alſo extorted by force, both it and the ratification will be voidable: for the ratification, being itſelf extorted by force, cannot add validity to it. In caſe the deed was not extorted by force, but granted voluntarily, it will not be voidable, tho the ratification ſhould be extorted: for the force uſed to extort the ratification, can have no effect on the validity of the deed.

But if the wife was forced only to grant the deed, and was not forced to ratify it, it cannot be liable to be ſet aſide; becauſe the ſubſequent ratification, being granted voluntarily, is a ſufficient confirmation of the deed which ſhe was forced to grant, and bars her *perſonali exceptione* from impeaching it. For her voluntary ratification is equivalent to a ſolemn renunciation of all right, which ſhe

ſhe hath to get it avoided, and of every exception which ſhe has againſt its validity, as extorted *vi et metu.*

The effect of judicial ratifications is limited to third parties ſo much, that a judicial ratification, tho made voluntarily, will not exclude a wife either from getting ſet aſide or from revoking a deed, made by her in favour of her huſband, in caſe it was either voidable or revocable before it was ratified. For the judicial ratification is itſelf a donation between huſband and wife, and is therefore revocable at any time during the life of the donor (§ 254.) Beſides, they relate not to deeds which married perſons grant *inter ſe*, but to thoſe granted by wives in favour of perſons different from their huſbands.

§ 266. Since a judicial juratory ratification is that, which alone hinders a wife from getting voided a deed extorted from her out of fear of her huſband, it muſt follow, that ſhe is not barred from getting it voided, in caſe ſhe has not judicially ratified it; provided ſhe was really compelled by him to grant it. For, if he did not compell her, it is impoſſible for her to get it ſet aſide as granted out of fear of him.

§ 267. A wife may pretend, that ſhe was forced to grant a deed, which ſhe was not, in truth, forced to grant. Therefore, the acts, upon which ſhe founds her allegation of compulſion, muſt be conſidered. For it is not every degree of fear, every ſort of force, which will make a deed liable to be ſet aſide. It muſt be ſuch as is conſiderable, and convinces the Judge, that the deed was granted not voluntarily but out of fear. *Verus et juſtus metus* ought to be both alledged and proved, *Ha.* 16th *June* 1613, *Hepburn*—*H.* 878—*Fo.* 16th *July* 1696, *Liſhman*—*F.* 28th *June* 1706, *Hay*. Much, therefore, muſt be left to the ſagacity of the Judge, who ought to conſider the circumſtances both of perſons and of things, and to form his judgment according to them. If no forcible or violent mean is proved to have been employed by the huſband to extort the deed, it will not be voidable merely *ob reverentiam maritalem*, even tho accompanied by *luctus et mœror*, by that paſſionate grief, with which a wife may be ſuppoſed to be agitated, when ſhe ſees her huſband laid on a bed of ſickneſs and approaching to his end, *St.* 24th *Jan.* 1674, *Murray*.

§ 268. I ſay, a deed, which has been judicially ratified, is not voidable. It is competent to prove it to have been ratified either by a writ ſigned by the wife, or by her oath. But it is not proveable by witneſſes: becauſe a ratification is a *nuda emiſſio verborum*, and may, in ſome ſort, be conſidered as a promiſe, which it is not competent to prove otherwiſe than either *ſcripto* or *juramento* to have been made. Therefore, an act of Court, ſubſcribed by the proper officer, either by the Clerk alone, or by the Judge alone, or by both the one and the other, or a writ ſubſcribed by the Judge before whom the oath was made, by the Clerk, or by them both, does not alone make proof of the judicial ratification, *Ba. writs*, 9th *Dec.* 1542, *poor wife of Broughton*. In order to make the inſtrument prove againſt the woman, it muſt be ſubſcribed by herſelf, by the party who emitted the oath, and obliged herſelf by it, *Du.* 22d *Jan.* 1635, *Bell*—30th *Jan.* 1635, *Mitchelſon*—*St.* 15th *Feb.* 1678, *Gordon;* for no writ can be either inductive or make proof of an obligation unleſs it is ſubſcribed by the perſon, who is obliged.

It is alſo competent to prove a deed to have been ratified by a wife, by her own oath. For every action done by one, is proveable by his own oath, provided it infers not either infamy or a corporal puniſhment.

TITLE XIII.

Of the Effects which Marriage has on the Perſons of a Huſband and his Wife.

§ 269. IN the foregoing Titles, all the effects which marriage has on the patrimonial intereſts of a huſband and his wife, have been explained. I ſhall proceed now to treat of thoſe, which it has upon their perſons (§ 201.).

I have had repeated occaſions to remark, that the primary end of marriage is the procreation of children, and that, in order to accompliſh it, married perſons ought to live in one houſe and in one family together (§ 169, 205, 225.). They ought not, therefore, to have, each of them, a ſeparate abode; one of them ought to enter into the habitation of the other. But the man is held, by Law, to be ſuperior to the woman. Therefore, ſhe ought to yield to him, to leave her own houſe, and to cohabit with her huſband. Hence, the houſe of the huſband is called by POMPONIUS, *domicilium matrimonii*, *l.* 5. *ff. de ritu nupt.*

Of courſe, ſhe is bound to follow his domicil, to attend him whitherſoever he propoſes to go, and to ſettle with him in that place, in which he reſolves to fix his abode, *R. M. l.* 2. *c.* 16. § 13, 15. *Q. A. c.* 12. § 6. For he, the head of the family, has alone the power of determining where it ſhall remain.

§270. Huſband and wife become, after marriage, as it were, one fleſh (§ 205.) GEN. *c.* ii. *v.* 23. Therefore, the wife muſt become partaker of the rank and dignity of her huſband. The affection which he ought to have for her, will make him expect, that the ſame reſpect, which is ſhewn to himſelf, be ſhewn to her. Hence, ſhe takes place, after marriage, as the wife of her huſband; no regard is had to her former condition: her precedency is always determined by his rank, *l.* 8. *ff. de ſenat. Uxores coruſcant radiis maritorum*, *Nov.* 105. *c.* 2. *p.* However there is one exception to this rule. For if a Lady of quality, *i. e.* the daughter of a Peer, marries a commoner, ſhe loſes not her rank in conſequence of her marriage, and takes place, not as the wife of her huſband, but as the daughter of her father. Of courſe, ſhe retains, notwithſtanding her marriage, the ſame quality, which ſhe had before it. But a Lady of quality, who marries a Peer, loſes the rank which her birth gave her as daughter of her father, and participates, in all caſes, of that of her huſband: for all Peers are equally noble. Conſequently, the daughter of a Duke, when ſhe marries a Lord, ranks no longer as the daughter of her father, but as the wife of her huſband. Therefore, ſhe has not, after her marriage, the precedency of a Viſcounteſs, whereas ſhe had it before.

A woman not only partakes of the dignity of her huſband, during her marriage, but retains it during her viduity. For, as ſoon as ſhe marries a ſecond huſband, ſhe loſes the rank which ſhe acquired by her former marriage, and participates of that of her new ſpouſe, *l.* 10. *C. de nuptiis*, *l.* 9. *C. de incolis*, *l.* 13. *C. de dig.*

The legal advantages, ariſing to wives from this participation of the dignity of their huſbands, are few *. They chiefly regard the ſeverity and gentleneſs of the puniſhments, which ought to be inflicted on them. For puniſhments ought always to be ſuitable to the fortune and the notions, ſince it is ſufficient, if they are remedies adequate to the crimes of thoſe, on whom they are inflicted, *R. M. l.* 4. *c.* 3. § 4. *Sk. Not. ad d.* § 4.—1581, *c.* 103. *in med.*—1617, *c.* 8.—1661, *c.* 38. A ſevere puniſhment ought never to be inflicted for any crime, if one leſs ſevere will be ſufficient to anſwer the ends of it, and to prevent either the criminal himſelf or others from committing the ſame delinquency in time to come; becauſe the rigour of puniſhment ought to be as much as it can poſſibly be moderated, *l.* 42. *ff. de pœnis*, *l.* 155. § 2. *ff. de reg. jur.* But a puniſhment will produce its effects on a perſon of rank, who has delicate ideas of things, and has a character to loſe, which will make little or no impreſſion upon one of mean fortune, who

* The wives of Peers have various privileges; but theſe will fall to be explained afterwards.

who is regardleſs of his reputation, and has not any lively feelings of honour. The wiſdom, therefore, of all nations hath diſtinguiſhed between delinquents of different ranks. Slaves have always been puniſhed more ſeverely than freemen, perſons of low than perſons of high rank, *l.* 1. § *ult. l.* 9. § 11. *l.* 10. *l.* 15. *l.* 16. § 3. *l.* 28. § 2, 5, 16. *l.* 38. § 2, 3. *ff. de pœnis. Quoniam difficilius emendantur*, ſays PLINY *. *Servi cruciatu corporis pœnas æſtimant, exiſtimationis ſecuri; ingenui vero animi, non corporis, dolore pœnarum modum æſtimant, Val. Max. l.* 9. *c.* 10. A wife, therefore, enjoys the privilege, which the rank of her huſband gives her in this reſpect. But the participation of his dignity gives her little or no advantage in other matters.

§ 271. Since a wife follows the domicil of her huſband, it is plain, that ſhe muſt, according to the common rules of Law, acquire a new *forum ratione domicilii; ſortitur forum ratione domicilii*, provided ſhe lives in the ſame domicil with her huſband. Therefore, ſhe is convenable in the forum, and may be ſued before the judges, to which he is ſubject. For every one, who has a domicil, *ſortitur forum ratione domicilii*, and is liable to be convened in it, ſince by reſiding within the territory of a judge, one is really and *ex neceſſitate* ſubjected to his coercive power, *l.* 19. *ff. de juris. l.* 65. *ff. de judic. l. ult.* § 3. *ff. ad. munic. l. ult. C. de incol. l.* 13. *C. de dignit.*

I ſay, provided ſhe lives in the ſame domicil with her huſband. For ſhe acquires this forum *ex neceſſitate*, in conſequence of the common rules of Law, becauſe ſhe has her domicil within the juriſdiction of that particular judge, to whoſe forum her huſband is amenable. Therefore, if her domicil be different from that of her huſband, if it is ſituated within a different territory, *ſi ſedes tabulas laremque habuerit, et rerum ac fortunarum ſuarum ſummam conſtituerit*, within the territory of a judge different from him, under whoſe juriſdiction her huſband lives, *l.* 203. *ff. de verb. ſignif. l.* 7. *C. de incol.* ſhe will be convenable not in the forum of her huſband, but in that of her own domicil alone, *l.* 5. *C. de incolis.* Conſequently, the forum, to which ſhe is ſubject, muſt, not only when ſhe is ſeparated from her huſband *a menſa et toro*, or when her marriage is diſſolved by his death, but in all caſes, be determined from her own place of abode alone. For it is the domicil, the actual place of abode, which alone does, which alone can, and which alone ought to determine the forum; *quod quis ſortitur intuitu et ratione domicilii.* So, if a wife lives within the ſhire of Aberdeen, and her huſband within that of Edinburgh, ſhe is not convenable before the Sheriff of Edinburgh; becauſe he has no juriſdiction over one, who lives not within his own territory, but within the ſhire of Aberdeen. She can be convened before no other Sheriff than the Sheriff of the ſheriffdom of Aberdeen. Therefore, if any action is brought againſt her, her huſband muſt be ſummoned † to appear as her curator before the Sheriff of Aberdeen, whoſe juriſdiction over the huſband is founded by the reſidence of the wife within his territory, *L. B. c.* 33. For every curator is obliged to appear before that judge, to whoſe juriſdiction the perſon committed to his care is ſubject, and to defend him in that forum; becauſe the forum, not of the curator, but of the perſon who is under his care, is alone conſidered in queſtions, where the curator is not either principal purſuer or principal defender, but appears only *ex officio*, as acceſſory to the ſuit, *qua* tutor or curator to the perſon principally intereſted in it.

'Tis true, a huſband is convenable before the judge of that territory, within which he has his domicil; and he is liable to be ſued for the moveable debts of his wife (§ 227, 229, 230, 243.). But he is not the proper debtor, by whom they are due. Of courſe, action cannot be brought for them againſt him alone; it muſt be brought both againſt his wife, who is the principal debtor, and againſt him, who is her curator. By conſequence, in all caſes, in which a huſband is ſued for a moveable debt due by his wife before a judge, within whoſe territory ſhe

* Lib. VIII. Epiſt ult.

† An edictal citation, ſuch as that by which tutors and curators are cited, ſeems not to be enough; a huſband muſt be ſpecially cited on letters of ſupplement; for he is not like other curators, ſince his patrimonial intereſt may be affected by the ſuit. Beſides, the individual perſon, who is her curator, is known.

ſhe does not live, ſhe muſt be ſummoned, on letters of ſupplement, to appear before that judge: for an edictal citation is not enough, ſince ſhe is not the curator of her huſband, but the principal defender in the ſuit. Beſides, ſhe is known to be an individual intereſted in it.

§ 272. A huſband is ſuperior to his wife. Of courſe, it would be abſurd for him to be ſuppoſed to acquire dignity from her. Therefore, her perſonal dignity is not, by marriage, communicated to him: for ſhe is not ſuppoſed to be capable of communicating any to him. All, which he acquires, is that, which ariſes *ex neceſſitate* from her eſtate (§ 218.). By conſequence, a Commoner, by marrying a Peereſs, becomes not a Peer, and is not entitled to any of the privileges of peerage.

§ 273. I ſaid, (§ 269.) that a wife is bound to cohabit with her huſband; therefore ſhe has no right to a ſeparate maintenance, if ſhe will not live with him. 'Tis ſufficient, if he is willing to maintain her in his own houſe. For ſhe has it not in her power capriciouſly to deſert the houſe, the family, and the company of her huſband, and thereby to fruſtrate the ends of marriage. If ſhe is obſtinate in doing ſo, ſhe does not her duty. Therefore, ſhe cannot, in this caſe, have claim to a ſeparate alimony, *Fo.* 19th *July* 1711, *Lady Kinfawns.*—LEEUWEN. *cen. for. p.* 1. *l.* 1. *c.* 15, § 19.—VOET. *de div. et rep.* § 18.

Beſides, in caſe ſhe leaves the company of her huſband, and deſerts his bed, he may bring an action of adherence againſt her, before the court of Commiſſaries; that ſhe may be ordained and decreed by them to adhere to him, and to admit him to the enjoyment of thoſe connubial rights, which he acquired by his entrance into marriage. If ſhe ſtill continues to perſevere in her obſtinacy, and refuſes to return to him, after ſhe has been decreed to do it, he acquires, after a certain time, a right to have his marriage diſſolved, and to obtain a divorce for non-adherence, 1573, *c.* 55. For the cohabitation of huſband and wife is introduced by Law, and is intended for the procreation of children. A man, therefore, who is maliciouſly deſerted by his wife, and is thereby deprived of the power of having lawful children by her, has a right to the attention of the Law, and is juſtly entitled to have his marriage diſſolved, that he may, if he pleaſes, marry another woman, and raiſe up children to ſucceed and to repreſent him.

§ 274. A huſband, it has been ſaid (§ 204, 205.), is the head of his wife; he is ſuperior to her, and ſhe is bound to obey him. Of courſe, he has, by the Law of Scotland, *Q. A. c.* 12. § 6. *c.* 20.—*ſt. D.* II. *c.* 16.—*L. B. c.* 131. as he had, by that of the Romans, PEREZ. *ad tit. C. de emendat. prop.*—*Nov.* 117. *c.* 14. a right to adviſe and to reprove, and, ſome Lawyers add, to correct her moderately. Hence, a wife is ſaid to be *ſub virgâ mariti ſui. Q. A. c.* 12. § 6. *c.* 20.

But he is bound to love, to protect, and to defend her, and ought not to abuſe or to be bitter againſt her, EPHES. *c.* v. *v.* 25, *ſqq.*—COL. *c.* iii. *v.* 19. Therefore, his power of correcting her is not unlimited, and ought not to be extended *in infinitum.* It ought never to exceed that, which the Law, *l.* 11. *C. de emend. prop.* calls *jus domeſticæ emendationis.* Indeed, it ſeems to be contrary to that diſcretion, which the Law ſuppoſes every married woman to poſſeſs, to allow her huſband to chaſtiſe her corporally. Beſides that it indicates a brutal diſpoſition for a man to uſe a Lady in this rough manner, remedies of this kind can hardly have good effects. Therefore, if the huſband proceeds to an atrocious and culpable ſeverity, the wife is entitled to the protection of the Law; and is not bound either to cohabit with him, or to adhere to him, till ſhe ſhall be rendered ſecure of being uſed with humanity, and of being treated like a wife, *Ha.* 18th *June* 1594, *Howiſon.*

But his cruelty may proceed to an enormous degree, and may continue during ſo long a time, as to give certain indications of the barbarity of his temper, and to make it almoſt impoſſible for her to live any how comfortably with him. She muſt, therefore, in this caſe, be entitled to live ſeparately from him, and to be maintained at his expence, *Fo.* 19th *July* 1711, *Lady Kinfawns.*—8th *June* 1697,

1697, *Ducheſs of Gordon.*—*D.* I. 394. *Nov.* 1728, *Lady Kirkhouſe.*—LEEUWEN. *con. for. p.* 1. *l.* 1. *c.* 15. § 4, 17, 18, 19.

For this purpoſe a wife, who has been abuſed by her huſband, and has thereby been looſed from the obligation of cohabiting with him, may bring, either before the Commiſſaries, or before the Lords of Seſſion; for actions of *ſeparation* and *aliment* may be brought directly before the Lords, ſince the Commiſſaries have not a privative juriſdiction in queſtions of this ſort, which are not properly conſiſtorial. I ſay, ſhe may bring an action of *ſeparation and aliment* againſt him, in order to ſhew, and to have it found, that ſhe has good reaſons to ſeparate from him *quoad menſam et torum*, to get an allowance fixed by them for her maintenance, and to have him decreed to pay it.

The firſt thing, therefore, to which the judge ought to attend, is the goodneſs of the reaſons, given by the wife for her ſeparation from her huſband. But it would be dangerous to lay down any general rule, by which he ought, in all caſes, to determine himſelf: for every caſe is diſtinguiſhed by its own circumſtances. Therefore, the judge ought to form his opinion *tanquam bonus vir*, from the evidence brought by the woman, and from the circumſtances of abuſe proved by her, and to determine from thence whether it is, or is not reaſonable for her to ſeparate from her huſband. Only it may be remarked, that beating is not neceſſary for obtaining an aliment; for a man may uſe his wife very cruelly without beating her, for inſtance, by ſtarving her: and that it is not every heat, every fever, every miſunderſtanding, every *fribuſculum*, which ought to be adjudged to be a good reaſon for ſeparating married perſons: it muſt be ſomething, which it is impoſſible to endure. Conſequently, it may vary as the tempers of men, the circumſtances of life, and the atrocity of injuries. The ſame cauſe, which will be ſufficient for ſeparating perſons, who may be preſumed to be *effæti*, will not be a good reaſon for parting a couple, who are in the flower of their youth and the prime of their beauty; becauſe ſuch a ſeparation cauſes the innocent as well as the guilty to ſuffer, and makes them be married in vain, by depriving them both of the power of having lawful children, and of the other pleaſures of a married life. For the ſame reaſon, perſons, who have children, will, perhaps, be allowed to ſeparate from one another more eaſily than ſuch as have none; for they have already accompliſhed the end, which they intended by marriage. In ſhort, the determination of this, which is, indeed, the eſſential point, muſt be left to the integrity of the judge, who ought to conſider the amount of the whole proof, to have a particular regard to the utility of human ſociety, and to regulate his judgment by that golden rule which has been imprinted by nature on the heart of man, and has been taught him in the goſpel, that he ought to do by another, as he would wiſh this other to do by him.

In caſe he is of opinion, that the woman has made proof of good reaſons for ſeparating from her huſband, it is his duty to find her entitled to a ſeparate alimony, to determine a ſum for it ſuitable to the condition of parties, and to decree the huſband to pay it at certain times. If on the other hand he thinks, that ſhe has not made proof of good reaſons for ſeparating from him, he ought to adjudge, that a ſeparate alimony is not due to her.

§ 275. Perſons, who are ſo unfortunate as to be obliged to ſeparate from one another, becauſe they cannot live comfortably together, continue ſtill to be married perſons, and cannot be divorced from one another for not adhering to the nuptial bed; becauſe their ſeparation is not voluntary, but neceſſary. For it is in thoſe caſes alone, in which the ſeparation is voluntary, or in which one of the parties deſerts the other maliciouſly, without reaſon, that divorce can be obtained for non-adherence. Perſons, therefore, who are ſeparated for neceſſary cauſes, continue ſtill united by the bond of wedlock, and are not at liberty to marry others. They muſt languiſh away an unjoyous, a tedious, and an unnatural life, till they become reconciled to living together.

§ 276. Since a huſband and wife enter into the ſtate of marriage for the procreation of children, they muſt be both bound to be faithful to each other's bed (§ 169. *ax.* 8.) For the man marries the woman, that he may have children by her, and the woman marries the man, that ſhe may have children by him. Therefore, if the man, unmindful of the duties which he owes to his wife, ſhall divert to other women, he breaks the engagement which he made to her; beſtows on others that affection, which he ought to devote to her alone; deprives thereby both himſelf and her of ſeveral chances which they might have had of having lawful children; makes his wife, in her turn, grow leſs ſcrupulous about preſerving her fidelity to one, who is unfaithful to her; leads her, by degrees, to think lightly of her honour, and invites her, at laſt, to throw it away, ſince her huſband, ſhe ſees, deals diſhonourably by her. If the wife, forgetful of her vows, proſtitutes her regard to other men, ſhe frequently diſappoints the hopes both of herſelf and of her huſband, and, for the ſatisfaction of a fruitleſs paſſion, prevents the ſucceſs of both their endeavours; or ſhe impoſes on him a ſpurious breed, and invites him to repair the injury done him, by beſtowing his love on ſtrange women. Thus, as ſoon as either of the ſpouſes becomes unfaithful to the nuptial bed, that harmony and concord, which ought to ſubſiſt between them, is immediately deſtroyed; their mutual affection grows cool by degrees; their love of one another is changed into hatred; the peace and the happineſs of the family is at an end; brawlings, ſtrifes, and contentions are introduced into it; their children are regarded by them, not with parental looks, but with ſuſpicious eyes; they are neglected as the ſuppoſititious offspring of unlawful embraces; they are hated as perpetual remembrancers of the infidelity of their mother.

Since the evils, ariſing from infidelity to the nuptial bed, are ſo numerous and ſo great, it is plain, that the Legiſlators of all countries have done well to enjoin the ſtricteſt fidelity to it, and to guard it by the ſevereſt ſanctions.

Hence, if either of them violates it, the innocent party acquires a right to have the marriage diſſolved, and to obtain a divorce for the adultery of the other; becauſe they entered into marriage under the condition of mutual fidelity to one another, and brought themſelves under ſtrict obligations to obſerve it. Therefore, as ſoon as one of the parties preſumes to looſe himſelf from his obligations, the condition fails, and the innocent party acquires a right of being looſed from the obligations under which he came, and of being delivered either from the evils, or from the chance of the evils, which may be conſequent on the infidelity of his ſpouſe *. Thus, we are arrived at the fourth queſtion concerning marriage (§ 169.), and ſhall, therefore, proceed to treat of its diſſolution.

TITLE XIV.

Of the Diſſolution of Marriage.

§ 277. MARRIAGE is ſaid to be *diſſolved*, in the moſt extenſive ſignification of the word, when it is declared to have never ſubſiſted, and to have been null *ab initio*. But it is ſaid, in a more proper as well as more limited

* The Scotch hiſtorians inform us, that King EVAN III. of Scotland, a prince, who, our antient legends pretend, reigned ſome years before the birth of our SAVIOUR, made a Law, by which it was enacted, that ſuperiors ſhould, in all caſes, have the firſt night of the brides introduced into their lands; a right, which, no doubt, our anceſtors took care to exerciſe. The Law ſeems once actually to have been made, and to have continued long in force. For it was not repealed till the days of MALCOLM CANMORE. He made thoſe firſt fruits, the *Marchetæ mulierum*, as they were called, redeemable by money. The preciſe ſum, with which they might be redeemed, varied with the rank of the perſon, See *R. M. lib.* 4. *c.* 31. and SKENE's *notes on it.*

ed ſenſe, to be diſſolved, when a man and a woman, who were validly married to one another, and had brought themſelves under the obligations of a married life, either are declared by the ſentence of a competent court to be no longer huſband and wife, and are freed from the obligations with which they were bound, or are effectually ſeparated from one another by death.

§ 278. Marriage may be declared to have been null *ab initio* for the ſame reaſons, for which people are prohibited by Law to enter into it (§ 170.).

Hence, *firſt;* It may be declared to have been null from the beginning for impotence of body: for marriage is entered into for the procreation of children. Conſequently, all, who cannot anſwer this its primary end, cannot and ought not to be allowed to marry (§ 171.).

Therefore, if the impotence ariſes from ſome viſible, apparent, and incurable cauſe, the marriage may be, at any time, declared to have been null. But, if one, who is in reality impotent, *appears* to be like other men, and labours under a latent diſeaſe, his debility, however real it may be, is no cauſe of an immediate declaration of the nullity of the marriage. Some time muſt be expected, ere it can be annulled. Both the Civilians and the Canoniſts make this to be three years; and their doctrine ſeems not to be diſagreeable to common ſenſe. For one, who is *in reality* impotent, may at ſome time be declared to be ſo. But *how long* ſhall his ſpouſe be obliged to wait? She cannot be bound to remain in expectation for ever; ſome time muſt be defined, within which if he gives no proofs of his virility, he muſt be held to be impotent; and three years ſeem to be long enough. It is not therefore unreaſonable to ſay, that a marriage may be declared, after this time is paſt, to have been null, in caſe one of thoſe, who appeared to be, and therefore muſt be called married perſons, both was from the beginning, and continued during the courſe of three whole years, to be impotent.

The ſame doctrine, which has been declared concerning the impotence of males, is to be held with regard to the inability of females, *arg. R. M. l.* 2. *c.* 17. § 2. for the diſpoſition of the Law ought to be the ſame in all caſes, in which the reaſon of it is the ſame; and women are marriageable in Scotland at the age of twelve years.

Theſe principles, which are taught by JUSTINIAN in the Civil Law, *l.* 10. C. *de repud. N.* 22. *c.* 6. *N.* 117. *c.* 12. are inculcated by his Holineſs, in that curious title of the decretals *de frigidis et maleficiatis et impotentiâ coëundi*, as well as in other parts of the Canon Law, *Dec. p.* 2. *cauſ.* 33. *quæſt.* 1. and have been *minutely* explained by both the Civilians and the Canoniſts, have been adopted into the Law of Scotland; becauſe thoſe, with which they are ſtrictly linked, and from which they flow, have been adopted into it. But it is impoſſible, when treating of this ſubject, to avoid offending modeſt ears: for one ought not, in a juridical treatiſe, to uſe expreſſions which are dubious. I will not therefore go into the detail upon it, and ſhall content myſelf with referring you to the writers on the Civil Law, from whom you may get full and ſatisfactory anſwers to every queſtion.

Secondly, Marriage may be declared to have been null from the beginning for ſuch an imbecillity of mind, as renders one incapable of giving a deliberate conſent, deprives him of the uſe of his reaſon, or hinders him from the free exerciſe of his will. For it is entered into by conſent (§ 172.). Conſequently, where there is not a real and a free conſent, there is no marriage. Therefore, marriage is liable to be declared to have been void for Ideotiſm, madneſs, force, fear, or any other cauſe, which deprives one of the uſe of his reaſon, and renders him incapable of conſenting to marriage.

Thirdly; Marriage is, and is liable to be declared to have been null, if the married perſons are related to one another in forbidden degrees of propinquity, (§ 173. *ſqq.*)*.

Fourthly;

* It ſeems to have been otherwiſe by the antient Law of Scotland, during the prevalence of Popery, and of the maxims of the Canon Law: for a marriage, which had been once celebrated, could not be either diſſolved or

Fourthly; Marriage is liable is to be declared to have been null, if one of the parties ſtood married to any other at the time, at which the ſecond marriage, the nullity of which is to be declared, was contracted: for polygamy is prohibited by the Law of Scotland (§ 178.).

Fifthly, A marriage contracted by one, who has been divorced for adultery from the perſon to whom he was lawfully married, and the perſon, with whom he is declared by the ſentence of the Judge to have committed the crime, is, by a ſpecial act of Parliament, 1600, *c.* 20. declared to be null. Conſequently, it is liable to be declared by the decree of a competent Court to be ſo (§ 180.).

But it muſt be remarked, that all thoſe cauſes, for which marriage is liable to be declared to have been null, muſt have exiſted from the beginning. For a marriage, which is lawfully contracted, and is once perfected, cannot be declared either to be or to have been null for an accidental calamity, which had not exiſtence at the commencement of it, and ſupervenes only afterwards. *Quid enim tam humanum eſt, quam ut fortuitis caſibus mulieris maritum, vel uxorem viri, participem eſſe: l.* 22. § 7, 8. *ff. ſoluto mat. l.* 8. *ff. de his qui ſui vel alieni juris ſunt, l.* 16. § *ult. ff. de ritu nupt.*

But, tho marriage cannot be annulled for a cauſe which begins to exiſt only after its completion, it is plain, that ſuch a misfortune may befal one of the ſpouſes, as will entitle the other to ſeparate from him, and to get a ſeparate maintenance in the ſame way, as when they are ſeparated *propter ſævitiam alterius conjugis*, and an alimony is allowed to the injured party.

Actions declaratory of the nullity of marriage muſt be commenced and ſued before the Commiſſaries of Edinburgh. For inferior Commiſſaries are not judges competent to them, *arg.* 1609, *c.* 6. *A. S.* 28th *Feb.* 1666.

§ 279. The cauſes, for which a valid and effectual marriage may be diſſolved during the life of both married perſons, are two; 1) Wilful deſertion; 2) Adultery.

§ 280. For a huſband or a wife, who deſerts the nuptial bed, fruſtrates the end for which marriage was inſtituted, and does not fulfil the obligations, under which married perſons bring themſelves by their entrance into it. Hence wilful and malicious deſertion of the nuptial bed is declared by 1573, *c.* 55. to be a ſufficient cauſe of obtaining divorce, and of diſſolving marriage.

But marriage is one of the moſt ſacred and indiſſoluble ties, by which mankind can be bound. The Law hath therefore introduced a certain method of procedure, in order to obtain a divorce for wilful and malicious deſertion. 1) Ere an action can be ſued for obtaining a divorce, 'tis neceſſary, that the deſertion appear to be wilful, malicious and obſtinate, and that it hath laſted for a conſiderable time. The act of Parliament requires it to be continued for four years. But cuſtom hath very rightly derogated from this part of the Law; for the Commiſſaries ſuſtain actions and pronounce decrees of adherence after a deſertion of one year.

Every mutual contract implies mutual obligations. One, therefore, who challenges another for not fulfilling it, or ſues him to perform the obligations incumbent upon him, ought himſelf either to have fulfilled, or to be willing to fulfil his own part of it. Hence it is neceſſary, 2) That the perſon, who has been deſerted, bring an action of adherence againſt the perſon, who has continued, during one year, to deſert the nuptial bed, in order to have him decreed to adhere to it. This action may be brought before the inferior Commiſſary, within whoſe juriſdiction the deſerter lives, as well as before the Commiſſaries of Edinburgh, *Aſ.* 28th *Feb.* 1666.

3) That

or declared to have been *ab initio* null; and that *propter religionem ſacramenti*. So the parties were no more than *ſeparated* from one another. Of courſe, the children, if any were procreated between them, were held to be legitimate, and to be heirs of their parents, *R. M. l.* 2. *c.* 16. § 74.

3) That decree be recovered againſt the deſerter, ordaining him to adhere to his ſpouſe and to his nuptial bed.

4) That Letters of horning, conformable to the decree of the Commiſſary, be iſſued on it.

5) That the deſerter be, in conſequence of theſe letters of horning, charged to obey the ſentence of the Commiſſary by adhering to the nuptial bed.

6) That, if he contemns the charge and does not obey it, he be denounced rebel and put to the horn.

7) Then the perſon deſerted muſt make application to the preſbytery or ſuperior ſpiritual Court, within whoſe territory the deſerter remains, and require them to direct private admonitions to the offender admoniſhing him to adhere.

8) The deſerter, by a contemptuous diſregard and diſobedience of theſe private admonitions, muſt make it neceſſary for the ſpiritual Court to order either the miniſter of the pariſh in which the offender lives, or ſome other miniſter to proceed, 1) To public admonitions, and if they be contemned, 2) To the ſentence of excommunication.

After the pronunciation of this ſentence, an action of divorce muſt be brought before the Commiſſaries of Edinburgh: for all actions of divorce muſt be brought before them; the Commiſſaries of other Dioceſſes are not Judges competent in them, 1609, *c.* 6—*Aſ.* 28th *Feb.* 1666. The Commiſſaries are obliged to hold the pronunciation of the ſentence of excommunication to be a ſufficient cauſe of divorce, and to diſſolve the marriage of the deſerted and deſerter by divorcing them from one another.

But it muſt be remarked, that the ſpace of four years muſt be paſt from the firſt deſertion, ere it is lawful for the Commiſſaries to pronounce the ſentence of divorce. Thus far cuſtom has receded from the words of 1573, *c.* 55. but adhered to its ſpirit by allowing a decree of adherence to be made after a deſertion continued for the courſe of one whole year.

§ 281. *Secondly*, Marriage may be diſſolved for the adultery either of the huſband or of the wife; for they are both of them bound to be faithful to each other's bed. Conſequently, if they violate the fidelity due to it, the injured party acquires a right, which he may, if he pleaſes, uſe, to have his marriage diſſolved, and to get the ties, with which he is bound, looſed by a formal ſeparation and divorce of the one from the other (§ 276.).

I ſay, he may uſe it, if he pleaſes: for, if he has once forgiven the injury done him, he is held to have relinquiſhed the right, which he had acquired to ſue out a divorce. It would be abſurd to allow one to complain of an injury, or to bring his action upon it, after he has remitted it, *arg. ſ. ſt. R.* I. *c.* 13. § 2.

From hence it follows, that one is precluded from the right of obtaining a divorce, if he ſhall, after he has come to the knowledge of the guilt of his ſpouſe, go to the nuptial bed, and behave as if no ſuch thing was known to him, *ſ. ſt. R.* I. *c.* 13. § 2. *St.* 15th *July* 1681, *Watſon.* Therefore, if they continue to cohabit, this will be held to be evidence of actual copulation; unleſs the innocent party proves, that he retired immediately from the participation of the other's bed, and lay in a ſeparate apartment. For, if this is proved, it puts the *onus probandi* on the guilty perſon, and makes it neceſſary for *him* to prove, either that he was admitted to actual copulation, or at leaſt, that he lay in the ſame bed with his wife; in which caſe, the injury will be preſumed to be forgiven, *Stair, ibid. Nam volenti non fit injuria.* Such a one is contented to put up with the affront done to his honour. Of courſe, he is excluded from complaining afterwards, and from obtaining a divorce; for every thing, from which it appears that the perſon, who was injured, has forgiven the injury done him, bars him from making the complaint.

From the ſame principle it follows, that, if both the huſband and the wife are guilty of adultery, the one cannot ſue to be divorced from the other on ac-

count of a delinquency, of which himſelf is equally guilty. *Eâ lege, quam ambo contempſerunt, neuter vindicetur: paria enim delicta mutua penſatione diſſolvuntur, l.* 39. *ff. ſolut. mat.*

An action of divorce cannot be ſued before an inferior Commiſſary. It muſt be brought before the Commiſſaries of Edinburgh: for they have a privative juriſdiction, in the firſt inſtance, in all actions of divorce, 1609, *c.* 6. *A. S.* 28th *Feb.* 1666.

§ 282. Thoſe, who have been divorced from one another either for wilful deſertion or for adultery, become, on the diſſolution of their marriage, unmarried perſons. Conſequently, they are both of them, the guilty as well as the innocent, at liberty, ſince they are not prohibited (§ 170.), to marry any body they pleaſe: nay, they may go together, and marry one another again. Only it is ſpecially enacted, 1600, *c.* 20. that all marriages, contracted by perſons divorced from their lawful ſpouſes for adultery, with thoſe with whom they are declared by the ſentence of the Judge to have committed the adultery, are null; and, therefore, that the children, produced from ſuch unlawful embraces, are unable to ſucceed as heirs to their parents, *Go.* 22d *June* 1670, *Lyle.*

§ 283. *Laſtly;* Marriage is diſſolved by the death either of the huſband or of the wife.

TITLE XV.

Of the Conſequences of Marriage, after it is diſſolved.

§ 284. FROM what has been ſaid in the foregoing Title it appears, that marriage may be diſſolved in three different ways; *firſt*, becauſe it was void from the beginning; *ſecondly*, on account of the delinquency of one of the married perſons; and *thirdly*, by death. It will be eaſy to ſhew the conſequences, which it has, after its diſſolution, in all theſe three caſes.

§ 285. In caſe it was void *ab initio*, it has not properly any effects; for it never ſubſiſted. Therefore, every thing, which has been done in conſideration of it, muſt, as much as poſſible, be reſtored to the ſtate in which it was before the marriage. The agreements of the parties, and every article of them, become void; the portion, which has been given by the woman to the man, muſt be returned to thoſe, from whom it came; the proviſions, which are made either by the Law or by contract, are not due, *arg. R. M. l.* 2. *c.* 16. § 73, 74. *c.* 17. § 1, 2.—*l.* 3. *ff. de jure dot.*—*Ha.* 14th *July* 1610, *Earl of Eglington.*

§ 286. In caſe it is diſſolved for the delinquency of one of the ſpouſes, it may be either for wilful deſertion, or for adultery (§ 279.).

§ 287. The conſequences of a marriage diſſolved for wilful deſertion are determined 1573, *c.* 55. *the partie offender to tyne and loſe their tocher & donationes propter nuptias.* Theſe words, it muſt be owned, are obſcure; they do not give that full and preciſe information, which in a matter of this kind one would wiſh to get; and leave ſeveral points doubtful, which ought to have been defined. The difficulty ariſes chiefly from the firſt part of the ſentence, in which it is ſaid, that the offender ſhall *loſe the tocher:* for the other is plain enough.

Thus much is clear, 1) That the party offending loſes his right to the proviſions, which have been made either by Law or by contract for him: for theſe are meant by the *donationes propter nuptias* in the ſtatute, and are applicable both to the huſband and to the wife. But the party, to whom the injury is done, ought not to ſuffer for the delinquency of the other. Therefore, 2) He becomes immediately entitled to all the proviſions made for him either by the Law or by contract in the ſame manner, as if the marriage had been diſſolved by death at the time,

time, at which the parties are divorced, *arg. Du.* 21ſt *March* 1637, *Manderſon.* But a doubt remains concerning a third point, whether the offender is obliged to *reſtore* to the party offended the fortune, tocher, or portion, which he got with his ſpouſe. In order to reſolve the difficulty, it muſt be remarked, that *tocher* ſignifies 'the fortune which a huſband gets with his wife *;' and that the words uſed in the ſtatute may be underſtood either of the caſe in which the huſband is ſuppoſed to be the offender, or of that in which it is ſuppoſed to be the wife. In the firſt caſe they muſt mean, 'that the huſband, who has offended the Law 'by deſerting his wife, ſhall loſe the fortune which he got with her, ſhall not 'be allowed to retain it, but ſhall be obliged to reſtore it to her:' for this is the only meaning, which theſe words, *the huſband offending ſhall loſe the tocher*, can have. But in the other caſe they muſt mean, 'that the wife, who has offended, 'ſhall loſe her tocher, that ſhe forfeits it to her huſband, that he is entitled to 'retain it, and that he is not bound to reſtore it to her.' It muſt be owned that it is not clear, whether the Scotch Legiſlature intended they ſhould be underſtood in the one or the other meaning, or in both. But it is moſt probable, that it had the Civil Law in its eye, and meant by them no more than is expreſſed in the latter explanation of the words. For, among the Romans, the *dos* or tocher always returned to the wife on the diſſolution of the marriage; and one of the exceptions to the general rule was, 'provided its diſſolution proceeded not from 'her fault.' In that caſe the huſband was not, as in ordinary ones, bound to reſtore it, but was entitled to keep it to himſelf. 'Tis to this exception, that the Scotch ſtatute ſeems to allude; for the word *tocher* is always applied to a woman; we never ſay *his tocher*, or *a man's tocher*; beſides, in thoſe caſes, in which a marriage is diſſolved becauſe it was void from the beginning, all things return *hinc inde*; and the Legiſlature ſeems to have inſerted theſe words in the act, in order to diſtinguiſh this caſe in which the marriage is ſuppoſed once to have ſubſiſted, and to be diſſolved for the fault of one of the parties, from the one which has been juſt mentioned. So that the ſtatute cannot be underſtood to determine, that the huſband, in caſe he is the offender, is bound to reſtore the fortune which he has got with his wife; it leaves this a moot point, and by doing ſo gives one good ground to maintain, that he is not bound to do it. Indeed, equality, which the Law ſtudies to preſerve in all caſes, could not otherwiſe be maintained between the man and the woman. For the woman has nothing which ſhe can reſtore to her huſband, upon being the offender, and it would be hard to make the obligation of reſtitution lie on the offending huſband alone.

The *dos* or portion is given in order to enable the huſband to bear the burdens of matrimony, and ought to remain with him who bears theſe burdens. But the huſband continues, after he is divorced, alone bound to bear them; he is not freed from them by it, and no part of them is transferred to the wife; ſhe has no body but herſelf to maintain, and their common children muſt be maintained by him alone. But ſhe contributed to bring them into being, and ought therefore to contribute ſomething towards their ſupport. Of courſe, her portion ought to be ſtill retained by her huſband; and it is enough, if ſhe becomes immediately entitled to enter on poſſeſſion of the proviſions made for her on the event of the diſſolution of the marriage. If the huſband was bound to reſtore her portion, he would for the ſame reaſon be bound to account for every pecuniary advantage, which he hath made during the marriage either by her induſtry or otherwiſe, and to pay her for her labour. Thus, an endleſs diſpute would ariſe between them.

The opinion, which has been maintained, *ſeems* to be held by good authorities in the Law of Scotland. Lord Viſcount STAIR † ſpeaks not a word of the obligation of reſtitution; all, to which he ſays the party injured is entitled, is *the ſame*

* See SKENE on the word *Dos*.
† Inſt. Book I. Tit. IV. § 22.

ſame benefit as by the other's natural death. 'Tis true, he ſays that *the party injurer loſeth all benefit accruing through the marriage:* but this means not, that he is bound to *reſtore* any thing; it means no more than that he ceaſes to have the rights which he acquired by marriage, and is not entitled to the proviſions made for him. Sir GEORGE MACKENZIE * and Lord BANKTON † ſeem both to be of the ſame opinion; and their doctrine is confirmed by a judgment of the Court of Seſſion, 1733, *Lady Locharriot*, and ſeems not to be diſagreeable to the Civil Law. For the rights which the wife had by it, to get her *dos* reſtored to her immediately on the diſſolution of the marriage, is like that which ſhe has by the Law of Scotland to enter on poſſeſſion of the proviſions made for her; her huſband made none for her; her *dos* returned to her; and the *donatio propter nuptias* was equal to it, and was made only in ſecurity of it. So the obligation, under which the huſband lay to reſtore it, is, in no ſort, like that under which he would be brought, in caſe he was obliged among us to reſtore her portion. At the ſame time it muſt be owned, that Sir JAMES BALFOUR, Sir ROBERT SPOTISWOOD ‡, and Mr. ERSKINE **, to whoſe authority great reſpect is due, are all of opinion, that he is bound to reſtore it.

Having premiſed theſe general obſervations, it may not be improper to conſider the conſequences, which the diſſolution of the marriage may have, 1) In caſe the wife is the offender, and is divorced for deſerting her huſband, 2) In caſe the huſband is the offender, and deſerts his wife.

In caſe a marriage is diſſolved, becauſe the wife has maliciouſly deſerted her huſband, 1) He *retains* every thing which he *has got* by her; for the Law ſays, ſhe *loſes* her *tocher*. Thus, if he has got a portion before marriage, or has made acquiſitions during its ſubſiſtence, all theſe he retains. For the ſame reaſon, he is entitled to retain the management, and to reap the fruits of her heritable eſtate during her life; for he acquired right to them by the marriage, and cannot be deprived of it by her delinquency. 2) He becomes entitled to enter immediately upon poſſeſſion of the proviſions made for him in the ſame manner, as if the marriage had been diſſolved by her death at the time of the divorce, and to retain them till his death. Thus, he will be entitled, upon her death, to the courteſy of her heritage, in caſe he would have been entitled to it if the marriage had been diſſolved by her death at that ſame point of time, at which it is diſſolved by the divorce; if he would not have been entitled to it, in caſe the marriage had been diſſolved at that time by her death, he will not be entitled to it at the time at which ſhe actually dies. 'Tis true, it may be ſaid to be owing to the fault of the wife, that children are not procreated, in order to entitle the huſband to the courteſy, and that therefore he is entitled to it in all caſes, in which marriage is diſſolved for wilful deſertion committed by his wife; becauſe he ought not to ſuffer for her fault. But it ſeems to be otherwiſe; for the Law does not make his condition the better for her delinquency; it might have happened, that he would not have been entitled to it, tho ſhe had not deſerted his bed. Of courſe, the loſs of the courteſy, which he ſuſtains by her deſertion of his bed, is no more than conſequential damage; it ariſes not neceſſarily from the divorce. But one is not entitled to get reparation of conſequential damage. Beſides, the Law gives a huſband the courteſy of the heritage of his wife, becauſe he is ſuppoſed to be the father of her heir; and it would be abſurd to ſee a ſon enjoying an ample fortune, and his father, perhaps, depending upon him. Therefore, he is not entitled to it, in caſe he was not *actually* the father of her heir.

The

* Inſt. Book I. See alſo his obſervations on 1573, *c.* 55.
† Inſt. Book I. Tit. V. § 134. ‡ On the Title *Divorcement.*
** Inſt. Book I. Tit. VI. § 25.

The wife, who gave occaſion to the divorce by maliciouſly deſerting her huſband, loſes every advantage which ſhe would have had, in caſe the marriage had been diſſolved by his death. The portion, which ſhe brought does not return to her; it remains with her huſband; he ceaſes to be bound to maintain her; ſhe muſt depart forever from his family, and is not entitled to the proviſions made for her either by contract or by Law. Conſequently, ſhe has no right to draw her *jus relictæ* out of the moveables of her huſband; to have a terce of his heritable eſtate; or to get a jointure or other proviſions, if any were ſtipulated to her, *R. M. l.* 2. *c.* 16. § 73.—*c.* 17. § 5.—*ſ. ſt. R.* I. *c.* 13. § 1.

Again, in caſe the divorce is obtained at the ſuit of the wife, for the delinquency of the huſband, ſhe becomes entitled immediately to all the proviſions made for her, either by Law or by contract. So, if ſhe was by contract provided to a jointure, to a ſhare of the houſhold-furniture, to part of the moveable eſtate of her huſband, or to any other thing, ſhe is entitled to enter immediately upon poſſeſſion of them, in the ſame way, as if the marriage had been diſſolved by the death of her huſband. If ſhe was left to the chance of the proviſions of Law, ſhe has right to them. But the huſband, for whoſe delinquency the marriage is diſſolved, loſes all the benefit which he might have reaped by it. He ceaſes to have the management, and to reap the fruits of her heritable eſtate; he ceaſes to acquire the property of the moveables, which accrue to her; he is not entitled to the courteſy of Scotland, even tho he would have been entitled to it, in caſe the marriage had happened to be diſſolved by the death of his wife at that time, at which the ſentence of divorce was pronounced. But he is not, as has been ſaid, bound to *reſtore* any thing to her.

§ 288. In caſe the divorce is obtained for adultery, 'tis the common opinion of the writers on the Law of Scotland, tho it is not expreſsly defined by ſtatute, that the conſequences of it are the ſame with thoſe of a divorce obtained for malicious deſertion, *R. M. l.* 2. *c.* 16. § 73.—*c.* 17. § 5.—*ſ. ſt. R.* I. *c.* 13. § 1. Only it muſt be remarked, that the time, at which the divorce is obtained, may produce very different conſequences. For the marriage may be diſſolved by the ſentence of divorce either before or after year and day are paſſed from the time, at which the man and the woman became huſband and wife.

In caſe it is diſſolved before a full year is paſſed from its conſtitution, there either was or was not a living child procreated of it.

In caſe the wife bore not a living child to her huſband, and the marriage is diſſolved for adultery committed by her, her huſband, who is innocent, and at whoſe ſuit the divorce was recovered, acquires the property of all the moveable eſtate, which he got with her: for he is not obliged to reſtore it, tho his wife ſhould happen to die; and his repreſentatives are not obliged to reſtore it, tho he ſhould happen to die before a full year is paſt from the conſtitution of the marriage. The reaſon is, not that he *acquires*, by the diſſolution of the marriage for the delinquency of his wife, a perfect and an indefeaſible right to it, but becauſe ſhe *loſes*, for her own delinquency, her *jus relictæ*: ſhe is not entitled to any part of the eſtate of her huſband. But he is not entitled to the courteſy, or to any other *proviſion* made for him out of her eſtate; becauſe, *ex hypotheſi*, there is not a living child procreated of the marriage. For one is not entitled to the courteſy, unleſs a living child is procreated of it, *C. March* 1589, *Innerwick*. And in caſe marriage is diſſolved before year and day from the conſtitution of it, all things are, as we ſhall ſee, reſtored on both ſides.

If the divorce is obtained for the delinquency of the huſband, and he happens to die, before year and day are paſſed from the commencement of the marriage, the wife can have no right to the proviſions, either legal or conventional, made for her out of either the moveable or the heritable eſtate of her huſband; becauſe ſhe would not have had a right to them, tho the marriage had not been diſſolved by divorce, ſince there is not a living child procreated of the marriage, and it would have been diſſolved by death within year and day. Therefore,

ſhe can have no right by her marriage, unleſs a ſpecial proviſo has been made in an ante-nuptial contract, that the contract ſhould ſtand good, and every article of it be fulfilled, tho the marriage ſhould happen to be diſſolved within year and day. In general, it may be affirmed, that, if the marriage both is diſſolved by the ſentence of divorce, and would have been diſſolved by the death of one of the ſpouſes, the other, who is offended and at whoſe ſuit the divorce was obtained, can have no right, which he would not have had, if a divorce had not been obtained, and the marriage had happened to be diſſolved by death, within year and day from its conſtitution: for this plain reaſon, becauſe the Law, 1573, *c.* 55. does not give, on account of the delinquency of the offender, any new right to the offended; it does not render his condition better, than it would have been, if no delinquency had been committed; it means only to puniſh the delinquent by detracting from his rights, and by rendering his condition worſe than it would have been, if he had not committed the crime, and given cauſe to the diſſolution of the marriage.

In caſe either there is a living child procreated of the marriage, or both ſpouſes live a full year after its conſtitution, it has, upon being diſſolved for adultery, the ſame conſequences, which, it has been ſaid (§ 287.) it has upon being diſſolved for wilful deſertion.

§ 289. In caſe marriage is diſſolved, and the married perſons are ſeparated from one another not prematurely by divorce, but naturally by death, it may be followed by different conſequences according to circumſtances. For it either is diſſolved before a full year is paſſed from the conſtitution of it, or ſubſiſts for year and day after it. Either the parties have or they have not entered into a contract of marriage.

In caſe it is diſſolved before year and day are paſſed from the time of its conſtitution, it has not, as it has been ſaid, any effects. For every thing, done *intuitu* of it, is, as much as it can be, reſtored to the ſtate, in which it was before marriage. Every thing, brought by the wife to the huſband, or given by the huſband to the wife, or by a third perſon to either of them *intuitu matrimonii*, returns to thoſe, from whom it came. The huſband is not entitled to any proviſion out of the eſtate of his wife, and the wife is not entitled to any out of the eſtate of her huſband. In ſhort, both the huſband and the wife return to the condition, in which they were before marriage, *Du.* 23d *July* 1634, *Maxwell.—Ha.* 1600, *Lady Maxwell.—Ba. tacks*, 30th *Jan.* 1562, *Robertſon.—Ha.* 8th *June* 1610, *Roſs.—Du.* 13th *July* 1627, *King.—St.* 9th *November* 1672, *Guthrie.*—16th *July* 1678, *Burleigh.*—23d *Feb.* 1681, *Gordon.*

This is the diſpoſition of the Law in all caſes, in which the marriage ſubſiſts not for a full year from the time of its conſtitution; no matter whether the huſband and wife did or did not make a contract of marriage. But there are two exceptions to this rule. Firſt; The marriage has its full effects, either legal or conventional, in caſe a ſpecial *proviſo* was made by an effectual contract, that, in caſe the marriage ſhould be diſſolved before year and day from the time of its conſtitution, it ſhould have the ſame effects, which it would have had, in caſe it ſubſiſted for a full year. In that caſe, nothing returns on either ſide, but every thing ſubſiſts on both ſides, tho the marriage ſhould happen to be diſſolved before it has ſubſiſted a year. Every article of the contract muſt be fulfilled in the ſame way, in which it would have been fulfilled, in caſe the marriage had ſubſiſted for that time. The reaſon is, *pactum dat legem contractui;* perſons may enter into any articles, which are agreeable to them.

Secondly; In caſe a living child, who was heard to cry, is procreated of the marriage, it produces its full effects, tho it ſhould be diſſolved before a year is paſſed from its conſtitution, *Ho. Huſband*, 26th *Jan.* 1612, *Ogilvie.—Du.* 20th *July* 1632, *Irvine.* By its full effects I mean all thoſe, either legal or conventional, which it would have produced, in caſe it had ſubſiſted either for more than a year, or for the longeſt time. The reaſon is, that by the procreation of a living

living child the marriage is, as much as it can be, conſummated; the end, for which it was inſtituted, is accompliſhed; it has, therefore, produced its full effects. Of courſe, it ought to have all the patrimonial effects, which it can ever have.

§ 290. In caſe it ſubſiſts for a full year, it produces certain effects, to wit, either thoſe, which are determined by the Law, or thoſe, which have been determined by the agreement of parties. For the parties either have not, or have entered into a contract of marriage. In caſe they have not entered into one, it muſt produce the effects, and each of the ſpouſes has the rights, defined by the Law. Let us therefore ſuppoſe, 1) That the huſband dies before the wife, and leaves her a widow; 2) That the wife dies before the huſband, leaving him to ſurvive her; and let us ſee the rights, which each of them has upon the diſſolution of the marriage.

§ 291. A huſband, it has been ſaid, reaps the fruits of all the labour of his wife. During the marriage, ſhe labours for him, takes care of his affairs, and, by her frugality, aſſiſts him in adding to his ſtock. Beſides, he acquires the property of all her moveable eſtate, and every thing, gained by her, accrues to him, Of courſe, ſhe is unable to lay up for herſelf. Therefore, the Law holds it to be the duty of every huſband, at the time of his marriage, to make reaſonable proviſions for the maintenance of his wife, in caſe ſhe ſhall happen to ſurvive him. *R. M. l.* 2. *c.* 16. § 2. Hence, if a contract was made between them before marriage, the rights of the huſband and wife muſt be regulated by it as well after the diſſolution as during the ſubſiſtence of it *, *R. M. l.* 2. *c.* 16. § 8, 9, 10, 11. And if any thing is not expreſsly determined by the words, it muſt be determined by attending to the ſpirit of the contract, and taking a complex view of it and of the Law.

The deciſions of the Law are the ſame, in caſe their pecuniary intereſts were determined by a poſt-nuptial contract, provided it be a reaſonable one; for it is not in that caſe revocable (§ 250.).

§ 292. But they may neglect to enter into one before marriage; the huſband may not make ſpecial proviſions for his wife, and he cannot be compelled to do it: for a woman, who does not take care to provide for her intereſt by a contract before marriage, is preſumed to hold herſelf contented with the proviſions made for her by the Law, and to be willing to run the riſk of the fortune of her huſband, *H.* 382. 'Tis true, if her portion is not actually recovered by him, ſhe may in ſome caſes *retain* it, till ſecurity is found her for the intereſt of it, or for a reaſonable jointure, *H.* 387.—*Fo.* 10th *Nov.* 1687, *Forreſter.*

But the Law does not, in caſe ſhe is not otherwiſe provided, leave her deſtitute, but gives her a right to a certain proviſion both out of his moveable and out of his heritable eſtate.

§ 293. The ſhare of the moveable eſtate of a huſband, to which his relict is entitled, is, in the Law of Scotland, called the *jus relictæ*, and amounts ſometimes to a half, ſometimes to a third part of all his moveables.

It amounts to an half in two caſes: Firſt; In caſe the huſband hath not left any children, procreated either of this preſent widow or of any other marriage: Secondly; If all the children, whom he hath left to ſurvive him, were foriſfamiliated during the life of their father, *Ba. Teſtament*, 23d *Feb.* 1561, *Hamilton.*

For, if he hath left unforisfamiliated any children either of the preſent widow or of any former marriage, *Du.* 17th *June* 1631, *Chapman*—18th *July* 1634, *Henderſons*, the *jus relictæ* extends only to a third part of the moveables (§ 160), which belonged to the huſband, *Ha.* 24th *Feb.* 1607, *Stevenſon.*—*Du.* 19th *July* 1623.

* This is ſo true, that in antient times a huſband could not, by any poſterior deed, augment the proviſions which he had made for his wife by an ante-nuptial contract, *R. M. l.* 2. *c.* 16. § 1, 2, 11. 'Tis otherwiſe at preſent.

1623, *Sibbald.*—*N. executor.*—15th *July* 1622, *Kennedy.*—*St.* 12th *Jan.* 1681, *Trotter.*—*R. M. l.* 2. *c.* 37. § 1, 2. *. Children are ſaid to be ſorisfamiliated, when they have formally *renounced* the right, which, as children of the family, they have to a legitim, and, being no longer conſidered as belonging to the family, are therefore excluded from any ſhare of the moveables belonging to their father at the time of his death, *Sp. forisfamiliation*, 24th *Feb.* 1627, *Roſs.*—*St.* 16th *July* 1678, *Murray*; for one never loſes his right to it, unleſs it is expreſsly renounced and *diſcharged*. *St.* 14th *Feb.* 1677, *Duke of Buccleugh.*—*H.* 475.—*D.* I. 544. 11th *Dec.* 1719, *Lady Balmain.*

Since the *jus relictæ* is ‘ to have a certain portion of the *moveable* eſtate, which ‘ belonged to her huſband,’ it is plain, that, in order to recover it, ſhe can have acceſs to *his moveables* alone. She cannot have acceſs to his heritage; becauſe that, which ſhe is entitled to get, is not heritable.

By conſequence, ſhe can ſue thoſe alone, who have confirmed themſelves executors of her huſband; becauſe the confirmation veſts his moveable eſtate in them. Beſides, they are entitled to ſee, that ſhe get no more than her juſt ſhare of his effects. Therefore, ſhe cannot directly ſue either the moveable debtors of her huſband, or thoſe who poſſeſs his moveables; becauſe ſhe has no *title* to do it. They are liable to thoſe alone, who have acquired a title to his eſtate. But ſhe has not one, merely by being relict, *Ha.* 13th *March* 1612, *Dunduff.*—*Du.* 14th *Feb.* 1622, *Steven*—7th *July* 1625, *Falconer*—9th *Dec.* 1628, *Mackie*—*F.* 12th *Dec.* 1712, *M‘Aulay.* As little can ſhe ſue thoſe, who *intromit vitiouſly* with the moveable eſtate of her huſband. For vitious intromittors are liable to be ſued by creditors alone.

But ſhe may confirm herſelf executrix of her huſband *qua* relict, and, upon this title, may bring every action, which is neceſſary for recovering her ſhare of her huſband's moveables.

I ſay, ſhe is entitled to a ſhare of his moveable eſtate. For, if her huſband leaves no moveables, ſhe has not, becauſe it is impoſſible ſhe can have, a *jus relictæ.*

One's eſtate is properly no more than remains after payment of his debts. Therefore, her ſhare of his moveable eſtate can extend to no more than a ſhare of that moveable eſtate, which remains after his moveable debts are paid out of it †. Of courſe, if his moveable debts exceed his moveable eſtate, ſhe cannot have a *jus relictæ*; for there is nothing, of which ſhe can get a ſhare.

§ 294. A wife has nothing, with which ſhe can maintain herſelf after the death of her huſband: it would be cruel immediately to turn her helpleſs out of doors. Therefore, the Law gives her, 2) A right to have her family maintained at the expence of her huſband, till the firſt term, at which the legal or conventional proviſion, made for her maintenance, becomes payable after his death. Of courſe, his repreſentatives are bound to give her an allowance, in order to enable her to maintain it. 'Tis commonly thought, that this is a moveable debt, and that his executors are *primo loco* liable, *St.* 20th *Dec.* 1662, *Lady Turſapie.* But there are not wanting good reaſons for calling this poſition in queſtion. For this is not a debt, which can properly be ſaid to have been due by the huſband before his death; and, ſuppoſe it was, it implies in all caſes *tractum futuri temporis*, obligations which become continually and ſucceſſively due. Therefore, it ſeems to be heritable (§ 154. *art.* V. § 155. 157, 158.).

The extent of this allowance is arbitrary according to the circumſtances of the eſtate and condition of the deceaſed huſband, and is not regulated by the extent of the jointure provided for her, *G.* 25.—*Fo.* 15th *Jan.* 1709, *Lady Ormiſton*—*F.* 15th *July* 1713, *Creditors of Scot.*—*D.* I. 395. 18th *Nov.* 1737, *Boſwel.* From hence it follows, that, if he does not leave an eſtate ſufficient for paying his debts, his widow cannot be entitled to be maintained at the

* A wife can make a teſtament, and diſpoſe of her moveable eſtate, of courſe, of her *jus relictæ* by it; but ſhe ſeems not to have had this power in antient times, *R. M. l.* 2. *c.* 36. § 7, 8.

† By his moveable debts I mean thoſe which are moveable *quoad jus mariti et uxoris* (160.), or which, if due by her, he would have been liable to pay.

the expence of his repreſentatives. The reaſon is, becauſe her right to have her family maintained out of the eſtate of her huſband, at the expence of his repreſentatives, always ſuppoſes, that he hath left a free eſtate, more than ſufficient for diſcharging his debts: for, if he does not leave as much as will clear his debts, he leaves no eſtate; ſince all, that belonged to him, doth in reality, in this caſe, belong to his creditors. Conſequently, unleſs his wife has acquired ſome legal right by which ſhe has become a creditor of her huſband, ſhe cannot have acceſs to any part of his eſtate; his creditors are always preferable to her, and may attach it for payment of the debts due to them. Now, *ex hypotheſi*, there is no contract. So ſhe has acquired no ſuch legal right. Therefore, a widow is not entitled to have her family maintained out of the eſtate, that belonged formerly to her huſband, in competition with his creditors, to whom it may now be conſidered as belonging.

§ 295. Cuſtom hath introduced certain ceremonies, by which we mark our grief or our reſpect for our deceaſed friends. It would be affronting their memory to neglect the common obſervances of the world. Therefore, 3) A widow is entitled to mournings for her huſband, in caſe they uſe to be worn for perſons of his condition. So his repreſentatives are liable for them, and they muſt be ſuitable to his rank, *St.* 12th *Nov.* 1664, *Murray.*—7th *July* 1675, *Wilkie.*

I doubt not, ſome people may be ſurprized to find one maintaining this alſo to be an heritable debt. But the favour ſeems, in all caſes, to be due to executors, and every burden ought to be held to be heritable which one can find principles for making ſo: for the heir gets, ſurely, enough at any rate. But this is not properly a debt which was ever due by the huſband; neither his perſon nor his eſtate could have been attached during his life, in order to ſecure a fund for it. Beſides, it is the honour of the heir, that reſpect be ſhewn to the memory of his predeceſſor. On theſe principles one may be allowed to conclude, that this debt is heritable, (§ 154. *art.* IV. § 157, 158. 155. *art.* III.).

Being due by the repreſentatives of the huſband, it ſeems to follow, that, in caſe he hath left no eſtate to repreſent him and to pay his debts, the relict is not entitled to mournings: becauſe, if the widows of people who die poor, are not, much leſs muſt thoſe of perſons who die inſolvent, be entitled to wear or to get mournings.

§ 296. She is entitled 4) To the expences of a poſthumous birth; if ſhe happens to bear to her huſband any children after his death. For the child, whom ſhe bears, is his; he would have been bound to be at the expence of its birth, and to maintain it. Conſequently his repreſentatives are bound to pay them to her, *St.* 10th *Nov.* 1671, *Haſty.*—*Fo.* 19th *Feb.* 1706, *Lady Braidiſholm.* And this may well be ſaid to be a privileged debt, due out of the firſt and readieſt of the eſtate of the deceaſed huſband, and preferable to ordinary debts due by him. For the birth of children is a matter not only of private concern but of public utility. It ſeems to be of as great importance to a nation, that a new citizen be born, as that a dead one be buried, *H.* 445. *favorabilior eſt cauſa partus, quam pueri: partui enim in hoc favetur, ut in lucem producatur; puero, ut in familiam inducatur; partus enim iſte alendus eſt, qui (et ſi) non tantum parenti, cujus eſſe dicitur, verum etiam reipublicæ naſcitur, l.* 1. § 15. *ff. de ven. in poſſeſs. mit.*

§ 297. A relict is alſo entitled to a certain proviſion out of the *heritable* eſtate of her huſband (§ 292.). The proviſion to which ſhe is entitled, is, by the Law of Scotland, called the *terce*, and may be defined to be 'a proviſion, made by 'the Law for the maintenance of the relict, and extending to the uſufruct of the 'third of the landed eſtate, in which her huſband died veſted and ſeiſed as of fee,' *R. M. l.* 2. *c.* 16. § 4, 5, 60. *ſqq.*—*ſt. A.* II. *c.* 22. § 5.

The definition ſays, I. That the terce is the uſufruct of the *third* of the landed eſtate of the huſband. II. It is the terce of his *landed* eſtate. III. It is the third of the eſtate in which he was *infeft* as of fee. IV. It is the third of that e-

ſtate alone, in which he dies *infeft*. V. It is a proviſion made for the *maintenance* of the relict.

§ 298. The terce was, perhaps, fixed to be the uſufruct of the *third* of his landed eſtate, becauſe, upon the death of the huſband, his heritage fell naturally to be divided into three parts. For three perſons and their families fell to be maintained out of it. His relict is ſuppoſed to have one, which ſhe is obliged to maintain; the heir has another, proper to himſelf. Beſides, he is ſuppoſed to be married, to have a wife, and to have children. Of courſe, the expence of the maintenance of his family muſt be at leaſt double that of the relict's. For he has, beſides himſelf and his own family, his wife and his children to maintain. In order therefore to maintain all the families equally well, the heir ought to have allowed him *ſomething more than double* the allowance of the widow. Hence, the *landed* eſtate, and it alone, is divided into three equal ſhares; the widow gets one of them, and the heir gets the remaining two. I ſay, the *landed* eſtate: for, the heir being entitled to *ſomething* more than double the allowance of the widow, we ſhall ſee that ſhe is entitled to the third of the landed eſtate alone; and that every thing, which cannot be ranked under it, goes all to the heir.

The terce or third was reckoned to be a proviſion, ſo reaſonable for the maintenance of the relict, that it is called, in the old books of the Law, *R. M. l.* 1. *c.* 3. § 2—*l.* 2. *c.* 16. § 4, 5. *rationabilis tertia*, and was ordained to be the conſtant meaſure of the fund for the maintenance of the widow. So that a huſband was incapacitated, by the diſpoſition of our antient Law, to provide his relict to a jointure, that would extend to *more*, tho he could provide her to *leſs* than the amount of this *rationabilis tertia;* and, if he did expreſsly provide her with a greater jointure, it behoved to be diminiſhed, ſo as to amount, in all caſes, to no more than the terce, *R. M. l.* 2. *c.* 16. § 5, 6, 7. But this has been altered by cuſtom. For it is now lawful for a bride to ſtipulate for herſelf the beſt proviſions, which her bridegroom will conſent to give her.

§ 299. I. The terce is the uſufruct of the third of the *landed* eſtate of the huſband, *terris et tenementis*, *R. M. l.* 2. *c.* 16. § 60.

Therefore, it extends, 1) To land, properly ſo called, *terris:* for it, ſurely, is a part of his landed eſtate. But the land itſelf would be uſeleſs to the relict, were it not, that it yielded fruits: for they alone can help to maintain her. Therefore, it is properly the fruits, to which the terce extends. Of courſe, it muſt extend to *all* the fruits yielded by it.

Hence it extends, 2) To tithes of land: for they are a part of the fruits, which the land produces. Of courſe, it extends to tithes of all ſorts, as well to thoſe which have not been erected, and have not been ſeparated from the land, for inſtance to tithes of lands *cum decimis incluſis* *, as to thoſe which have, by being erected, been ſeparated from the land, and in which the huſband died infeft, *Du.* 13th *Feb.* 1628, *Lady Dunfermline*. For thoſe of the one ſort are as much a fund of maintenance as thoſe of the other. The huſband dies infeft in the one as well as in the other; for being infeft in the land, he is, conſequentially, infeft in the tithes; ſince they were never ſeparated from it, and are included under it. Beſides, a terce of land, from which the tithes are not ſeparated, includes in truth a terce of them; for it muſt include a terce of every thing, which is an inſeparable part of it. But the tithes are, *ex hypotheſi*, not ſeparated from the land; they are a part of it. Of courſe, one, who has a right either to all or to any part of the fruits of the land, muſt neceſſarily draw an analogous part of the tithes.

For the ſame reaſon, 3) It extends to feu-duties. 'Tis true, theſe are paid *in agnitionem dominii*. But they are a conſtant rent paid to the huſband; and they are not *cluſory*. They are, in ſome ſort, adequate to the value of the farm, are like

* It has been adjudged, that the terce extends not to ſuch tithes, as are not rendered, by erection, ſeparate from the land, *St.* 9th *Feb.* 1667, *Moncrief.*

like rent paid by tenants, and are *annui reditus*, to which the brief of terce directs her to be ſerved. Therefore, it ought to extend to them, as well as to annual-rents or other profits out of land *.

For, 4) It extends to annual-rents, and to all other profits, which are due out of lands, and in ſecurity of which the huſband died infeft. The brief ſays, *annui reditus*, *Du.* 30th *Nov.* 1627, *Tenants of Eaſthouſes.*

It extends not only to land, but to tenements, *tenementis.* By tenements, in this place, are underſtood rural tenements alone.

Therefore, 5) It extends to *mills;* for they are immoveable fructiferous rural tenements, in which the huſband is infeft.

6) For the ſame reaſon it muſt extend to fiſhings: for they are appurtenances of the land, and are fructiferous.

Of courſe, 7) It muſt extend to the houſes, which are upon the land; ſuch as cottages, ſtables, barns, *&c.* for they are comprehended under the word *tenementa.* Beſides, they are conſidered as part of the land, accompany it, are not a ſeparate tenement, do not require a ſeparate ſeiſin, and are carried by the ſame infeftment as acceſſories of it. Only it deſerves to be remarked, that if there are two meſſuages or dwelling-houſes on the Land, the principal one belongs, and ſhould be allotted to the heir; and the other to the relict. If there is only one dwelling-houſe on the eſtate, it ought not to be divided, but ought to be allotted to the heir alone. He, therefore, if he inclines to live in it, ought alone to be allowed to have it, and ſhould not be obliged to divide it with the relict. 'Tis ſufficient, if he either provides her with another houſe or pays a ſome of money equivalent to her terce of the meſſuage †. But if he inclines not himſelf to live in it, the relict has a right to be preferred to it, provided ſhe 1) Is willing to rate it at as high a rent as any other will pay for it; and 2) Will, like other tenants, find ſecurity for payment of two thirds of it, the amount of that which belongs to the heir after deducting the terce of the relict, *R. M. l.* 2. *c.* 16. § 62.—*St.* 26th *Jan.* 1665, *Logan.* She is bound to find ſurety for payment of no more than two thirds of the rent, becauſe ſhe has a right to retain the other third, as her terce of the meſſuage.

One, who gets a thing, is entitled to all the appurtenances of it. Hence, the brief of terce orders the relict to be ſerved to the *lands*, *terris cum* pertinentiis. Of courſe, the terce muſt extend, 8) To real ſervitudes, that is, ſervitudes annexed to the terceable eſtate. The relict is entitled to a third of the benefit ariſing from them.

§ 300. The terce is intended for the maintenance of the relict (§ 297. *ax.* 5.); and it extends to rural tenements alone (§ 299.). Of courſe, it extends not to ſuperiorities, or to thoſe lands, the *dominium directum* or ſuperiority of which belonged to the huſband, *S. March* 1541, *L. Glenbervy.* For ſuperiority is conſidered as an indiviſible right, is inſeparable from the perſon of the ſuperior, and is not productive of conſtant, regular and ſucceſſive fruits, ſufficient for the maintenance of any one. Beſides, the intereſt of the vaſſal is here concerned; for he ought not to be obliged either to acknowledge more ſuperiors, or to pay his *reddendo* to more perſons than one.

Conſequently, it can extend to thoſe lands alone, the property or *dominium utile* of which belonged to the huſband: becauſe no others are conſidered as uſeful for helping to maintain the relict.

Since the terce extends not to the ſuperiority itſelf, it cannot extend to thoſe eluſory duties, which are due from the vaſſal to the ſuperior *in agnitionem dominii:* becauſe they muſt follow the ſuperiority itſelf, and can be paid to no other than the ſuperior. Therefore, the relict of a ſuperior is not entitled to a terce either of

* It was once adjudged, and it ſeems to be commonly thought, that the terce extends not to any duties, due to ſuperiors, *Du.* 13th *Feb.* 1628, *Lady Dunfermline.*

† The principal meſſuage was, of old, held to be ſo eſſential a part of the eſtate, that the proprietor of it could not, except in caſes of neceſſity, grant it to be liferented by his relict, *L. B. c.* 110.

of blanch duties or of any other eluſory duties, which uſed to be paid to her huſband by his vaſſals *in agnitionem dominii*, *Du.* 13th *Feb.* 1628, *L. Dunfermline.*

I ſay *eluſory* duties: for if they are, like feu-duties, not eluſory, but profitable, they muſt be terceable.

If the terce extends not to the conſtant profits of ſuperiority, much leſs can it extend to thoſe, which are caſual.

Since the terce is intended for maintaining the relict, it cannot extend to ſuch things, as are incapable of yielding funds for her maintenance. Hence, it does not extend to patronage of churches; becauſe the right of preſenting one qualified to ſupply the vacancy of a church is a thing which is unable to afford, in any ſort, maintenance to the perſon, who has it, *Cr. St. Erſkine* *. Beſides, it is indiviſible: ſo the matter would be inextricable, if the right was to be divided between the heir and the relict, proportionably to the ſhares, which each of them has of the eſtate of the huſband: for it is impoſſible to divide it *per vices*; ſince the right of the relict is perſonal to herſelf, and laſts during her own life alone. Conſequently, the heir, whoſe right is more durable, more noble, and more extenſive than that of the relict, ought to be preferred to her †.

Since it extends to rural tenements alone, 'tis plain, that it cannot extend to houſes held burgage, *Ha.* 20th *June* 1612, *v.* The reaſon, perhaps was, that the widows of burgeſſes poſſeſſed not ſuch rank, as entitled them to a terce.

§ 301. But, II. 'Tis neceſſary, that the huſband was infeft in the eſtate, a terce of which is claimed by his relict (§ 297. *ax.* 3.): for a terce is not due of things, in which he was not ſeized. Hence, a terce is not due of things, 1) Which, by their own nature, admit not of infeftment. Thus, a terce is not due of leaſes of lands: therefore, the widow of a tenant is not entitled to rent the third of the farm which was rented by her huſband: for no tenant is infeft in the lands which he rents; and, if he were, he is no more than tenant; he is not proprietor, and cannot be ſaid to be ſeized *ut de feodo.*

For this reaſon alſo, a relict is not entitled to a terce of rights of patronage. For patronage is a *jus incorporale.* Therefore, it does not properly admit of ſeiſin, ſince it is not held of a ſuperior. At leaſt, it is complete without it.

A fortiori, the terce extends not to money, which is due by perſonal bonds, either bearing intereſt, or containing clauſes excluding executors: for ſeiſin either has not or cannot follow on them.

For the ſame reaſon it extends not to reverſions: for they are *jura incorporalia*, and admit not of ſeiſin.

2) A terce is not due of things, in which, tho they admit, *ſua natura*, of infeftment, the huſband was never actually infeft, *Fo.* 29th *Jan.* 1706, *Carruthers*; and that, tho it ſhould be ſuſpected, that he continued to be not infeft, out of a malicious and fraudulent deſign, in order to fruſtrate the rights, which his relict might happen to have to a terce. For the relict, by betaking herſelf to the legal proviſions, repoſed herſelf on her huſband's honour, and has no right to force him to cauſe himſelf to be ſeized. Of courſe, ſhe can have no right to the terce: for, if the Law gave her right to the terce, it would give her a remedy; that is, it would entitle her not only to force her huſband to cauſe himſelf to be ſeized, but to hinder him from diveſting himſelf of his property, after he was ſeized. Beſides, it would be dangerous to determine poſitively concerning the intention

* It ſeems, however, to have been otherwiſe according to our antient Law, *R. M. l. 2. c. 16.* § 60, 61, 67, 72. 'Tis otherwiſe, in caſe the wife is provided by contract to the liferent of a certain field, *v. g.* of a barony, with all its appurtenances. For in that caſe, if the patronage of a church is annexed to that barony, the relict will alone be entitled to preſent to all the vacancies, which ſhall happen during her life.

† The Law of Scotland has, in certain caſes, given patrons a right to the tithes of pariſhes. Of courſe, a relict muſt be entitled to her third of the tithes, to which her huſband, by being patron, had right.

intention of the huſband. He might remain not ſeiſed, without intending to defraud his relict of her terce. The Law preſumes not, that a huſband has any intention of defrauding her, *F.* 29th *Jan.* 1706, *Carruthers* *.

§ 302. But it is not enough, that the huſband be ſeiſed: he muſt be ſeiſed *as of fee, ut de feodo* (§ 297. *ax.* 3.); that is, he muſt be proprietor of the eſtate, in which he is ſeiſed.

Hence it extends not to lands, which belonged to a former wife, and were liferented by him. For he is not proprietor; he is no more than liferenter of theſe. Therefore, tho he was ſeiſed, it could not be *ut de feodo*, *R. M. l.* 2. *c.* 17. § 3.

But, if he was ſeiſed *ut de feodo*, it is no matter, whether his right was redeemable or irredeemable: for it extends to lands, which are wadſet to him, or which have been adjudged by him. It is true, they may be redeemed: but the relict is entitled to her terce of them, till they are redeemed; and, in caſe they are redeemed during her life, ſhe is entitled to liferent a terce of the money, with which they are redeemed. Beſides; it extends to thoſe acquired by him *titulo ſingulari*, as well as to thoſe, which deſcended to him by inheritance.

§ 303. It is not enough, that the huſband was once ſeiſed *ut de feodo*. It is neceſſary alſo, that he *died* veſted and ſeiſed of the eſtate, of which a terce is claimed by the relict (§ 297. *ax.* 4.): for a terce is not due out of things, in which the huſband was not ſeiſed at the time of his death †; no matter whether he ever was, or was not ſeiſed of them; becauſe 'tis the time of his death, which is alone regarded in this matter. A widow, therefore, may be diſappointed of her terce by every way, in which her huſband may diveſt himſelf of the property of his eſtate. For he retains, notwithſtanding his marriage, a right to diſpoſe of his own property, *R. M. l.* 2. *c.* 16. § 13, 14. Therefore, if he alienates it, the terce muſt be excluded ‡. However, as nobody ought to have it in his power to hurt another after a fraudulent manner, ſo no huſband ought to be allowed to defraud his wife of the right ſhe has to a terce, by betaking himſelf to cunning devices, invented on purpoſe to deprive her of it, *F.* 15th *Feb.* 1712, *Marquis of Annandale*. But it ought to be remarked, that a fraudulent purpoſe and intention is not to be inferred from every inconſiderable circumſtance. The fraud, the purpoſe, the intention of cheating the wife ought to be palpable, evident and glaring. If, therefore, it is doubtful, whether he had, or had not a fraudulent intention of hurting her, the terce will not be due to her; becauſe fraud ought never to be inferred from ambiguous preſumptions, *F.* 29th *Jan.* 1706, *Carruthers*.

§ 304. A relict, therefore, has right to a terce of the lands, in which her huſband died ſeiſed. Therefore, ſhe is not excluded from it, tho an adjudication has been obtained of them, and a charge has been given the ſuperior upon it, *S.* 12th *Dec.* 1677, *Lady Frazer*; becauſe an adjudger, who gives a charge to a ſuperior, is not, by that means, ſeiſed in the lands adjudged: for a charge is not an infeftment; it gives the perſon, who charges the ſuperior, only a right to come in *pari paſſu* with other adjudgers, who have adjudged within year and day of the firſt effectual adjudication. Conſequently, the huſband remains infeft notwithſtanding the charge, which has been given the ſuperior. Indeed,

* It was otherwiſe in antient times. See *ſt. A.* II. *c.* 9.—*Ba.* *Blair v. Hamilton.*—*Sp. terce*, *Craig de feudis, lib.* II. *dieg.* 22. § 27.—*Stair's inſt. l.* 2. *t.* 6. § 16.—*Macdouall's inſt. l.* 2. *t.* 6. § 2.

† The diſpoſition of the Law, in antient times, was different; for, in antient times, the terce extended to thoſe tenements alone, in which the huſband was infeft at the time of the marriage. So that a ſpecial antenuptial proviſo was neceſſary, in order to entitle a relict to a terce of tenements acquired by him after it. For it is probable, that a bride might ſtipulate to have a terce of the tenements acquired by him after the marriage, and that ſuch a ſtipulation was effectual. But without it ſhe had no right to a terce of them, *R. M. l.* 2. *c.* 16. § 5. 8, 9, 10, 11, 33, 41, 60. But it ſeems to have come to be otherwiſe in the days of *R.* III. *Vide ſt. R* III. *c.* 20.

‡ Indeed, if ſhe was ſpecially provided to the liferent of a particular tenement, that right he cannot defeat. Therefore, if he alienates it, before ſhe is infeft in it, his heir is liable to warrant it to her, *R. M. l.* 2. *c.* 16. § 51 for marriage is an onerous contract. I ſay, if ſhe was not infeft. For, if ſhe was, her right is become real, and is therefore effectual againſt ſingular ſucceſſors.

he is never diveſted, till another is actually infeft in the lands; ſo a terce is due to his relict, *K.* 56 *.

For the ſame reaſon, a widow is not excluded from her terce, tho her huſband ſhould have made a conveyance of the lands, and granted either a procuratory of reſignation or a precept of ſeiſin, or both; for the huſband is never diveſted, till either he has reſigned the lands into the hands of his ſuperior, or another has been infeft in them, *St.* 12th *Dec.* 1677, *Lady Fraſer.* For by reſigning them into the hands of his ſuperior, he is fully diveſted, becauſe he reſigns, ſurrenders, and makes over to his ſuperior all right, which he has to them. The ſuperior, therefore, becomes fully veſted of them. If the reſignation is made *ad remanentiam*, the property is thereby conſolidated with the ſuperiority, and the ſuperior needs not be infeft; becauſe he is infeft already. If the reſignation is made *in favorem*; then it is made in favour either of another or of himſelf. If it is made in favour of another, no terce can be due; becauſe the huſband is, by the reſignation, wholly diveſted of all right which he had to the lands; and another is actually ſeiſed in the property, as well as the ſuperiority of them. 'Tis true, the ſuperior is veſted in the property of them, not that he may retain it to himſelf, but that he may convey it to another. Again, if the reſignation is made in favour of the huſband, the reſigner himſelf, that he may be, of new, infeft in the lands; the caſe ſeems to be different: for a reſignation, made for this end, ſeems to be not ſo much a diveſtiture of the huſband, as a mean of conveying the property to thoſe, to whom the reſigner inclines to convey it, and of reſtricting the powers of thoſe, whom he calls to ſucceed to it. Conſequently, humanity will never allow a widow to be deprived of her terce, becauſe her huſband happens to die after he has reſigned his lands in favour of himſelf, but before he has been re-inveſted with them by getting new infeftment. If, therefore, the perſon, who is called next to the ſucceſſion, ſhould attempt to exclude her, his iniquity ought to be repelled, and to be fruſtrated by an *exceptio doli*.

Further; The terce is not either excluded or affected by any feudal delinquency, committed by the heir or ſucceſſor of her huſband, in conſequence of which the ſuperior is entitled to obtain either a perpetual or a temporary right, either to the property, or to the profits of the fief belonging to his vaſſal; becauſe the right of the relict was prior to the delinquency of the vaſſal, and, conſequently, to the right of the ſuperior. So it is not affected by any caſualties of ſuperiority, or by any thing ariſing from the delinquencies or deeds of him who ſucceeds to the eſtate of her huſband; ſuch deeds or delinquencies can have effect upon that part of the eſtate alone, which belongs fully to the heir.

Let us, in the next place, ſee, how it is affected by caſualties of ſuperiority, that ariſe from the deeds of the huſband himſelf.

Theſe caſualties are, 1) Non-entry, 2) Relief, 3) Liferent-eſcheat, 4) Diſclamation, 5) Purpreſture.

There can be no room for the queſtion in the caſes either of non-entry, or of relief. For a terce is not due of lands, upon which the huſband was not entered; becauſe he is not ſeiſed in them: and the caſualty of relief ſuppoſes the huſband to be ſeiſed; for it is a caſualty paid by the vaſſal for relieving his fief out of the hands of his ſuperior, and for obtaining himſelf to be ſeiſed in them.

But it is excluded by the caſualties of liferent-eſcheat, diſclamation, or purpreſture; becauſe the huſband, by doing any thing which gives riſe to theſe, conveys to his ſuperior a right either to the profits or to the property of the fief. Of this right the ſuperior cannot be deprived on the death of the huſband †: becauſe it was fully conſtituted before it. The right of the relict, therefore, cannot hurt that of the ſuperior, ſince it ariſes after the perfect conſtitution of it.

In

* The contrary was found twice, *Ho. liferents,* *Crighton.*——*B.* 46.

† It may, perhaps, be ſaid, that the wife is entitled to the terce in the caſe of liferent-eſcheat, becauſe that caſualty proceeds on a fiction of the civil death of the huſband (§ 161.).

In ſhort, the relict is effectually excluded from her terce by every deed either of her huſband or of any other perſon, in conſequence of which ſome body, different from him, acquires, during his life, a legal right, completed by infeftment, either to the property or to the profits of the fief; becauſe the right, which is acquired by this other, excludes that of the relict, ſince it is incompatible with it. Thus, it is excluded, if the huſband has omitted to pay his feu-duty for two full years, and has thereby forfeited his right to his fief: for ſuch a neglect gives in ſome caſes the ſuperior a right to the property of the feu of his vaſſal *.

§ 305. But a relict is entitled to a terce of thoſe things alone, in which her huſband died infeft. By conſequence, her right muſt be commenſurate to his, and can extend no farther than his infeftment. Hence the terce is ſaid to be burdened by every charge, which is made real by ſeiſin, and affects the lands. The truth is not that the terce is burdened by ſuch real rights, but that it does not extend to them: for it is due of thoſe things alone, in which the huſband was infeft. Therefore, if another is infeft, the right of the huſband is ſo far excluded; becauſe he is in ſo far not infeft. Thus, if one is infeft in a rent payable out of lands, which belonged to the huſband, and in which therefore he was infeft, the right of this annual-renter diminiſhes that of the huſband; for the huſband has a real right to no more than remains of the profits of the lands, after the annual-rent is cleared. So the terce can extend to no more than the third of this ſurplus. The annual-renter continues to draw his full annual-rent after, in the ſame way in which he drew it before the death of the huſband. For his right was fully conſtituted, and was made real by ſeiſin, both before it, and before the conſtitution of the right of the relict. From hence it is plain, that every *real* charge, with which the lands were affected *before* the death of the huſband, continues to affect them after his death in the ſame manner, in which it affected them before it; and that the terce of the relict extends to no more than the third part of the ſurplus of the profits of the lands, which remains free after all thoſe real debts are paid, *A. terce*, 15th *Feb.* 1633, *Lady Balmaghie;* becauſe an infeftment, taken by another, diveſts the huſband ſo far as it extends.

§ 306. From hence it muſt follow, that, if one relict ſhall fall to have right, after another has actually acquired a right to a terce, the terce of the firſt relict, whoſe right is already conſtituted, cannot be either diminiſhed, or in any ſort affected by that of the ſecond. Conſequently, the terce of the ſecond cannot, during the life of the firſt tercer, extend to more than a third of the two thirds, which are not affected by the terce of the firſt, *ſt. A.* II. *c.* 9. *R. M. l.* 2. *c.* 16. § 64. Hence the terce of the firſt tercer is called the greater, and that of the ſecond is called the leſſer terce; becauſe the firſt terce extends to $\frac{1}{3}$, whereas the ſecond extends only to $\frac{2}{9}$ of the whole free profits of the eſtate, out of which both terces are due. The reaſon is, that the right of the firſt tercer, tho ſhe is not infeft, is as good and as ſtrong, as that of the ſecond. Therefore, the right of the firſt muſt prevail over that of the ſecond; becauſe it is a general maxim of Law, that priority of time regulates the legal preference of rights, which are equally ſtrong and effectual in Law. *Prior tempore eſt potior jure.*

I ſay, that the ſecond has, *during the life of the firſt tercer*, right to no more than a leſſer terce, *i. e.* to $\frac{1}{3}$ of the $\frac{2}{3}$, which are not affected by the greater terce. For, as ſoon as the firſt tercer dies, the right of the ſecond begins to extend as far as the greater terce extended. So her right becomes more ample than it was, and amounts preciſely to the ſame quantity, to which it would have amounted, if the lands had happened not to be affected by the greater terce at the time, at which her huſband died. So now it extends to $\frac{1}{3}$ of all the terceable

* 'Tis needleſs to take notice of the effects of the caſualties proper to tenure by ward, for ward-holdings are now aboliſhed, with all their conſequences. However, 'tis plain, what muſt have been the conſequences of each of theſe caſualties, while the ſubſiſtence of tenure by ward gave place to them.

able eſtate, whereas, during the life of the firſt tercer, and the ſubſiſtence of the greater terce, it extended to no more than $\frac{2}{9}$ of it, *ſt. A.* II. *c.* 9 *.

§ 307. The relict has, immediately on the death of her huſband, right to her terce: and ſhe makes it effectual by purchaſing a brief of terce out of the chancery, which is directed to the Judge Ordinary, the Sheriff, the Stewart, or the Baillie, within whoſe juriſdiction the terceable eſtate is ſituated, and is ſerved by him †. The tenor of it is fixed to be as follows,

'VICECOMITI,
'SALUTEM, mandamus vobis et præcipimus, quatenus dilectæ noſtræ B, relictæ
'quondam A, latrici præſentium, haberi faciatis rationabilem tertiam partem
'ſuam de omnibus et ſingulis terris et annuis reditibus, cum pertinentiis, quæ et
'qui fuerunt dicti quondam A ſui mariti hereditariè, infra balliam veſtram, quas
'et quos de nobis tenuit in capite, et de quibus obiit ultimo veſtitus et ſaſitus ut
'de feodo. Tantum inde facientibus, quod pro veſtro defectu amplius inde juſ-
'tam quærimoniam non audiamus. Teſte meipſo, apud, &c.'

This brief, when iſſued out of the Chancery, is preſented to the judge, to whom it is directed, that he may hold a court, and order it ſpecially to be ſerved upon the heir of the huſband, and generally to be duly publiſhed againſt the lieges by an open proclamation made at the market-croſs of the territory of that judge, to whom it is directed, and within whoſe juriſdiction the terceable eſtate is ſituated.

The method of ſerving it upon the heir of the huſband is the ſame with that of ſerving a ſummons upon one, againſt whom it is iſſued. The officer, who is ordered to ſerve it, muſt go to his dwelling-houſe, and, in caſe he gets acceſs into it, and apprehends him perſonally, muſt 1) Deliver to him a full copy of the brief, ſigned by himſelf, and muſt, 2) At the ſame time, notify to him the day againſt which, and the place where, it is to be ſerved: beſides, 3) He muſt charge him to appear againſt that day, at that place, with certification. In caſe he does not apprehend him perſonally, he muſt deliver the copy to thoſe belonging to his family whom he finds in the houſe. In caſe he does not get acceſs, he muſt give *ſix* knocks at the *moſt patent* door of the houſe, and upon his not getting into it, he muſt affix the copy on the door. A certificate, containing a full and minute account of all the ſolemnities obſerved by him, ſigned by himſelf and by two witneſſes, is called the *Execution:* for two witneſſes muſt be preſent and ſee him actually obſerve the forms required in ſerving the writ. Along with the copy of the brief he muſt alſo deliver or leave affixed a ſhort copy of the execution ſigned by himſelf. The day, againſt which he charges the heir to appear, muſt be full 15 days from that, on which the brief is ſerved, 1540, *c.* 72.—1621, *c.* 19. For it is not neceſſary, that 15 days *intervene* between them; 'tis ſufficient, if either the day of the ſervice, or that of appearance be free, and theſe two with thoſe intervening between them, make in all 16 days, *Du.* 27th *July* 1626, *M'Culloch.* In this manner muſt the brief be ſerved upon thoſe individuals, upon whom it is neceſſary to ſerve it.

But it muſt alſo be ſerved upon all the lieges in general, after the following manner. The officer muſt proclaim it at the market-croſs of the principal borough within the juriſdiction of that judge who orders it to be ſerved, and of the ſhire within which the terceable eſtate lies, 1587, *c.* 60. He proclaims it, 1) By calling the word *Oyez*, three ſeveral times with an audible voice, in order to convoke

* We are not to imagine, that it follows from the words of this ſtatute, that a relict has a right to the terce of lands in which her huſband was not infeft. The meaning of the word *Saſitus*, in our antient Law, is no more than *poſſeſſed*. For ſuch formal ſeiſins, as Law requires at preſent, were unknown in thoſe days, and were not introduced into Scotland till towards the reign of JAMES I.

† The ſervice of this brief, it appears from *R. M. l.* 1. *c.* 3. § 2. belonged, in the moſt antient times, to the juriſdiction, office, and connuſance of the Sheriff.

voke the lieges, and to draw them to attend to the ſerving of the brief; 2) By reading it all over three ſeveral times with an audible voice, that the people may hear it; and every time before he reads it, he muſt call the word *Oyez* three ſeveral times. At the ſame time, 3) He muſt make a particular notification of the place where and day againſt which the ſervice of it is to proceed; that thoſe intereſted may know them with preciſion. 4) He muſt charge *all and ſundry*, that is, every one intereſted in the matter, to appear at that place againſt that time. 5) He muſt leave a full copy of the brief with a ſhort copy of the execution, both ſigned by himſelf, affixed on the market-croſs. All theſe formalities muſt be obſerved by him before two witneſſes, who muſt ſign along with him the principal certificate of execution, that is, the certificate which is returned to the judge, and uſes to be written on the brief itſelf. For it is not neceſſary, that they ſubſcribe the copies delivered, or affixed; 'tis ſufficient if they be named and deſcribed in theſe, 1693, *c.* 12. The place, at which he charges them to appear, muſt be the ſame with the former: and the day muſt be alſo the ſame, and muſt be full 15 days from that on which the brief is proclaimed, 1503, *c.* 94.—1592, *c.* 141.

The brief is ſerved ſpecially upon the heirs of the huſband, *arg. R. M. l.* 1. *c.* 24.—SKENE *notæ ad dict. loc. R. M. l.* 2. *c.* 16. § 20, 36, 37, *et ſqq.*—*l.* 47. *ff. de re jud. R. M. l.* 2. *c.* 16. § 54; becauſe it is notorious, that they are particularly intereſted in the matter, and have right to ſee, that ſhe, who claims to be ſerved, be the relict of their predeceſſor, and be not ſerved to more than a third of all the terceable eſtate, which belonged to him. It is proclaimed at the market-croſs of the territory of that judge, within whoſe juriſdiction the terceable eſtate is ſituated, and is thereby ſerved upon the lieges in general, that if there is any other, who is intereſted in the ſervice, or affirms herſelf to be the alone lawful widow, becauſe ſhe was the alone lawful wife of him, a terce of whoſe eſtate is claimed by the purchaſer of the brief, ſhe may know, that he, who ſhe ſays was her huſband, is dead; that another affirms herſelf to have been his lawful wife; that ſhe claims to be, for this reaſon, ſerved to her reaſonable terce of his terceable eſtate; and that the ſervice is to proceed againſt the day and at the place particularized in the execution and publication of the brief. On the arrival of this day a court muſt be held, and the officer who ſerved the brief, as well as thoſe who were witneſſes to the ſervice of it, muſt verify the execution by their oaths; that is, the officer muſt ſwear that he actually did the things which he ſays in his certificate he did, and the witneſſes that they ſaw them done and were preſent at the doing of them. After this an inqueſt, conſiſting of fifteen men, muſt be impannelled by the judge, to whom the brief is directed: then the relict preſents to them a claim, in which ſhe narrates, that ſhe is the relict, and was the lawful wife of the perſon whom ſhe calls her huſband; ſpecifies the eſtate, in which he died infeft as of fee, and of which a terce is due to her; and deſires to be ſerved to a terce of it. Next, evidence muſt be brought, in order to prove the juſtice of her claim.

The firſt point, of which ſhe muſt make proof, is the reality of her marriage. For ſhe is not entitled to a terce, unleſs ſhe is a widow. But ſhe cannot be a widow, if ſhe was never married.

The Law of Scotland requires no ſolemnities to the conſtitution of marriage. Therefore it holds her to have made proof of her marriage, in caſe ſhe proves, that ſhe was, during the life of him whom ſhe calls her huſband, held and reputed to be his lawful wife, 1503, *c.* 77; becauſe the command of the brief ſuppoſes the claimant to be ſo. 'Tis true, ſhe is not hindered from proving the actual ſolemnization of her marriage: for all, which it is incumbent on her to prove, is her marriage. If ſhe proves it, it is no matter, whether ſhe proves that ſhe was held and reputed to be his wife: for one may keep his marriage private. The Law has, out of favour to widows, freed a woman from the neceſſity of proving the actual conſtitution or ſolemnization of her marriage, and

holds her to have proved enough to entitle her to be ſerved to her terce, in caſe ſhe proves, that ſhe was held and reputed during the life of him, of whoſe eſtate ſhe is ſuing for a terce, to be his lawful wife. If ſhe cannot prove herſelf either to have been really, or at leaſt to have been reputed to be his wife, the ſervice cannot proceed: for ſhe fails in proving the cardinal point, upon which her right turns. Of courſe, the jury have no authority to ſerve her; for the brief ſuppoſes the claimant to have been the wife of him, of whoſe eſtate ſhe demands a terce.

2) It muſt be proved that the huſband is dead. For, if he is not dead, ſhe is not his relict. Of courſe, ſhe cannot be entitled to a terce. Proof is held to be made of his death, if it is proved, that he is commonly believed to be dead.

3) The particular time, about which he died, ought to be ſpecified. The reaſon is, that the preciſe time may be known, from which the right of the relict to her terce commences.

And, 4) It muſt be proved that he died veſted and ſeiſed of the eſtate as of fee; becauſe if he was not veſted and ſeiſed of it, at the time of his death, his relict is not entitled to a terce of it. All this appears plainly from the tenor of the brief.

If the legitimacy of the marriage, the death of the huſband, and his infeftment in the terceable eſtate, be proved to the inqueſt, they find that the relict was held and reputed to be the lawful wife of him, whom ſhe affirmed to be her huſband, and do, therefore, ſerve her to her terce of all the particulars, of which the terceable eſtate of her huſband conſiſts, and in which he is proved to have died veſted and ſeiſed as of fee *.

§ 308. To this ſervice the judge, to whom the brief is directed, interpoſes his authority. On this the relict is ſaid to be *ſerved* to her terce, and has a right to a third of the annual profits of all the particulars ſpecified in her ſervice, from the term which followed next after the death of her huſband *incluſivè*. I ſay, *incluſivè*. For ſhe is entitled to a third of the profits, which fall due at the term following next after his death, as well as of thoſe which fall due at terms ſubſequent to that firſt one; becauſe theſe rents are due to the heirs of her huſband. But ſhe is entitled to a third of all the terceable profits, which are due to them, during her life, *Du.* 30th *Nov.* 1627, *Tenants of Eaſthouſes.*—21ſt *Jan.* 1629, *Lady Ayton.*—*St.* 12th *Jan.* 1681, *Trotter.* Beſides, ſhe is entitled to the third of thoſe profits, which the lands have *actually* yielded ſince her huſband's death. For 'tis the quantity of the profits which they yield after it, while ſhe has right to her terce, not thoſe which they yielded before it, when ſhe had no right to it, that regulates the extent of what ſhe is entitled to demand, *Du. ult. Jan.* 1628, *Lady Dunfermline.* Neither is it any matter at what time ſhe was ſerved, whether immediately or long after the death of her huſband; for 'tis the time not of the ſervice, but of his death, which regulates the right of the relict, *Ba. terce*, 21ſt *Feb.* 1532, *Crighton.*—*Du.* 25th *Nov.* 1624, *Tenants.*

§ 309. A relict, who has been ſerved to her terce, acquires a right to the third of the profits of the terceable eſtate. Therefore, ſhe has a good title to ſue the tenants and all others who meddle with the rents of it, for her third of them, *Du.* 31ſt *Jan.* 1628, *Lady Dunfermline.*—15th *March* 1632, *Relict of Veitch* †.

But ſhe is not, upon being ſerved, entitled either to enter upon poſſeſſion of the terceable eſtate ‡, or to make others remove from it, or to hinder others from poſſeſſing

* All theſe forms may be gathered from DALLAS.

† A decree, declaratory of a right of terce, ſeems to be held to be equivalent to a ſervice: for a widow, who had obtained one, was found to have a good title to bring an action againſt the poſſeſſors of the lands for a third of the rents of them, *D.* II. 472. 26th *Jan.* 1731, *Fea.*

‡ It does not ſeem to have been otherwiſe in antient times. 'Tis true, a relict was entitled to enter upon the poſſeſſion of her terce, in caſe it was vacant, immediately after the death of her huſband. But this was only in caſe the *dos* was *nominata*, *i. e.* in caſe ſhe was provided to the life-rent of a particular tenement, *R M. l.* 2. *c.* 16. § 11. 17, 18, 19, 20, 53. And even in that caſe, ſhe could not enter upon immediate poſſeſſion, without the conſent of the heir, § 17.

posſeſſing it; becauſe her ſervice gives her no more than a right *pro indiviſo*. Of courſe, it is not a title *of poſſeſſion*. In order to give her a right to poſſeſs *pro diviſo*, ſhe muſt be *kenned* as well as ſerved to her terce. For, till ſhe is kenned to it, the quantity to which it amounts, the limits within which it is contained, and the particulars which ſhe is entitled to poſſeſs, cannot be known, *Sp. terce*, 1583, *Graham.*—*St.* 3d *Feb.* 1675, *Barclay.*

§ 310. A relict, who has been, by the verdict of an inqueſt, ſerved, and has been, by this ſervice, found to be entitled to a terce, may, as ſoon as ſhe pleaſes, deſire the Judge, to whom the brief was directed, to *ken* her to her terce, *i. e.* to divide the particulars, of which the terceable eſtate conſiſts, and which are ſpecified in her ſervice, between her and the heir; to ſeparate them from one another; and to aſſign one third of them to her and two thirds of them to him; that thus they may, by knowing the particulars, which each of them is entitled to poſſeſs, be hindered from interfering with one another, and may not be forced to remain in a community, which is ſaid to be the mother of diſcord. Of courſe, not only the relict, but the heir is entitled to inſiſt to have her kenned to her terce: for he is not obliged to poſſeſs his two thirds *pro indiviſo* with her.

This diviſion is made ſometimes after one, ſometimes after another manner. In general it ought, in all caſes, to be made ſo that the third, which is allotted to the relict, be productive of a third of the profits, which the whole terceable eſtate yields. One way, by which a relict is kenned to her terce, is by 1) Determining by lot, whether the aſſignment ſhall begin to be made from the ſun *i. e.* from the eaſt, or from the ſhade *i. e.* the weſt; and then 2) Meaſuring off two acres for the heir, and every third one to the relict alternately, till the whole terceable eſtate is exhauſted and divided. But this method is inconvenient and hardly ſerves for putting an end to the community. Therefore, a better, a more convenient, and a more equitable way of kenning a widow to her terce is that which proceeds by dividing the eſtate between the heir and the relict ſo as to make whole farms fall to the ſhare of each of them, and thoſe, aſſigned to the relict, amount only to $\frac{1}{3}$, while thoſe, aſſigned to the heir, amount to $\frac{2}{3}$ of the whole. Equity ought to regulate this diviſion; regard ought to be had to the vicinity of the lands to the dwelling-houſes, and to the contiguity of the ſhares aſſigned to each of them: ſo that thoſe farms, which are moſt commodious, ought to be allotted to each of them, *R. M. l.* 2. *c.* 16. § 63.

After this diviſion is made, 'tis uſual to deliver earth and ſtone either to the relict, if ſhe is preſent, or to her attorney, if ſhe is abſent; and to take an inſtrument of the whole procedure in the hands of a Notary public; tho it is not abſolutely neceſſary to do ſo.

There are ſeveral terceable things, which admit not of an actual diviſion; ſuch are annual-rents. In thoſe caſes the relict, who is ſerved to her terce, has a right to ſue tenants, poſſeſſors and intromittors for her third of the profits of them. Thus, ſhe may ſue thoſe, who uſed to pay the whole annual-rent to her deceaſed huſband, for her third of it; or, if they have paid it to the heir, ſhe may demand it from him.

§ 311. A relict, who has been not only ſerved but kenned to her terce, acquires immediately a right to enter upon poſſeſſion of the lands aſſigned to her, or, if ſhe is already in poſſeſſion, to retain it. Conſequently, ſhe is intitled to remove the tenants and preſent poſſeſſors of her terce; provided ſhe do it according to Law. For, if the lands are let out, the tenants, who rent them, cannot be removed, till the expiration of their leaſes; becauſe tacks, cloathed with poſſeſſion, are declared, by 1449, *c.* 18. to be real rights, effectual to ſecure the tenants as well againſt ſingular ſucceſſors, and all who may happen to acquire the property of the farms rented by them, as againſt him who let them, or his heirs. Conſequently, if the lands are rented from year to year, the tenants are removeable, becauſe their tacks expire at the end of each ſucceſſive year.

The

The year, when conſidered with regard to the removal of tenants, may, in ſome ſort, be ſaid both to begin and to end at the 26th of May; becauſe tenants uſe to remove at that term. For 'tis at that time, that the earth is renewed, and becomes fit for culture. Hence the Legiſlature, attending to the natural connection, which ſubſiſts between the return of the ſeaſons and the culture of the earth, hath enacted, that, if the property of a farm ſhall happen to be any how altered by being conveyed to either univerſal or ſingular ſucceſſors of him, who let it, a tenant, who has only a moveable or annual tack, ſhall not be liable to be removed from the farm, till the next Whitſun-term after the alteration has happened, 1491, *c.* 26. But it muſt be remarked, that in this, as in all caſes, the tenant muſt be warned, 40 days before the term, that he is to be removed againſt it. Elſe he will not be liable to be removed till the ſecond, or other ſubſequent term, 40 days before which he has been warned, that he is to be removed at it.

§ 312. One, who has been kenned to her terce, and has got the preſent poſſeſſors of the lands to remove, may, if ſhe pleaſes, either let them to others, or cultivate them herſelf.

§ 313. But the right of the relict is only temporary, and laſts during her own life alone; ſhe muſt therefore, like other liferenters, uſe the terceable or fructuarious things, *ſalvâ ſubſtantiâ*, and, for this purpoſe, muſt find caution, that ſhe will not either deſtroy or waſte the buildings, orchards, woods, ſtanks, parks, encloſures, meadows, or dove-cotes, or any other thing, of which ſhe is uſufructuary; and that ſhe will, during the ſubſiſtence of her right, keep, preſerve and uphold them in the ſame condition, in which ſhe gets them, 1491, *c.* 25.

The extent of her right is limited by the purpoſe, for which it is intended. Being a proviſion for her maintenance, it muſt be limited by this deſign. Hence, the tercer has right to all the *fruits* of the terceable eſtate; thoſe fruits, towit, which are produced at regular and ſucceſſive periods, either by trees, or by the earth. But ſhe has no right to cut the trees themſelves; becauſe woods, growing timber, and trees are parts of the earth (§ 151, 152.), which cannot any more than the earth itſelf be alienated, waſted, or deſtroyed by the uſufructuary. She cannot take even ſo much of them, as is neceſſary for the uſes of the eſtate which ſhe liferents; but muſt purchaſe theſe at her own expence. In this reſpect, her powers ſeem to be leſs extenſive than thoſe of a conjunct-fiar, *Fo.* 3d *July* 1696, *Lady Borthick.* For a conjunct fiar is in ſome ſort conſidered as proprietor, and has therefore right to cut wood of all ſorts; provided ſhe cuts no more than is neceſſary for the uſes of the fructuarious ſubſtance, and does not cut any for ſale, *N.* 64. But if the trees are intended not to remain on the ground, but to be cut at regular and ſucceſſive periods of time, in order to be ſold for profit, the tercer has right to cut them; for copſes, or *ſylvæ cæduæ* ſhould be conſidered not as fixed parts, but as *fruits* of the ground (§ 152.). That ſpot of earth, on which they grow, is intended to be cultivated by being planted with them, on purpoſe that profit may be made of it, and the land turned to account, as much as if it was ſown with graſs or corn. Beſides; the advantage, which would ariſe to the relict from cutting them, was viſible, would be attended to, and taken into account, when ſhe was kenned to her terce. The lands, on which they grew, were notwithſtanding aſſigned to her as a part of her terce. Of courſe, ſhe can alone be entitled to cut them all.

§ 314. But a tercer has no right to any thing, which is below ground. Conſequently, ſhe has no right to open the ground, and to dig for coals, ſtones, or minerals below it. But, if the ground is already opened, a mine diſcovered and begun to be wrought, ſhe has right to take as much of the coals, minerals, or ſtones, as are neceſſary for the uſe of her family and of the terceable ſubſtance, *Du.* 14th *Feb.* 1628, *Lady Laminton*—*St.* 13th *July* 1677, *Lady Preſton*—*June* 1727, *heirs of Roſeburn.* I ſay ſhe has no right to open the ground. But this doctrine ſeems to admit of an exception: for ſhe has, no doubt, right even to open

open the ground, in order to get at lime, marle, or other materials, which will serve to meliorate the land.

§ 315. The right of the relict is personal, and determines at her death. Her executors have right to every thing, to which she had acquired one before her death. Of course, their right must be different according to the different times at which she dies, and the different things of which her terce consists.

For it consists either of things, such as lands, which yield fruits at regular successive and returning points of time, or of those, the fruits of which are produced and enjoyed continually and in every instant.

If it consists of things of the first sort, of which lands, tithes, mills, and annual-rents made payable at regular terms, are the chief examples, then either she possesses and cultivates them herself, at her own expence, and by her own servants, or she lets them to others and cultivates them by her tenants. In the first case, when she retains the natural possession of them, and cultivates them herself, no regard is had to the time of her death: for her executors have no right to use the terceable estate. They have right to do no more than reap the crop which was sown by her, without paying rent for it; because it is a general maxim of the Law of Scotland, that he, who sows, ought also to reap, *Du.* 14th *Dec.* 1621. *Macmath.*—*St.* 25th *July* 1671, *Guthrie.*—*Fa.* II. 9.

In the second case, when she has let the lands to tenants, and cultivates by them, the right of her executors is determined by the time of her death; for they have right to every thing, to which she had acquired one by surviving the term, at which it became due to her. Thus, if it was land, and she dies *before* the 26th of May, they are not entitled to that half of the rent, which the Law declares to be due on it; because they have not a right to any thing, to which she had not right: but, if she dies before the 26th of May, nothing was due to her; because *dies nondum venerat*, the 26th of May being the Whitsun-term. If she sees it, but dies before the 22d of November, that half year's rent, which became due on the 26th of May, is due to her executors; because it was due to herself, since the day, at which it was due, was past, *dies venerat* before her death. But they are not entitled to that half-year's rent, which becomes due on the 22d of November, because it was not due to their predecessor; since its day had not past: Whereas, if she survives not only May, but sees the 22d of November, her executors have right not only to the rent which fell due on the 26th of May, but also to that which became due on the 22d of November; because it was due to their predecessor, since its day was past before she died. In general, this doctrine is to be held, that these nominal days of May and of November are the legal terms, at which rents of land fall due, and that the representatives of a tercer or liferenter have, since their predecessor had right to all the rents, which were due at all the legal terms, which were past before the liferenter died, *Du.* 1st *Feb.* 1631, *L. Blaus*—*Fo.* 14th *Feb.* 1684, *Baillie.*—*F.* 22d *Feb.* 1711, *Laurie*; for no regard is had to the conventional ones, *Go.* 23d *July* 1668, *Carnegy*. A liferenter is held to have survived the term, if she happens to see it, that is, to live any part of that day, tho she should happen to die on it; because *in civilibus dies cœptus pro completo habetur*, *l.* 8. *ff. de feriis*, *Ho. succession*, 21st *Feb.* 1609, *L. Merchiston.*—*Du.* 16th *Feb.* 1642, *Lady Brunton.*—*Da.* 52.

If the terce consists of things, which are produced and enjoyed *continuo et singulis momentis*, the tercer has right to all, which is due to the very day of her death; because every day is a term. So her executors have right to the profits of things of this kind till the very day of her death; for *dies venerat* before her death. Things of this sort are houses and money secured by infeftment, in case the interest is made payable, not at regular and successive terms, but *de die in diem*. For, if it is made payable at terms, these must regulate the right both of the relict and of her executors, *n.* 81. 131. for interest of money runs *de die in diem*. Of thiskind one would think mills; but custom, it seems, hath made it other-

wiſe; for mill-rents become due at the ſame terms, with rents of lands, *Du.* 21ſt *Feb.* 1635, *L. Weſt-niſbet.*— *St.* 20th *July*, 1671, *Guthrie.*—8th *Dec.* 1671, *Guthrie.*

§ 316. Beſides her terce, a relict ſeems to have been of old entitled to remain in the houſe of her huſband 40 days after his death, *ſt. A.* II. *c.* 22. § 3. 4. And, no doubt, the preſent humanity of the Law would allow her a reaſonable time to prepare herſelf for moving. She could not be forced to move immediately, without any delay.

§ 317. Before we proceed to conſider the rights, which the huſband has when he ſurvives his wife, it is not improper to make the following fugitive obſervations, and to remark, 1) That the relict is in all caſes entitled to her *jus relictæ*, to her ſhare of the moveable eſtate of her huſband, unleſs ſhe has either renounced it expreſsly, or accepted of a proviſion made for her in lieu of all which ſhe could claim on his death. Therefore, ſhe is entitled to it, tho ſhe be provided by her marriage-contract either to a ſum of money, to a ſhare of his houſhold-furniture, or to other moveables, *H.* 464.—*K.* 66.

'Tis otherwiſe with reſpect to the terce: for 2) A woman, who is provided by her huſband with a jointure, or with a particular proviſion for her maintenance after his death *, either before or after her marriage, is not entitled to a terce of his eſtate, unleſs a ſpecial *proviſo* is made in the deed by which her jointure is granted, that ſhe ſhall be entitled to it, 1681, *c.* 10.

It muſt be remarked, 3) That every deed made by a huſband in favour of his wife, is preſumed by Law to be made *pro tanto* in ſatisfaction of the proviſions, which he has bound himſelf to make for her; becauſe the huſband is, *ex hypotheſi*, brought under obligations. He is become debtor to his wife. Theſe therefore he is held to mean to fulfil by every gratuitous deed, which he makes in her favour after he became bound: for a debtor is never preſumed *donare*, *Ha. March*, 1594, *Kyle*,—23d *Jan.* 1611, *common ſeal.*—*Dec.* 1614, *Relict of Crawford.*—*Ho. huſband*, 9th *Feb.* 1615, *Muirhead.*—*F.* 4th *July* 1712, *Hamilton.*—*B.* 4.—*D.* II. 144, 145.

A widow is not 4) A privileged creditor for her contracted proviſions, and is not preferable for them to the other perſonal creditors of her huſband. For ſhe is a creditor merely perſonal; ſhe has him no more than perſonally bound for them. Of courſe, it would be unjuſt to make her condition better than that of others, who are as much creditors as ſhe; and her preference muſt depend on the date of her diligence. If her diligence is prior to that of others, ſhe muſt for that reaſon be preferred to them; becauſe ſhe has thereby either wholly or partly veſted, as it were, the eſtate of her huſband in her own perſon, and has prevented others from attaching it till the debt due to her is paid: if her diligence is poſterior to theirs, ſhe muſt for the ſame reaſon be poſtponed to them, *Fo.* 17th *Feb.* 1688, *Keith.*—*Da.* 100, 110 †.

But it is otherwiſe, in caſe her right is made real by ſeiſin: For what has been ſaid, muſt be taken conſiſtently with the principles of Law. The wife has been ſuppoſed to be no more than a perſonal creditor, and her competitors to be perſonal creditors like herſelf. For real creditors are, in all caſes, preferable to one another according to the dates of their ſeiſins, or of thoſe other diligences, by which they become real creditors, and acquire preferences. Therefore, they muſt come

* A method, by which a widow obtained poſſeſſion of a tenement, to the liferent of which ſhe was provided, is deſcribed minutely in *R. M l.* 2. *c.* 16.

† It was otherwiſe in antient times. Wives were once thought to be privileged creditors for the proviſions, which their huſbands bound themſelves by contract or otherwiſe to make for them. The reaſon was, that the Civil Law made them preferable for their *dotes*, *l.* 12. *C. qui pot. in pig.*—*Nov.* 97. *c.* 2. *ſqq.* which, however, reſembled in no ſort proviſions made for wives among us, and were governed by quite different rules. The *Dos* in the Roman Law was like the heritable eſtate of a wife in Scotland (§ 209, 210. 211.) *A. wife*, 27th *March* 1627, *Cranſton.*—11th *July* 1631, *Lady Yeſter.*—22d *July* 1631, *Mack.*—*Du.* 20th *Jan.* 1631, *Creditors of Brown.*—*St.* 8th *Feb.* 1662. *Crawford*—*Go.* 14th *Nov.* 1672, *Smiton.*

come *in pari paſſu* together, in caſe they are all perſonal creditors, and either ſhe has done diligence which entitles her to come *in pari paſſu* with them, or they have done diligence which entitles them to come *in pari paſſu* with her.

But a wife, as has been obſerved (§ 225.), tho ſhe is not a privileged creditor, is not, however, in all caſes, without a remedy. For, if the portion, which ſhe became bound to pay to her huſband, be not paid, or the pecuniary obligations, which ſhe became bound to fulfil *nomine dotis*, be not fulfilled, ſhe may, in ſome caſes, for inſtance, in that of the inſolvency of her huſband, *retain* them, till ſecurity be found her for the proviſions which he bound himſelf to make good to her, *H.* 346, 372.—*Fo.* 23d *Dec.* 1703, *heirs and creditors of Chalmers.*—*F. m.* 2d *Feb.* 1714, *Pagan.*—*D.* I. 596. 4th *July* 1732, *creditors of Watſon.*—*July* 1732, *creditors of Hope.* The reaſon is plain; every mutual contract implies the ability of the parties to fulfil their reſpective obligations; and every one of them is entitled to refuſe to fulfil his part of it, in caſe the other either will not or cannot fulfil his.

§ 318. If the wife dies before the huſband, there can be no place for enquiring concerning the right which he has in her moveable eſtate: for a wife has not a moveable eſtate, ſince all the moveables, which belonged to her before her marriage, or are acquired by her after it, are, by virtue of it, transferred to her huſband, and become his property (§ 205. *ſqq.*).

But, tho the huſband is the proprietor of all the moveables which belong to them both, his right is *diminiſhed* by the death of his wife; for her repreſentatives have right to a certain portion of them, different according to the different circumſtances in which the family is at her death.

For ſhe either does, or does not leave children, procreated between her and that huſband, who ſurvives her. If ſhe leaves any, no portion of the moveables, which belong to their father, is preſently demandable by them. The father, ſince he was the alone proprietor of them before the death of his wife, continues to retain the *property* of them after it, during his life. 'Tis true, it is ſometimes ſaid, that the moveable eſtate of the huſband ſuffers a threefold diviſion on the death of his wife. For the father is ſaid to retain one third, as belonging *proprio jure* to himſelf; another third, as a legitim, which may become due to his children at his death; and another third, as that which would have belonged to his wife, if he had happened to die before her, and now belongs to her children, in right of their mother. But this is ſaid improperly; for theſe ſhares, tho they are ſaid to belong to the children, are not either determinate or demandable during the life of their father. He retains not only the poſſeſſion, but alſo the abſolute power of adminiſtring and of diſpoſing of his moveable eſtate at pleaſure. For one third of every man's moveable eſtate is *dead's part*, and is, of courſe, at the abſolute diſpoſal of its owner: a legitim is not due till the death of him, out of whoſe eſtate it is due; and the quantity of it depends on the quantity of the eſtate, which he has at his death: and the third, which is due to the wife, is held to be due to her only at the death (§ 292. 293.) of her huſband. Of courſe, it muſt be the third of that eſtate, which he has at his death. So he muſt retain the diſpoſal of it. Therefore, the Right of the children remains always in abeyance, ſince all the moveables continue to be at the diſpoſal of their father, during his life, *Ha.* 18th *Dec.* 1606, *Home.*

If ſhe leaves no children that were procreated between her and him, whom ſhe has left to ſurvive her, her huſband either has or has not children, entitled to a legitim, at the time of the diſſolution of the marriage by the death of the wife. If he has children entitled to a legitim, the executors of the wife, whoever they are, have right only to a third part of the moveables belonging to the huſband; becauſe thoſe children, who are entitled to a legitim, come in with them, to make a threefold diviſion of the moveable goods, *Du.* 17th *June* 1631, *Chapman.*—18th *July* 1634, *Henderſons.*

But

But if he has no children of former marriages, who are entitled to a legitim, the executors of the wife have right to a half of the whole moveables, which belonged to the huſband at the diſſolution of the marriage.

I ſay, the *whole* moveables: for the ſhare of the executors of the wife extends to them all indiſcriminately. It extends to a ſhare of more than the ſurplus which remains after moveable heirſhip is deducted: for this cannot be deducted, ſince the huſband is alive; but one, who is alive, cannot have an heir, *D.* I. 366. *Jan.* 1727, *Lindſay.*

§ 319. A huſband, whoſe wife was proprietor of a landed eſtate, has right to all the profits which it produces; becauſe he acquires, as it has been ſaid, (§ 205.) the property of all the moveables which either belong to her at her entrance into marriage, or are acquired by her during its ſubſiſtence. By means of theſe ſucceſſive acquiſitions he is enabled to live after a manner, and is accuſtomed to hold a rank, ſuitable to one poſſeſſed of a fortune equal to both his own and that of his wife. It would be hard, therefore, if he was, immediately on the death of his wife, to be deprived of her fortune, and to be thereby reduced to a condition worſe than that, in which he was during her life. Beſides, if he has by her any children, who are to ſucceed to her eſtate, it would be unnatural, that they ſhould live in ſplendor, and be independent of their father, while he is, perhaps, neceſſitated to live in obſcurity, and to depend on his children.

For theſe reaſons, the Law of Scotland hath given huſbands right not only to manage the heritable eſtates belonging to their wives, and to acquire the property of the profits yielded by them, during their lives, but alſo to continue their poſſeſſion of liferenting their heritage, after their death. This is what is called the *courteſy* of Scotland, *curialitas Scotiæ*, *R. M. l.* 2. *c.* 58. *

It may be defined to be 'a proviſion made by the Law for the honourable 'maintenance of a huſband, whoſe *deceaſed* wife bore him a living child, that 'was heard to cry and was at ſome time of its life preſumptive heir of its mother; 'extending to the *uſufruct* of *all* the *heritage*, to which ſhe either did actually *ſuc-* 'ceed or *would have ſucceeded* as *heir* of its former proprietor, and in which ſhe 'was *veſted* and *ſeiſed* as of *fee* at the *time* of her *death*.', *R. M. l.* 2. *c.* 58.

From the definition it is plain, I. That a huſband is, by the Law of Scotland, entitled to *liferent* the heritage of his deceaſed wife; provided II. He had by her a living child, that 1) was heard to cry, and 2) became at ſome time of its life the preſumptive heir of its mother. III. That the courteſy extends to *all* the heritage of the wife, and to *heritage* alone. IV. That it extends to that heritage alone, 1) to which the wife either did actually ſucceed or would have ſucceeded as *heir* to its former proprietor, 2) in which ſhe was *veſted and ſeiſed as of fee*, 3) at the time of her death. From theſe axioms it will be eaſy to deduce 1) The caſes, in which the courteſy of Scotland takes place, and 2) The things, to which it extends.

§ 320. In order to make way for the courteſy, it is neceſſary, 1) not only that the wife die before the huſband, but alſo that ſhe have born him a *living* child (§ 319. *ax.* 2.): for, if he had no children by her, he has not right to the courteſy, *R. M. l.* 2. *c.* 58. § 3. *L. B. c.* 44. § 5.

§ 321. 'Tis neceſſary, 2) that this child be born alive, and be heard to cry (§ 319. *ax.* 2.): for this is the *only* thing, which Law holds to be evidence of its life. The courteſy has not place, in caſe the child, which was born, was not heard to cry. The father may prove, that it was heard to cry, by witneſſes female as well as male: for women uſe to be preſent at births, and are neceſſary witneſſes, *R. M. l.* 2. *c.* 58. § 1. *L. B. c.* 44. § 1. 4.

§ 322. It is neceſſary, 3) that the child be, at ſome time of its life, the preſumptive heir of its mother (§ 319. *ax.* 2.). 'Tis true the courteſy of Scotland is

* It is called the courteſy of Scotland, becauſe it is known to few other nations, Sk. *N. ad d. c.* 58.

is due not only to a firſt but to a ſecond, third, fourth, *&c.* huſband, *R. M. l.* 2. *c.* 58. § 6. *Ha.* 7th *June* 1610, *Spence.* But it is not due to a huſband during the life of a child, whom his wife bore to a former one, and who ſucceeds to her eſtate, *Fo.* 1ſt *Dec.* 1702, *Darleith.* The reaſon is plain; the right of the child of the former huſband ariſes either from a contract made with its father, or from the will of the Law, which devolves the ſucceſſion to him. If it ariſes from a contract, the child acquires thereby a right to ſucceed to the eſtate of his mother, of which ſhe cannot, by her ſubſequent marriage, deprive him. If it ariſes from the will of the Law, the right which he has already acquired by his primogeniture, cannot be taken from him by another deed of the ſame Law, which is poſterior to the conſtitution of his right; ſince it takes place only from the ſecond marriage, or rather from the death of his mother.

I ſay, the huſband is not entitled to the courteſy, unleſs his child was, at ſome point of its life, the preſumptive heir of its mother; that is, unleſs there was a time of its life, at which, in caſe its mother had died, it would have ſucceeded to her heritage. If there was no time, during its whole life, at which it would have ſucceeded to her, in caſe ſhe had died, the huſband is not entitled to the courteſy. For it has place in thoſe caſes alone, in which the child, procreated between the deceaſed wife and her ſurviving huſband, may, by poſſibility, ſucceed to its mother. But it is impoſſible for it to ſucceed to her, in caſe, during its *whole* life, there was a perſon alive, who would have been preferred and would have ſucceeded *before* it: for, *ex hypotheſi*, there is no aſſignable point of its life, at which it could have inherited its mother's eſtate, in caſe ſhe had died at that time. The Law ſays, ſhe muſt bear *heredem auditum vel brayantem*, *R. M. l.* 2. *c.* 58. § 1. The child, which is born, muſt be a *living* HEIR.

§ 323. From this doctrine various concluſions follow. For the wife may be ſuppoſed to have had either one or more than one huſband. In caſe ſhe had more than one, ſhe may be ſuppoſed either to have had children to her ſurviving huſband alone, or both to him and to her former ones, or to them alone.

The queſtions which occur concerning the courteſy, in caſe ſhe either had no more than one huſband, or had no children by him who ſurvived her, or had children by him alone, are ſimple, and reſolvable from the principles which have been explained. The more intricate are thoſe which occur, in caſe ſhe is ſuppoſed to have had children both by her ſurviving huſband, and by former ones. It may not be improper to diſtinguiſh the various caſes from one another, and to mark the deciſions of the Law in each of them: and, in order to hinder them from being involved, let us ſuppoſe the woman to have had no more than two huſbands; for all other caſes are almoſt the ſame with this one.

The wife may be ſuppoſed either to have had ſons, or to have had none but daughters by her firſt huſband.

In caſe ſhe had ſons by him, one of them may be ſuppoſed either to have or not to have ſurvived her.

In caſe one of her ſons ſurvives her, he either may or may not have veſted the eſtate of his mother in his perſon, and thereby made it impoſſible for any to make titles to it otherwiſe than by procuring themſelves to be ſerved heirs at Law to him.

In caſe he has veſted it by proper titles in his perſon, the ſurviving huſband is effectually and for ever excluded from the courteſy: for this ſon of his wife, who has veſted her heritage in his perſon, is, *ex hypotheſi*, not his ſon; he is a ſon of the firſt huſband. Of courſe, the ſurviving one cannot ſay, that he is the father of the preſumptive living heir of his deceaſed wife. And by veſting the eſtate in his own perſon, it ceaſes to be in *hereditate jacente* of his mother, and becomes her ſon's. So, upon his death, it becomes in *hereditate jacente* of him alone. Of courſe, it muſt deſcend to his heirs at Law, not to thoſe of his mother. Therefore, it can never deſcend to the children, whom ſhe bore to her ſecond huſ-

band: for they are related to him by their mother. Of courſe, they can never be entitled to ſucceed to his eſtate: for they can never be his heirs at Law, ſince the Law of Scotland calls no uterine relations to ſucceſſion. Therefore, the courteſy muſt be for ever excluded; becauſe it is impoſſible for the ſurviving huſband either to be or ever to become father of the *heir* of his deceaſed wife, ſince his children cannot ſucceed either to her or to her eſtate.

In caſe the ſon, who ſurvives his mother, dies before he has veſted her heritage in his perſon, the courteſy is effectually excluded during his life: for during it the ſurviving huſband cannot ſay, that he is the father of the heir of his wife, *Fo.* 1ſt *Dec.* 1702, *Darleith.*

In caſe none of the ſons, whom ſhe is ſuppoſed to have by her firſt huſband, ſurvives her *, ſhe may be ſuppoſed either to have or not to have had ſons by her ſecond huſband.

In caſe ſhe has ſons by her ſecond huſband, the ſon of her firſt one may be ſuppoſed either to ſurvive or not to ſurvive all of theſe.

In caſe he does not ſurvive them all, the ſurviving huſband, immediately upon the death of the ſon of the firſt huſband, acquires an eventual right to the courteſy of *all* the heritage of his wife: for his own ſon becomes immediately her ſole preſumptive heir. Of courſe, he can ſay, that he is become the father of the *preſumptive living heir* of his wife, of one who would be her heir in caſe ſhe were to die during his life.

In caſe the ſon of the firſt huſband ſurvives not only all the ſons, but all the daughters, whom we ſuppoſe his mother to have by her ſecond huſband, the ſecond or ſurviving huſband is for ever barred from the courteſy; becauſe, *ex hypotheſi*, *all* the children, daughters as well as ſons, whom his wife bore him, die before the ſon of the firſt huſband. Of courſe, it is impoſſible for him ever to become the father of the heir of his wife: for, during the lives of all his children, the ſon of the firſt huſband is alive, and is the preſumptive heir of his mother.

In caſe he does not ſurvive *all* the daughters of the ſecond huſband, the ſurviving huſband may be entitled to the courteſy either of all, or of a part of the heritage of his wife. For the daughters, whom ſhe is ſuppoſed to have had by her firſt huſband, either may not or may ſurvive their brother-german, the ſon of the firſt huſband. In caſe they do not ſurvive him, the ſecond huſband muſt be entitled to the courteſy of *all* the heritage of his wife: for, immediately upon the death of the children of the firſt huſband, the daughters of the ſecond become ſole heireſſes of their mother; the daughters of the firſt being, in the preſent caſe, ſuppoſed all to die before their brother-german, and he to die not only before his mother, but before *all* the daughters of the ſecond huſband. Of courſe, theſe daughters, becoming the ſole preſumptive heireſſes of *all* the heritage of their mother, give their father an eventual right to the courteſy of it all.

In caſe the ſon of the firſt huſband dies before his ſiſters-german, that is, the daughters of his mother by her firſt huſband, they may be ſuppoſed either to ſurvive or not to ſurvive their mother. In caſe ſome of them ſurvive her, they either may or may not veſt their portion of their mother's heritage in their perſons. In caſe they veſt it in their perſons by making proper titles to it, and make it thereby impoſſible for any to acquire it otherwiſe than by procuring themſelves to be ſerved heirs at Law to them, the ſecond huſband is for ever excluded from the courteſy of it. For, by veſting it in their perſons, it ceaſes to be *in hereditate jacente* of their mother, and is made to belong to them: ſo, upon their death, it muſt deſcend to their heirs at Law, not to thoſe of their mother. Of courſe, it

* *N. B.* It muſt always be ſuppoſed, in this argument, that the ſons do not leave lawful iſſue: for in all caſes the iſſue repreſent their father; the repreſentative produces the ſame effects with the perſon repreſented; he is ſubſtituted into his place *jure repreſentationis*. This obſervation muſt be kept in view all along, and relates to daughters as well as ſons.

t can never deſcend to the daughters, whom ſhe had by her ſecond huſband: for they can never become heirs at Law of their ſiſters-uterine. Of courſe, the ſecond huſband can never become father of the heir of that portion of the heritage of his deceaſed wife, which has devolved to her daughters by her firſt huſband. Therefore, he cannot be entitled to the courteſy of it; he is entitled to the courteſy of no more than the portion of his own daughters.

In caſe they neglect to veſt it in their own perſons, they exclude, during their lives, the ſecond huſband from the courteſy of their portion of their mother's heritage: for during all that time he cannot ſay, that he is the father of the preſumptive heir of it. Of courſe, he is entitled to the courteſy of no more than falls to the ſhare of his own daughters. But upon the death of all the daughters of the firſt huſband, he becomes entitled to the courteſy of all the heritage of his deceaſed wife; becauſe his daughters become alone heireſſes of it *all*. Of courſe, he can then ſay, that he is father of the heir of his wife.

In caſe the daughters of the firſt huſband do not ſurvive their mother, the daughters of the ſecond may be ſuppoſed either to ſurvive or not to ſurvive her.

In caſe they ſurvive her, their father is entitled to the courteſy of *all* the heritage of his wife: for all of it deſcends to his daughters alone, ſince all the children, daughters as well as ſons, whom ſhe had by her firſt huſband, are ſuppoſed to die before her. Of courſe, his daughters become ſole heireſſes of all her eſtate. So he can ſay, that he is father of the preſumptive heir of his wife.

In caſe they do not ſurvive their mother, they may be ſuppoſed either to ſurvive or not to ſurvive all the daughters, whom their mother had by her firſt huſband. In caſe a daughter of the ſecond ſurvives *all* the daughters of the firſt huſband, the ſurviving huſband is alſo entitled to the courteſy of *all* the heritage of his wife. For, upon the death of their ſiſters-uterine, his daughters become ſole preſumptive heireſſes of it *all*. So he can ſay, that he is father of the preſumptive heirs of his deceaſed wife.

In caſe the daughters of the ſecond do not ſurvive *all* the daughters of the firſt huſband, the ſecond is not entitled to the courteſy of *all* the heritage of his wife. For he cannot ſay, that he is father of the heir of it *all*; ſince a portion of it deſcends to the daughters of the firſt huſband. Of courſe, he is entitled to the courteſy of no more than would have fallen to the ſhare of his own daughters at that time, at which they were the preſumptive living heirs of their mother, and their number will be moſt beneficial to their father. For the courteſy of the ſurviving huſband muſt be eſtimated at that time, at which they become the preſumptive living heirs of their mother. If one of them dies, before ſhe becomes preſumptive heir of her mother, ſhe cannot be taken into the account, in order to enlarge the courteſy of her father: and he has a right to rate it by that number, which will be moſt beneficial to him, that is, which will entitle him to the courteſy of the largeſt ſhare of the heritage of his wife; for he acquires a right to the courteſy at every point of time, at which his children are preſumptive heirs of their mother. Of courſe, he acquires it at that time, at which their number will be moſt beneficial to him. I ſay, 'when their number will be moſt beneficial to him;' that is, not when their number is greateſt, but when it will entitle him to the courteſy of the largeſt ſhare of his wife's heritage. For it may happen, that he will not be entitled to the largeſt ſhare of it at a time, at which their number is greateſt. He is then entitled to the largeſt ſhare of it, when the number of his daughters, being preſumptive heirs of their mother, bears the greateſt proportion to that of the daughters of the firſt huſband, being alſo preſumptive heirs of their mother, or, converſely, when the number of the daughters of the firſt huſband, being preſumptive heirs of their mother, bears the leaſt proportion to that of his daughters, being alſo preſumptive heirs of their mother. I ſay, *being* the preſumptive heirs of their mothers; for

thoſe

thoſe daughters, who ſurvive *all the ſons* of both huſbands, can alone be taken into account. Thoſe, who die before them, cannot be taken into it; becauſe the exiſtence of the ſons makes it impoſſible for the daughters, who die before them, ever to be held to be the preſumptive heirs of their mother. For the reality of that preſumption cannot be certainly determined before the death of the mother; before all the poſſible events are known.

The deciſions of theſe various caſes ſeem to be agreeable to the principles of Law, *R. M. l.* 2. *c.* 58.—*L. B. c.* 44.

§ 324. But it is of no importance, 4) Whether the child, which was born alive, and was at ſome point of its life the preſumptive heir of its mother, does or does not ſurvive her: for it gave its father a right to the courteſy by its birth. Therefore, the father is entitled to the courteſy, as well when it dies before its mother, as when it ſurvives her, *R. M. l.* 2. *c.* 58. § 1. 6.—*L. B. c.* 44. § 1. 3.

As little is it of importance, 5) Whether the marriage was diſſolved by the death of the mother, or whether the child died, before or after a full year was paſſed from its conſtitution. All, which is required, in order to entitle the ſurviving huſband to the courteſy, is, that his wife bear him a living child, her preſumptive heir, *N. courteſy*, 20th *July* 1632, *Stewart.*

§ 325. The courteſy extends over all thoſe things, over which, it has been ſaid, the terce extends (§ 299. *ſqq.*). Therefore, it extends 1) To land; 2) To tithes; 3) To feu-duties; 4) To annual-rents and to all profits, which are due out of land, and in ſecurity of which the wife was ſeiſed; 5) To mills; 6) To fiſhings; 7) To houſes; 8) To ſervitudes and other appurtenances of things, over which it extends. It extends not to thoſe things, over which the terce does not extend (§ 299. *ſqq.*). Therefore, it extends not, 1) To things, which are incapable of being *ſeiſed* (§ 319.) ſuch as patronages, reverſions, money due by perſonal bonds, or tacks if a married woman could be ſuppoſed to hold them; 2) To thoſe things, in which the wife was never actually ſeiſed (§ 301. 319. *ax.* 4.); 3) To thoſe things, in which ſhe was not ſeiſed as of *fee* (§ 302. 319. *ax.* 5.); 4) To thoſe things, of which ſhe was not *ſeiſed at the time of her death* (§ 303. 319. *ax.* 4.).

§ 326. But the courteſy is in ſome reſpects more, in others it is leſs extenſive than the terce.

The terce, it has been ſaid (§ 300.), extends not either to the profits of ſuperiorities; or to burgage-tenements. The courteſy extends to both.

It extends 1) To the conſtant profits of ſuperiority: for they ariſe *conſtantly* out of the fief, become due to the wife at regular and ſucceſſive points of time, and were poſſeſſed by her during her life. Of courſe, they were poſſeſſed by her huſband during the marriage. Therefore, they muſt continue to be poſſeſſed by him after it.

I ſay, the *conſtant* profits of ſuperiority: for it extends not to the ſuperiority itſelf. Of courſe, it cannot extend to the caſualties of it. For the huſband was not, during the life of his wife, the ſuperior of the lands, which were held of her; ſhe was the true and real ſuperior of them. Of courſe, he cannot, by his courteſy, become ſuperior of them after her death; he has right only to continue to poſſeſs and to reap the profits of the heritage, which was poſſeſſed by him during the life of his wife; the proper and the alone ſuperior of them is her ſucceſſor. Of courſe, the huſband is not entitled to the caſualties of ſuperiority, which ariſe during his courteſy: for they are due to the ſuperior alone, to him who is the real ſuperior of the lands, and who acquires right to them, becauſe they are ſubſtituted, by the Law, in place of other things which are due, but are not performed to him. Beſides, they cannot be ſaid to have been poſſeſſed either by his wife or by him; ſince they ariſe after her death. But he is, by his courteſy, entitled to poſſeſs no more than was poſſeſſed by him during her life. *A fortiori*, the huſband cannot enter the ſucceſſors of the vaſſals of his wife: for he is not

not himself either superior or seised. Of course, he cannot grant seisin to another.

The courtesy extends 2) To tenements held burgage, *L. B. c.* 44. The reason is, that the right of the husband is limited and regulated by the possession of the wife. By consequence, he is entitled to the courtesy of every feudal thing, of which she died vested and seised as of fee, without regard to the tenure by which it was held *.

Besides; 3) The terce, it has been said, extends to no more than a third of the heritage of the husband. But the courtesy extends to more; it extends over *all* the heritage of the wife. The reason is; the terce is a provision merely alimentary. But the dignity of the family of the wife makes it indecent for her to be married to one, who is unable to maintain a rank suitable to hers. Therefore, the Law bestows the liferent of all her *heritage*, that is, of *all* of which she is *heiress*, on her husband, in order to enable him to preserve, after her death, a rank suitable to one, who was thought worthy of having the honour to be her husband, was the father of her heir, and was, of course, the person to whom the representative of her family would owe filial respect. Hence, I called (§ 319.) the courtesy 'a provision made for the *honourable* maintenance of the husband.'

§ 327. I said, that the courtesy is, in some respects, less extensive than the terce. For the terce, it has been said (§ 300, 301.), extends over all those things, which are terceable *sua natura*, without regard to the time, at which they were acquired by the husband, whether before or during his marriage; without regard to the title, on which he acquired them, whether it was an universal or a singular one; without regard to the way, by which he succeeded to them, whether it was as heir of one, of whom he was heir at Law, or as successor, *titulo singulari*, of the former proprietor of them.

But 'tis otherwise as to the courtesy; for it does not extend even to all those things, which *sua natura* admit of it, unless they devolved to the wife, *titulo universali*, as heir or universal successor of the former proprietor of them. For the courtesy is due to the husbands of heiresses alone. The reason is, that the dignity and perhaps the antiquity of their families, make it be thought necessary for their husbands to hold a higher rank than those of women, who purchase their own estates. Therefore, in order to make way for the courtesy, it is necessary that the things, of which the liferent is demanded by the husband, be strictly heritable, *i. e.* that they have not been *conquered* by the wife, *or* acquired by her on a singular title *v. g. emptionis*, *donationis*, *&c.* but that she either have actually, or would have succeeded to them on an universal one, as heir of the former proprietor of them, 28th *Jan.* 1595, *Lundie of Balgony*, reported by SKENE, *d. v. s. on the word* curialitas.—*Fo.* 22d *June* 1709, *Lawson.*—*F. ibid.*—*D.* I. 205. 11th *Jan.* 1740, *Hodge.* I say, the courtesy is due not in those cases alone, in which the wife did actually succeed, but also in those in which she would have succeeded as heir of the former proprietor: for it is due, if she acquires it *præceptione*, *i. e.* if one, to whom she was heir at Law, during his life, conveys to her an estate, to which she would have succeeded at any rate, tho it had not been made over to her; because she is in this case held to be heir as to this estate, as much as if she had actually succeeded to it, or had made her title to it by a service.

§ 328. From what has been said, it is plain, that the courtesy may be excluded in all the same ways, in which it has been said the terce may be excluded. Therefore, it must be excluded in every way, in which the wife is divested and disseised of the fee of her heritage before her death; and it is not excluded, in case she dies vested and seised of it as of fee. Every thing, therefore, which has

* I know, it is reported, *B.* 101. to have been once found, that the courtesy extends not to tenements held burgage. But it is probable, that the reporter has mistaken the *ratio decidendi* in that case: for the tenement, about which the dispute was, was not *heritage*, but *conquest*, which belonged to the wife. Her right to it had been completed by seisin during the life of her brother. See CR. *l.* 2. *d.* 22. § 43.—SK. *voce* curialitas.—STAIR's *Inst. b.* II. *t.* 6. § 19.—MACDOUAL, *ibid.*---ERSK. *b.* II. *t.* 9. § 31.

been ſaid concerning the ways of excluding the relict from her terce of the terceable eſtate of her huſband (§ 299, *ſqq.*), may be repeated, *mutatis mutandis*, concerning thoſe, in which a huſband may be excluded from the courteſy of the heritage of his wife.

§ 329. The terce, it has been ſaid (§ 305.), is affected by ſuch burdens alone, as are made real by ſeiſin, not by ſuch, as are perſonal. But the courteſy is burdened by the perſonal as well as by real debts due by the wife. The reaſon of the difference is this; the terce is conſidered as a proviſion merely alimentary; it is allowed to a relict for her maintenance, and is held to be no more than ſufficient for it; it extends only to a third part of the eſtate of her huſband. So two thirds remain entire to his heir. His heir, therefore, whoſe intereſt is perpetual as well as more extenſive than the temporary right of the relict, ought to be bound to pay not only all the debts that were due by his predeceſſor, but alſo the intereſt, and other burdens, which become due at ſucceſſive terms on account of them: except ſuch as are made real by ſeiſin, and of courſe affect the terced lands. But the courteſy is not conſidered as merely alimentary: for a wife is not held by law to be bound to provide for the maintenance of her huſband. His right, therefore, to the courteſy does not take place in all caſes; it takes place in thoſe alone, in which the Law thinks a proviſion ought to be made for the *honourable* maintenance of the huſband. Therefore, when it does take place, it is univerſal, and extends to the *whole* heritage of the wife. Hence it is called, by SKENE, in his Notes on the 58th chapter of the ſecond book of the MAJESTY, *Forma cujuſdem quaſi ſucceſſionis, per quam uxori vir pro tempore vitæ ſuæ ſuccedit, per curialitatem.* Conſequently, the huſband ought to be bound to pay the current intereſt of the perſonal as well as of the real debts due by his wife: ſince he enjoys the profits of all her eſtate, and ought, therefore, to be liable to the value of the rents, which he enjoys by the courteſy. But becauſe his right is only temporary, and the heir of his wife will, on the death of the huſband and the determination of his right, begin to have full poſſeſſion and enjoyment of his eſtate, he is liable not to the principal ſums due by her, but only for the current intereſt of them, and the other yearly burdens affecting her eſtate. And becauſe his wife may happen to have other repreſentatives, who may have, immediately on her death, ſucceeded either to ſome of her heritable eſtate, or to a ſhare of his moveables (§ 318.) which became due to them on her death; hence it is reaſonable, and it has been adjudged to be agreeable to Law, that he ſhould be entitled to be reimburſed by the heirs or executors, who have ſucceeded to part either of the heritable or of the moveable eſtate of his wife, which is not enjoyed by him by virtue of the courteſy; and that he has action againſt them for this reimburſement *pro ratâ* of the intereſt which he has payed of her perſonal debts, and of ſuch real ones as did *not* affect thoſe lands over which his courteſy extends, more than is proportionable to the ſhare which he enjoys of her eſtate. I ſay, the intereſt of ſuch real debts, as did not affect that part of the heritable eſtate of his wife which he liferents by the courteſy. For he is not entitled to get reimburſement of thoſe which become due at regular and ſucceſſive times, and are ſpecial charges on it, *K.* 2. ſuch as annual-rents due by infeftment, impoſts, taxations, and charges laid ſpecially on the particular lands poſſeſſed by him; becauſe he, who poſſeſſes and reaps the benefit of a thing, is legally bound, and ought to pay all the burdens, with which it is charged; for they accompany it, whoever happens to poſſeſs it. *Nam incommoda eum ferre oportet, cujus ſunt commoda.* Beſides, they are charges upon thoſe particular tenements alone; they are not burdens on any others. Of courſe, no others can be charged with them.

In the ſame manner, he is not liable to the annual-rent of ſuch real debts of his wife, as are charges on that part alone of her immoveable eſtate, which is not poſſeſſed by him: becauſe the creditors, to whom the debts are due, have acceſs to the things which are charged with them, and may ſue the poſſeſſors of them for

for payment. So the husband cannot be obliged to pay either the debts principally due, or those which become due at successive terms.

§ 330. Neither a service, nor a seisin, nor any other solemnity is necessary either to constitute or to complete the right, which the surviving husband has to the courtesy. For it is constituted *ipso jure*, and is completed immediately on the death of the wife. The reason is, that it extends to *all* her heritage. Therefore, there is no necessity either for a service, or for a kenning, or for a division, in order to shew the particulars, which he is entitled to possess. No body is intitled to possess along with him; his possession is exclusive; he has right to continue, after the death of his wife, to possess all that her heritage, which he possessed during her life, or rather in which she died vested and seised. Consequently, he has power, without being either served or kenned or seised, to cultivate and to inhabit the tenements, of which he has the courtesy, to let them out to be cultivated and to be inhabited by others, and to put out and to put in tenants, agreeably to Law. For he cannot, any more than the tercer, remove any sort of tenants, whether moveable or not, till the next Whitsun-term after the commencement of his liferent. If, therefore, they are moveable ones, and possess the lands from year to year, they may be removed against that next Whitsun-term, provided they may be, and are accordingly duly warned, that they are to be removed against it. If they are not moveable, but hold their farms for a period of years, they cannot be removed till the expiration of their leases. In short, a husband, who has the courtesy of the heritage of his wife, has over the tenements, to which his right extends, the same powers and the same rights which a widow, who has been *both served and kenned* to a terce of the heritable estate of her husband, has over the things to which her terce extends (§ 311, 312.).

§ 331. Since he continues, after the death of his wife, to have the same rights which he had before it, 'tis plain, that a husband, who has the courtesy, is entitled both to vote at the election, and to be himself elected a member of parliament; provided the lands, to which his courtesy extends, are of such a kind, of such an extent, and of such a valuation, as entitle the proprietor of them to elect or to be elected a member of parliament, 1681, *c.* 21.

§ 332. The right, which a husband has by virtue of the courtesy of Scotland, is personal to himself: therefore, it expires with himself.

On the determination of his liferent, his representatives have rights, in every respect, analogous to those, which, it has been said (§ 315.), the representatives of a tercer have after her death. So every thing, which has been said concerning the rights of the representatives of a tercer, is true, and may be repeated, *mutatis mutandis*, concerning those of the representatives of a husband, who had the courtesy.

A SYS-

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SYSTEM

OF THE

PRINCIPLES of the LAW of *SCOTLAND.*

PART I.

BOOK V.

TITLE I.

Who are Lawful Children?

§ 333. THE primary end of marriage is the procreation of Lawful iſſue. Therefore thoſe, who are the iſſue of lawful embraces, are alone held to be lawful children. Of courſe, *lawful* children may be defined to be 'Such, as are procreated between a man and a woman, 'who either are actually married to one another at the time of the *conception* of 'their children, or may be feigned to have been married at it, tho they were 'not actually married till ſome time after it, perhaps after the birth.' From the definition it follows, that lawful children are of two ſorts, I. Such as are procreated by parents, who are huſband and wife at the time of the conception of their children. II. Such as are procreated of parents, who marry each other ſome time after the conception of their children, and may be feigned to have been huſband and wife not only at that time, but alſo during all the period which intervenes between it and their ſubſequent actual marriage. Thoſe of the firſt ſort are ſaid to be *lawful* in the ſtricteſt ſenſe, becauſe they are the iſſue of embraces lawful in every reſpect. Hence they are oppoſed to thoſe of the ſe-

cond, who are properly called *legitimated* children, becauſe they are the offſpring of embraces, which were unlawful at the time of the copulation of the parents, but which the offenders have in ſome ſort purged of their guilt by marrying one another, and thereby making the only reparation and atonement, which they were capable of making the one to the other, and both to their offspring. For by this means, the children acquire all the rights of lawfully begotten ones, and the ſtain of their birth is ſome how wiped away.

§ 334. From the definition of thoſe of the firſt ſort, it appears to be plain, I. That, in order to entitle children to be called *lawful* in the ſtrict ſenſe of the word, they muſt be the children of a man and a woman, who are huſband and wife the one of the other, II. At the time of the conception of the children.

For thoſe children are alone ſaid to be *lawful*, who are the product of lawful embraces. Now, the embraces of perſons joined together in the lawful bond of wedlock, are alone held by the Law of Scotland to be lawful. All others are by Law prohibited under penalties proportionable to the atrocity of the delinquency.

But, becauſe it is impoſſible to know, in all caſes, whether the children born by a wife were begotten by her huſband, the Law attending to that which commonly happens, and conſidering how probable it is, hath, in order to prevent diſputes which might frequently ariſe, introduced a preſumption, 'that a huſband is 'the true father of the children born by his wife, or that *he* is the father whom 'the marriage demonſtrates to be ſuch.' *Pater eſt quem nuptiæ demonſtrant, l. 5. ff. de in jus vocando.* Hence a ſon is, *in l. 6. ff. de his qui ſui vel alieni juris ſunt*, defined to be, *is qui ex viro et uxore ejus naſcitur, R. M. l. 2. c. 49. § 6.—c. 50. § 1. 2. Sk. not. ad d. § 6. c. 49. l. 2.*

§ 335. But this preſumption is no more than a *præſumptio juris*; it is not one of thoſe, which Lawyers call *præſumptiones juris et de jure.* Therefore, it excludes not the huſband from proving, that the children, born by his wife, were not begotten by himſelf. The effect of it is only to eſtabliſh a preſumption in favour both of the fidelity of the wife, and of the filiation of the children; to put the *onus probandi* on the huſband; and to make it incumbent on him, in caſe he denies himſelf to be the true father of the children of his wife, to prove, either that ſome other is, or, at leaſt, that he is not himſelf the father of them.

This is ſo true, that a huſband is not excluded from the right of proving, either that he could not himſelf be, or that ſome other was the father even of ſuch of her children, as, it appears from the time of their birth, muſt have been begotten at ſome inſtant of a period, during which he lived with her.

For if he can prove, that he was impotent during all that ſpace of time, at ſome point of which the child muſt neceſſarily, according to the ordinary courſe of nature, have been begotten, he will not be obliged to own it to be his: no matter whether he can or cannot make proof of the individual perſon, who was the father of it; becauſe the proof of his own impotence, makes it clear that he could not be, whoever was, the father, *l. 6. ff. de his qui ſui vel alieni.*

Indeed if the huſband proves, not only that he was himſelf impotent at the time, at which the child muſt have been begotten, but alſo that a particular man then committed adultery with his wife, the proof will be ſo much the ſtronger on the part of the huſband; becauſe he makes poſitive proof of the infidelity of his wife, and points out one who might probably have been the father of her offſpring.

§ 336. But it muſt be remarked, that in all caſes, in which a huſband and wife live together, it is neceſſary to make proof of the impotence of the huſband, and that by the cleareſt evidence, ere the children can be adjudged not to be his. For Law preſumes, in all ſuch caſes, the huſband both to have had the ability of generation, and to have exerciſed it. Therefore, it requires evidence, which it calls clearer than the meridian light, *luce clarior*, in order to overcome the

the force of the preſumption. Of courſe, if the huſband does not prove his own impotence, the Law creates a preſumption *juris et de jure* in favour of the filiation of the children. So that children, whom a wife bears, and who muſt have been begotten, while ſhe was living with her huſband, are in all caſes held, *præſumptione juris et de jure*, to be the children of the huſband, in caſe he is not proved to have been impotent during the time, at which they muſt have been begotten. *Non tamen ferendum*, JULIANUS *ait, eum, qui cum uxore ſuâ aſſidue moratus, nolit filium agnoſcere, quaſi non ſuum, l.* 6. *ff. de his qui ſui vel alieni.*

This preſumption is ſo ſtrong, that a huſband, who is not impotent, and cohabits with his wife, will be held to have been the father of the children born by her, 1) Tho he proves her to have been guilty of adultery, and to have committed whoredom with other men; for the Law preſumes in favour of the children, that they are, ſince they *may* be the *lawful* iſſue of their father, as it is very poſſible, that the huſband may be their father, tho the mother hath committed adultery: *Nam non utique crimen adulterii, quod mulieri objicitur, infanti præjudicat; cum poſſit et illa adultera eſſe, et impubes defunctum patrem habuiſſe, l.* 11. § 9. *ff. ad leg.* JUL. *de adult.* Nay, he is held to be the father, 2) Tho the mother ſhould confeſs her own turpitude, and ſwear that the child, whom ſhe has born, was not begotten by her huſband; becauſe ſuch a confeſſion is preſumed to proceed either from a diſordered imagination, or from ſome ill-will borne by her to him. Therefore, it is held not to be ſufficient alone, without other evidence, for proving the illegitimacy of the offspring, *l.* 29. § 1. *ff. de prob. l.* 48. *ff. de r. j.* In general, in all caſes, in which it is poſſible for the huſband to have been, the Law preſumes on the favourable ſide, that he actually was the father of the children born by his wife, *l.* 56. 168. *ff. d. r. j. In ambiguis rebus humaniorem ſententiam ſequi oportet, l.* 10. § 1. *ff. de rebus dubiis.*

§ 337. Indeed, the Law preſumes, in *all* caſes, in favour of the filiation of the children, and makes it therefore incumbent on the huſband to prove, that he neither was, nor could be their father. Unleſs he proves ſo much, he proves nothing. Let him prove the behaviour of his wife to have been ſuſpiciouſly indecent, let him prove her to have been guilty of adultery, let him prove that ſhe proſtituted herſelf to every comer, let him prove what he pleaſes, the Law holds him to be the father of her children, unleſs he proves, that he *could not be* the father of them.

I ſay, unleſs he proves, that it was impoſſible for him to be their father. For if a huſband proves himſelf to have been abſent from his wife during all the time, at ſome point of which her children muſt have been begotten, the Law holds him not to be their father, and his wife to be an adultereſs; becauſe it is plainly impoſſible, that he could beget the children whom ſhe has born. Thus, if a man proves himſelf to have been in America, and his wife to have remained in Scotland for ſix years continually, he will not be obliged to own any children, who muſt have been begotten during this time, and are born by her; becauſe he could not be the father of them. In the ſame manner, if he proves that they lived ſeparately, at a diſtance which is not ſo great, during a certain period; he will not be held to be the father. But particular regard ought to be had to the greatneſs of the diſtance: becauſe if they live at a ſmall diſtance from one another, and could have eaſy acceſs to one another; thus, if they live in the ſame town, Law will hardly believe, that the huſband is not the father of the children, whom ſhe bears: ſince they might have come to each other's embraces in the ſilence of the night, apart from the knowledge of men. Therefore, in a caſe like this, the proof of the continual abſence ought to be very ſtrong, clear, and convincing. The Law of Scotland, it is true, like that of the Romans, allows the truth to be proved, and gives place to it in *all* caſes, *l.* 29. § 1. *ff. de probation.* But it alſo requires proof to be clear according to circumſtances, and to be ſtronger and ſtronger according to the nature of the fact to be proved, and

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the ſtrength of that negative or preſumptive evidence, which makes it probable, that it is not true.

§ 338. But II. In order to entitle children to be ſaid, *ſummo et ſtricto jure*, to be lawfully begotten, 'tis neceſſary, that their father and mother not only be huſband and wife, but be ſo alſo at the time of the conception of their children (§ 334.). For it is not enough that they be born, they muſt alſo be begotten during the marriage of their parents. 'Tis true the Law allows children, procreated of unlawful embraces, to be legitimated by the ſubſequent marriage of their parents; provided no impediment intervenes and incapacitates them from being legitimated. But it does not hold them to have been lawfully begotten, and to be *lawful* children ſtrictly ſo called: for all ante-nuptial embraces are held by Law to be unlawful, are therefore prohibited by it, and are ordained to be puniſhed, 1567, *c.* 13. 1661, *c.* 38. And it alters not either the nature or the atrocity of the crime, that the delinquents marry each other, after they have committed it; nor can the puniſhment be judicially remitted on that account, *F.* 9th *Nov.* 1709, *Sandilands*.

§ 339. Hence the Law, in order to prevent diſputes, and to ſhew who are and who are not begotten during the marriage of their parents, hath eſtabliſhed a general rule on which it founds its preſumption, 'that all thoſe, who are born 'full ſix months after the commencement or celebration of the marriage, were be-'gotten after their parents were huſband and wife, and are therefore lawful children 'in all reſpects,' *l.* 12. *ff. de ſtatu hominum*, *l.* 3. § 12. *ff. de ſuis et legit. hæred.* a rule which is extremely favourable to the legitimacy of the children. For the moſt accurate obſervations demonſtrate, that children are born ſeldom during the ſeventh, ſometimes during the eighth, often during the ninth, and commonly about the beginning of the tenth month. But becauſe children are ſometimes born alive during the ſeventh month, Law preſumes, in the way moſt favourable for them, that a child, born in the ſeventh month, was begotten after the marriage of its parents, A. GEL. *l.* 3. *c.* 16.

Therefore, a child, which is born during the ſixth or at any time before the beginning of the ſeventh month, is not preſumed to be the huſband's; he is not obliged either to own it, or to prove himſelf not to be the father. The time of the birth makes Law preſume in his favour, puts the *onus probandi* on the wife, and makes it incumbent on her to prove him to be the father. For, if either he does not acknowledge himſelf, or his wife does not prove him, he will be held not to be the father. Of courſe, he will not be bound to do by the child as a father is in duty bound to do by his offspring. By conſequence, the child will not either be, or be capable of being legitimated to that huſband, during whoſe marriage to the mother it was born. Whereas we ſhall ſee, that if it had been begotten by him, it would have been legitimated by his ſubſequent marriage of the mother. The reaſon of this conſtitution is to be found in the order of nature: for the *fœtus* begins not to live till towards the end of the ſixth month of the pregnancy of its mother. Therefore, if a living child is born before the end of the ſixth month from the commencement of the marriage, it is a ſure indication, that it was begotten before that point of time, at which the parents became married perſons. If it was by the huſband, it is legitimated by the ſubſequent marriage; if by any other, it is a baſtard.

§ 340. If the parents were married to one another at the time of the conception, 'tis enough to render the children lawful; and it matters not, tho the marriage ſhould happen to be diſſolved before the birth: for a huſband may die, leaving his wife with child by him. Hence the Law hath attended to a caſe, which frequently happens, and hath limited a certain time from the death of the huſband, within which if any children are born by his relict, it preſumes, that they were begotten by him, and are his lawful children. And it hath been as favourable both to the fidelity of the wife, and to the legitimacy of the offſpring in this, as it has been ſaid, it is in the former caſe. For it is ſeldom, that

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a wife happens to conceive ſo ſhort while before the death of her huſband, as to go with child full nine months, and to be delivered only during the tenth month after it. But men may be ſuddenly cut off either by momentary diſeaſes or by violence; and the Law obſerving, that it is poſſible a woman may bear to her huſband a poſthumous child in the tenth month after his death, therefore preſumes all the children, which a woman bears within ten months from the death of her huſband, to be his children lawfully begotten by him, *l.* 3. § 11. *ff. de ſuis et legit. hered.*

Conſequently if a child is born within that time, the preſumption of the Law in its favour makes it incumbent on thoſe, who deny its legitimacy, to prove, that the deceaſed huſband of the mother was not its father, and could not have got his wife with child at the time, at which it behoved it to have been begotten, either becauſe he had been, by caſtration, by accident, or by the violence of ſome tedious diſeaſe, rendered impotent, or becauſe he had been long abſent from her. If they do not prove, that he *could not be*, the Law preſumes him to have actually been the father of it.

Nay, the Law is not ſo rigorous, as to deny poſitively and in all caſes the lawfulneſs and filiation of a child, born even after the expiration of ten months from the death of the huſband. AULUS GELLIUS, *l.* 13. *c.* 16. tells us, that the Emperor HADRIAN, having occaſion to take cognizance of an extraordinary caſe, which occurred during his reign, thought proper to enquire into the opinions of the moſt celebrated philoſophers and phyſicians, formed his judgment on them, and found by a ſpecial decree, that a child born in the eleventh month *might* be lawful. But the mother was a woman of undoubted chaſtity. He quotes another caſe from the ſeventh book of PLINY's Natural Hiſtory, where the Prætor L. PAPYRIUS refuſed to give the *bonorum poſſeſſio* to one, who ſought it; becauſe the relict of him, of whoſe eſtate poſſeſſion was demanded, had born a child 13 months after the death of her huſband. SANDE reports a deciſion of a caſe, which happened in Friezland, where a child born in the twelfth month was found to be a lawful one. But in caſes of this kind, the integrity of the character of the mother muſt, at leaſt, be undoubted: beſides, it would go far to remove all ſuſpicion, if it were proved, that ſhe had any of the common ſymptoms of pregnancy either before or at leaſt immediately after the death of her huſband. But caſes of this kind are, indeed, extraordinary. Therefore, a proof, clearer than the meridian light, muſt be neceſſary, in order to give conviction of the fidelity of the mother.

§ 341. From what has been ſaid it is plain, that the violence of paſſion may hurry on a woman to do that which may render it uncertain, who is the father of her child. For ſuppoſe her, after the death of one huſband, to marry another, and to bear a child within the eighth month from the death of the one and from her marriage of the other huſband; it is plain, that, in this caſe, either the one or the other may be the father. For every child, which ſhe bears within ten months from the death of her firſt huſband, is by Law preſumed to be his (§ 340.); and every child, which ſhe bears at any time after the ſeventh month from her marriage of her ſecond huſband has begun to run, is by Law preſumed to be his (§ 339.). So that a child born by a woman at any time, before ten months from the death of her firſt huſband, and after ſix months from the commencement of her ſecond marriage are fully run, it is poſſible, may be the child either of the one or of the other huſband. Whoſe, therefore, ſhall it be adjudged to be?

Lawyers, in order to relieve themſelves from this perplexity, and the birth from uncertainty, have invented and have embraced various opinions. That, which has been moſt commonly received, gives the child to the ſecond huſband; becauſe it may be, and ought therefore to be held to be his. His precipitate marriage of the mother, at a time when he could not be ignorant, that it was poſſible ſhe *might* be, when at leaſt he could not know that ſhe *was not* with child by

her former marriage, is the ſole cauſe of the uncertainty. The deceaſed huſband is not alive to look to his own intereſt. There is, beſides, ſhrewd reaſon to ſuſpect, that there might have been ante-nuptial dalliances between a couple, who have been ſo forgetful of decency, as to precipitate themſelves as ſoon as they could fly into the arms of each other, while one of them ought, according to cuſtom, to have been as yet mourning and in tears for the loſs of her deceaſed huſband.

This opinion, it muſt be owned, would be extremely juſt, if the intereſt of the huſband and of the wife alone was concerned in the deciſion of the queſtion: for they merit not the favour of the Law. But, ſince they do a thing, which Law not only has not guarded by any penal ſanction, but has not even forbidden at all; and the intereſt both of that child whoſe parentage is diſputable, and of the other children of the mother, as well as of both her preſent and her deceaſed huſband, may be greatly concerned in it, there muſt, in all caſes of this kind, be, as the Law *l.* 29. § 1. *ff. de probat.* ſays on occaſion of a ſimilar queſtion, *locus veritati.* Therefore, a proof of the father ought to be allowed to any one, whoſe intereſt is connected with the filiation of the child; and he, who is proved, ought to be adjudged to have been the true father. For it would be extremely hard, that a child, who, if he was begotten by the deceaſed huſband of the mother, would ſucceed to an opulent fortune, ſhould *in pœnam* of the precipitancy and raſhneſs of others be held, on the authority of a ſimple preſumption alone, to be the child not of his *real* father, but of the preſent huſband of his mother; and be thereby deprived of that inheritance, to which he has in reality a juſt title, ſince his title would have been indiſputable, for his filiation would have been ſo, in caſe his mother had remained a widow till her delivery. Suppoſe again, that, if he is held to be the ſon of the preſent huſband of his mother, he would be entitled to ſucceed to a great eſtate, and to exclude this huſband's children by a former marriage from ſucceeding to it; would it not be extremely hard, that they ſhould be injured in a manner ſo eſſential, as they would thus be, in caſe he is really the ſon of the firſt huſband; and that, *in pœnam* not of any offence committed by themſelves, for they are abſolutely innocent, but of one committed by their father? Theſe caſes, and many others, which may be ſuppoſed, ſhew plainly, that by adhering to this preſumption, and by excluding all proof contrary to it, rights which have been honeſtly purchaſed may be infringed, and the innocent ſuffer inſtead of the guilty. Hence, it can be no more than a *præſumptio juris*; it is not a *præſumptio juris et de jure.* Therefore, a proof of the truth ought in all caſes to be allowed. For every preſumption, which is not expreſsly declared to be *juris et de jure*, ought to be held to be only a *præſumptio juris*, and to be allowed to be redargued by contrary proof. Beſides, ſuppoſe the preſumption concerning the preſent huſband was *juris et de jure;* is not that for the deceaſed one equally ſtrong? They are both founded on the ſame principle, *viz. Pater eſt quem nuptiæ demonſtrant*, that he is, whom the marriage points out to be, the father: but the marriage points out the deceaſed as clearly as it does the preſent huſband for the father; becauſe it is not the ſubſiſtence of the marriage, but the time, at which the child is born after or during it, that fixes the father. Law, as we have ſaid (§ 339.), does not preſume, unleſs the children are born *legitimo et juſto tempore.* If they are born within that juſt and lawful time, it preſumes in their favour, whether the marriage is or is not ſubſiſting. Conſequently, it preſumes in favour of the dead as ſtrongly as it does in favour of the living huſband. So the preſumptions balance each other, and make a proof neceſſary. Beſides, there is not in reality good reaſon for preſuming againſt the ſecond huſband, that the children are his: for he hath done nothing which is prohibited by Law, nothing which he has not an entire and perfect right to do. 'Tis true ſecond marriages were odious to the civil Law, and were therefore puniſhed by it. Its ſanctions were eſpecially ſevere againſt ſuch as precipitated themſelves *intra annum luctus* into them. But neither

neither the Law nor the cuſtom of Scotland knows any ſuch thing as an *annus luctus*; it allows people to marry as ſoon as they pleaſe. It would, therefore, be extremely hard in this country, if a man was to be puniſhed for what Law holds not to be an offence. Beſides, not the huſband alone, but all his kindred, to whom his children may ſucceed, are puniſhed along with him, if a child, that is not really his, be adjudged to be his. For theſe reaſons, a proof ought, in all caſes, to be allowed, that the real truth, to which every preſumption muſt yield, may be diſcovered. Conſequently, regard ought to be had 1) To the ſtate of health in which the deceaſed huſband was before his death, and to the fatality of which he died. For, if he was oppreſſed by a violent diſeaſe, and rendered by the force of it impotent; or, tho he cannot be proved to have been abſolutely impotent, if he was ſo greatly overwhelmed by it for ſo long a time before the birth of the child, as makes it impoſſible to believe, that he then impregnated his wife, it muſt have great weight to prove the preſent huſband to have been the father. 2) Regard ought alſo to be had to the condition of the mother: for her teſtimony ought to go far to determine the queſtion. If, therefore, it ſhall appear from an examination of herſelf, and from the depoſitions of her phyſicians, her midwife, her ſervants, or any others who had acceſs to know the ſtate of her body, that ſhe ſaid and believed ſhe was with child during the life of her deceaſed huſband, or before her ſecond marriage; if ſhe had the common ſymptoms which attend geſtation, before her entrance into it; it is probable that ſhe was with child before the death of her laſt huſband. Therefore, the ſecond huſband ought not to be deemed the father. 3) Regard ought to be had to the appearance of the child itſelf. For, if it appears to have been born before its due time, and not to be full grown; the probability will be ſtrong that the preſent huſband was the father. Thus, ſuppoſe a child to be born, whom phyſicians, midwives, and other perſons of ſkill depoſe to have been born during the ſeventh month from its conception, and the preſent marriage to have ſubſiſted for more than ſeven months, at leaſt before the time at which this child muſt have been conceived, 'tis plain, that the ſecond huſband, he who was the huſband of the mother at the time of the conception, can alone be the father. 4) Regard ought to be had to the time, at which the child is born. For if it be born in the tenth month from the death of the former huſband, and about nine months from the commencement of the ſecond marriage, Law will preſume it to be the iſſue of this ſecond marriage: for, tho it preſumes to be lawful a child that is born at any time within ten months from the death of the huſband of the mother, this is only a preſumption introduced in favour of the child, and is not *quod plerumque fit*. 'Tis ſeldom that women bear children to their deceaſed huſbands ten months after their death. So the times of the death of the firſt huſband, of the commencement of the ſecond marriage, and of the birth of the child, ought to be compared one with another, and a conjecture formed concerning the true father, whether he is the dead or the living huſband of the mother. In ſhort, every proof ought to be taken, by which a judge may be enabled to diſcover the truth; and from a view of the whole circumſtances of the caſe, an opinion ought to be formed about the true father. If it is abſolutely impoſſible to diſcover the truth, or it is doubtful, whether the one or the other huſband was the father, the Law muſt preſume, that the child was begotten by the preſent husband, ſince he cannot prove he was *not* the father of it; and beſides, it would be hard to load the dead huſband, when, perhaps, if he was alive, he could prove himſelf not to have been the father. So the Laws, to extricate the matter from the perplexity in which it is involved, muſt preſume againſt the ſecond husband, who cannot clear himſelf, and muſt hinder the children from being illegitimated.

§ 342. But the Law, in order to aſcertain the true fathers of children, and to hinder effectually women from impoſing ſuppoſititious births, hath made it lawful for thoſe, who are intereſted in the iſſue, *inſpicere ventrem et cuſtodire partum*. The

Romans

Romans allowed of this inſpection of the womb, and cuſtody of the fœtus in ſeveral different caſes, which were diſtinguiſhed accurately from one another.

§ 343. I. It was uſed when wives, who had been repudiated by their husbands, affirmed themſelves to be with child by them. For a woman, who had been repudiated by her husband, was, either by herſelf, or by her parent, or by ſomebody commiſſioned by one or other of them, bound, if ſhe thought herſelf to be with child by her husband, to notify, within 30 days from the day of the divorce, her pregnancy either to himſelf or to his parent, or, if neither of them could be perſonally apprehended, at their dwelling-houſe, *l.* 1. § 1, 2, 3. *ff. de agn. et al. lib.* On which notification it was incumbent on the husband either to anſwer and to proteſt that ſhe was not with child by him, or to ſend ſome perſons to inſpect her womb, and, if they declared ſhe was with child, to guard the fœtus and to hinder her from impoſing a ſuppoſititious child upon him, *l.* 1. § 4. If the husband thought it proper, either after the declaration of thoſe who had inſpected her, or before he received any notice of her pregnancy from her, of his own accord to ſend perſons to guard the fœtus, it was the duty of the woman to admit them. If ſhe did not, he might diſown the child, till his wife proved it was begotten by him, *l.* 1. § 6, 7, 8. *eod.* The ceremonious anxieties, which ought regularly to be obſerved in this caſe, are fully deſcribed in the title of the *Pandects de agnoſcendis et alendis liberis, l.* 1, 2, 3, 4. I ſay, which ought regularly to have been obſerved. For, if either by accident, ruſticity, or ignorance, any or all of them happened to be omitted, there was ſtill room for the truth. Only the party, who had forgotten to obſerve ſome punctilio of his duty, was puniſhed by being obliged, if the huſband was the perſon on whom the omiſſion was chargeable, either to own and to maintain the child, till he ſhould prove it not to be his; or, if it was the wife, to have the child held and preſumed not to have been, till it ſhould be proved to have been begotten by the huſband; or by ſome other pain ſuited to the importance of the omiſſion, and to the circumſtances of the caſe. For in all caſes there was *locus veritati*; an omiſſion on the part of either the man or the woman had not an effect ſo ſtrong, as either to oblige him to own a child, of whom he was not the father; or to convict her of impoſing a ſuppoſititious birth, when ſhe had not been in reality unfaithful to her huſband. The only effect which it had, was to create a preſumption againſt that perſon, who had omitted the ſolemnities of Law, and to put the *onus probandi* on him, *l.* 1. § 7, 8, 11, 12, 13, 14, 15, 16. *ff. de agnoſc. et alend. liber.*

II. The ſecond caſe, in which the Roman Law allowed the inſpection and the cuſtody of the womb, was, when a man, who had repudiated his wife, affirmed, while ſhe denied that ſhe was with child by him. In this caſe the huſband had a right to have her inſpected, that he might know whether ſhe was or was not with child. For this purpoſe it was neceſſary, 1) To call her before the Prætor, and to aſk her, whether ſhe was or was not with child? If ſhe either would not come, or would not anſwer, it was neceſſary to uſe Prætorian remedies, in order to compel her. If ſhe owned that ſhe was with child, then it behoved her to admit thoſe appointed to watch and to keep her. If ſhe ſaid, that ſhe was not with child, her belly was inſpected by three midwives of approved integrity and ſkill, who were choſen by the magiſtrate, and were ordered to inſpect her in the houſe of ſome matron of good fame, choſen alſo by the Prætor. If either all the three, or any two of them, after inſpecting her, declared ſhe was with child, ſhe was obliged to ſubmit to the cuſtody of the Law, and to allow herſelf to be guarded by ſuch as were appointed for this purpoſe; that thus ſhe might be hindered from doing violence to her own bowels, and from injuring her huſband by procuring an abortion. If the midwives declared, that ſhe was not with child, the repudiated wife had an action *injuriarum* againſt her huſband; provided he intended to affront her, and applied to the magiſtrate for his interpoſition *injuriæ faciendæ cauſâ*, when he knew ſhe was not with child by him.

him. For, if he had no ill intention, but wanted only to diſcover the true ſtate of her womb, he was excuſed, and nothing could be awarded againſt him to his wife *in ſolatium* of what could not be called an injury, ſince ſhe had been, for good reaſons, obliged to endure it, *l.* 1. *p.* 3. *ſqq.*—10.

Divorces are not ſo frequent in Scotland, as they were among the Romans. For marriage cannot be diſſolved among us at the caprice of the huſband and wife, as it could among them. We have ſeen, that there are only two cauſes for which married perſons can be divorced from one another, to wit, Wilful deſertion, and adultery. Hence, in this country, there can ſeldom be occaſion for an inſpection in this caſe. For actions of divorce are commonly preceded by a ſyſtem of conduct ſo peculiar, and proceed ſo ſlowly, that it is ſeldom a woman is with child by her huſband at the time, at which ſhe is divorced from him. It cannot happen at all in the caſe of deſertion: for a man, whoſe wife is with child by him, cannot be ſaid to be deſerted by her; and no action can be brought, in order to obtain a divorce for malicious deſertion, at a time when the wife is with child by the huſband, becauſe it is impoſſible, that either the man or the woman can, in this caſe, ſay the deſertion has laſted for the time required by Law for making it a ſufficient legal cauſe of divorce. But it is poſſible, that it may happen in the caſe of adultery: for a woman may be with child by a man, both at that time at which ſhe commits adultery, and at that at which ſhe is divorced from him for this very act of it. So there may be room for an inſpection. Therefore, it may be affirmed in general, that in all caſes, in which it is neceſſary and equitable, that the belly of a woman, divorced from her huſband, ſhould be inſpected and guarded, the inſpection and cuſtody of it is lawful, and may be obtained on an application made either by the huſband or by the wife. Thus, ſuppoſe a woman to be with child by her huſband, to diſcover an act of adultery committed by him, and to obtain a divorce for his infidelity, I doubt not, that either the woman or the man may inſiſt for inſpection in this caſe. 'Tis true it is not neceſſary, yet the woman may, *ex ſuperabundanti*, in order to remove every degree of ſuſpicion, deſire that her belly be inſpected by midwives of ſkill, and that ſhe be declared to be with child at the time of her divorce. Not that the neglect of this inſpection can hurt either herſelf, or her child, or her huſband: for the child will be held either to have been or not to have been begotten by her huſband, according to the circumſtances of the caſe. In the ſame manner, the huſband may inſiſt for inſpection and cuſtody of the belly of his wife, if he has any ſuſpicions of the wickedneſs of her intentions, and believes that, out of ill-will and hatred of him, ſhe is capable of imagining the deſtruction of the child, which ſhe bears in her womb. The ſame thing may be done, if the woman has been the guilty perſon, and has been divorced from her huſband for her adultery. In ſhort, in caſes of divorce the Judge, to whom application is made for the inſpection, ought to conſider all circumſtances, and either to grant or not to grant it, according to the reaſonableneſs of the petition. One thing only deſerves to be remarked, that the Law of Scotland does not make it neceſſary, after a divorce, either for the wife to make a notification of her pregnancy to her huſband, or for the huſband, to whom her pregnancy has been notified, to make a contrary notification. 'Tis true, either the man or the woman may make it; but neither of them is bound to do it: for it will not have any effect on the filiation of the child. That muſt be determined according to the real truth of the caſe, as it is diſcovered either from an actual proof, or from the common principles and preſumptions of Law.

§ 344. III. The third caſe, in which the inſpection and cuſtody of the belly were uſed by the Roman Law, was, when a marriage had been diſſolved by the death of the huſband. It was introduced in this caſe in order to prevent ſuppoſititious births. For the widow might, if ſhe pleaſed, fall on many devices to defeat the right, and to diſappoint the hopes of thoſe, who were next to the ſucceſſion, by impoſing a ſuppoſititious child upon them. For this reaſon, certain ceremonies

were appointed to be obſerved by every woman, who ſaid ſhe was with child by her deceaſed huſband, as well during her pregnancy as at the time of her delivery and after the birth, contrived in the moſt anxious manner, for preventing the poſſibility of any fraud or impoſition. 'Tis needleſs to make particular mention of every thing, which it was incumbent on her to do. They are minutely deſcribed in *l.* 1. § 10. and the other Laws of the title *de inſpiciendo ventre cuſtodiendoque partu:* from which appears the care taken by the Roman Legiſlature to render the impoſition of ſuppoſititious children impoſſible.

This has been introduced into the Law of Scotland by expreſs ſtatute, *ſ. ſt. R.* I. *c.* 27. Not that all the ceremonies, uſed by the Romans, muſt be ſtrictly obſerved among us. No more of them is neceſſary, than will be ſufficient for preventing the poſſibility of an impoſition. Therefore the number of perſons, who ſhall be preſent at the birth; of thoſe who ſhall be ſtationed to guard the door of the chamber, in which the woman is in labour; of the midwives, who ſhall make the inſpection; of the times, at which the pregnancy ſhall be notified to the heirs of the deceaſed huſband; or of thoſe, at which the child ſhall, after its birth, be ſhewn to its relations; theſe, and all matters of the ſame kind, muſt be left to be determined by the Judge, who ought to have it chiefly in his eye to prevent the very poſſibility of impoſing a ſuppoſititious child.

This remedy, we find, *Fo.* 30th *June* 1699, *Roſs*, was actually uſed both at that time, and in the 1695, when the relations of a huſband, who had died before his wife, ſuſpecting her to be capable of impoſing a child on them and on her deceaſed huſband, obtained from the Court of Seſſion leave to have her belly inſpected and guarded by proper perſons, choſen by one of the Lords ſpecially appointed for having the direction and overſight of the matter.

But it is not abſolutely neceſſary to uſe it: all, which can be ſaid to be determined by the Law of Scotland, is, that either the relations of the deceaſed huſband may, if they think they have reaſon to be ſuſpicious of fraud, ſue for inſpection and cuſtody of the belly of the relict, or the widow herſelf may, in order to remove every degree of ſuſpicion of her fidelity, deſire herſelf to be inſpected and guarded. But it is not neceſſary either for the widow to notify her pregnancy to the relations or heirs of her huſband, or for them to inſiſt for inſpection and cuſtody of her belly; becauſe the filiation of poſthumous as well as of other children depends on principles fixed in the Law, particularly on the time within which they are born (§ 340.).

§ 345. IV. A fourth caſe, in which inſpection of the belly is ordered to be made, was mentioned above (§ 124.), to wit, that of women accuſed of crimes, which infer corporal puniſhments. For if a woman, convicted of ſuch a crime, affirms herſelf to be with child, ſhe cannot be ordained immediately to be puniſhed. The Law *ſ. ſt. R.* I. *c.* 26. appoints her body to be inſpected by midwives of approved ſkill and integrity, and if they declare, after having inſpected her, that ſhe is with child, it is enacted, that the execution of the ſentence paſſed upon her be delayed till either ſhe be delivered, or the time of her delivery be paſt.

TITLE II.

Of legitimated Children.

§ 346. BUT children, who were not lawfully begotten, becauſe their parents were not huſband and wife at the time of their conception, are nevertheleſs capable of acquiring all the rights of lawful children by being legitimated.

timated. Legitimated children have been (§ 333.) defined to be 'ſuch as 'are procreated of parents, who marry each other ſome time after the conception of their children, and may be feigned to have been huſband and wife not 'only at that time, but alſo during all the period which intervenes between it and 'their ſubſequent actual marriage.' Legitimation, therefore, is 'an act of the 'Law, by which children, procreated between a man and a woman who were 'not huſband and wife one of the other at the time of the conception, are feigned to have been procreated by parents joined together by the lawful bond of 'wedlock, acquire all the rights and are brought under all the obligations of 'lawful children, becauſe their parents do not only marry each other at ſome 'time during their lives, but may alſo be feigned to have been huſband and 'wife both at the time of the conception, and during that whole period which intervenes between it and their ſubſequent marriage.'

From which definitions it is plain, I. That in order to the legitimation of children, it is neceſſary 1) That their parents were not married to one another at the time, at which the children were begotten; for if they were huſband and wife at that time, their children are lawful, ſince they are the iſſue of embraces which are lawful in all reſpects; ſo they cannot be legitimated, becauſe they are poſſeſſed of what is more honourable than legitimation: 2) That the parents marry each other, at ſome time during their lives: and 3) That they both were and continued to be in ſuch a condition, as makes it poſſible to feign them to have been married to one another both at the time at which the children were conceived, and during all the period which follows it till their actual marriage. II. That the effect of legitimation is to put the legitimated children into the ſame condition, by giving them the ſame rights, and by bringing them under the ſame obligations, with lawful ones.

§ 347. The appetite, which the ſexes have after intercourſe with one another, is interwoven by nature into the moſt intimate conſtitution of human kind. It is violent; and the gratification of it tends to produce effects ſalutary in themſelves and neceſſary to the exiſtence of ſociety. Therefore, human Laws, tho they have declared every violation of the rules of chaſtity to be criminal, and have appointed puniſhments for every irregular luſt, have not, however, been altogether regardleſs of human frailty, but have found it neceſſary to overlook, nay, to give ſanction, in ſome ſort, to the commiſſion of ſuch delinquencies, by allowing them to be repaired after that manner, which is moſt promotive of the happineſs both of ſociety, and of thoſe private perſons who are moſt eſſentially injured by them. 'Tis true, the Law holds to be baſtards all ſuch children, as happen to be procreated between a man and a woman whom either poverty, or paſſion, or a vitious taſte of life hath hindered from marrying one another; becauſe they are the iſſue of unlawful embraces. But it does not either conſider the parents as ſo unnatural and ſo heinous offenders, or look on their embraces as ſo odious and ſo culpable, or regard the offspring with ſuch malignant eyes, as either to puniſh the innocent children by incapacitating them from enjoying the ſame advantages which are enjoyed by others, who have indeed been brought into being in a more regular manner, but have not themſelves, upon that account, any more merit than they, or to hinder the parents from making reparation for their delinquency by marrying one another. Beſides, a man and a woman may have been guilty of delinquencies; but time may alter both their notions of life and the diſpoſitions of their hearts, and may make them ſenſible of the folly and vitiouſneſs of their ways. It would, in this caſe, be hard to hinder them from having lawful children, by legitimating thoſe whom they have unlawfully begotten, at a time when they may be diſabled by the decay of their natural ſtrength from having others, and may yet have the moſt ſtrong deſire to leave behind them a legitimate poſterity, as well as to repair the injury they have done their innocent offspring.

§ 348.

§ 348. The Law, therefore, hath declared children unlawfully begotten to be capable of being legitimated and to be actually legitimated by the ſubſequent marriage of their parents, Sk. *N. ad R. M. l.* 2. *c.* 51. § 2.—*l.* 10, 11. *C. de nat. lib.*—*c.* 1, 6. *decretal. lib.* 4. *tit.* 17. *qui filii ſint legitimi* *. For to the legitimation of children the actual marriage of their parents is abſolutely neceſſary (§ 346.). If the parents never become huſband and wife, the children are never legitimated. Hence, if a woman ſhall be impregnated by a man, who intended to marry her, but died before he carried his deſign into execution, the iſſue of their embraces cannot be legitimated; unleſs the *copula* along with that, which preceded it, was ſufficient to complete, and did actually perfect the marriage ſo as to make the man and the woman become, from the moment of their copulation, huſband and wife. Indeed, children can hardly be ſaid, in caſes like this, to ſtand in need of legitimation; ſince they are procreated of the lawful embraces of parents, who were really married to one another at the time, at which the children were begotten.

§ 349. But the ſubſiſtence of the marriage is not neceſſary to the legitimation of children. 'Tis ſufficient, if the parents did once actually become married perſons; no matter how long their marriage ſubſiſted, whether for a long or for a ſhort time. Hence Lawyers commonly ſay, that marriage may be either declared or perfected, in order to legitimate children, at any time during the lives of the parents, even *in ipſo articulo mortis*, Sk. *N. ad R. M. l.* 2. *c.* 51. § 2. But this doctrine ſeems to be abſolutely contradictory to the principles of the common Law of Scotland. For no man can do on death-bed any deed, which may be prejudicial to the intereſt of thoſe, who would be his heirs, in caſe he ſhould die at that firſt inſtant, at which he loſes his *liege pouſtie*, and begins to be on death-bed. Hence it muſt follow, that children are not legitimated by the ſubſequent marriage of their parents, unleſs they marry each other during their *liege pouſtie*. For at that moment, at which one ceaſes to be in *liege pouſtie*, and begins to be on death-bed, a right is acquired by thoſe, who would be his heirs, were he to die at it; they are entitled to get ſet aſide every deed, which may be done and is hurtful to their inheritance. Nor will the favour of legitimation ſupport it: for Law will hold a marriage, which has been either declared or perfected on death-bed, to be null. Indeed, how is it poſſible to ſuppoſe, that one lying on death-bed can have either freedom of conſent, or ability of generation, which are eſſential to the conſtitution of marriage? At what time can we ſuppoſe one to be more under the influence of others, than when he can do nothing for himſelf, and is entirely dependent on the caprices of thoſe about him? Have not the mother, the children, and the relations of both, temptations ſtrong enough to induce them to extort an involuntary and reluctant conſent from him? Can one, therefore, be ſaid to be at liberty at that time, at which he may well be preſumed to be willing to forego every thing, that he may be allowed to enjoy a little peace and quiet during his laſt moments †. Hence, the Law of Scotland would preſume conſent to a marriage contracted on death-bed, either to be extorted by force, or to be obtained during a delirium, and would accordingly hold it to be void (§ 182. *ſqq.*) For a parent, who delays till ſo diſtant a moment the legitimation of his children, may well be ſuppoſed to intend to cut them off from the ſucceſſion, to leave them in their illegitimate condition, and to prefer ſome other to them.

§ 350.

* Either it was otherwiſe by the antient Law of Scotland, or the compiler of the *Regiam Majeſtatem* has committed an error by confounding the Law of England with that of Scotland; for children, unlawfully begotten, are declared by it, *l.* 2. *c.* 50. § 4. *c.* 51. § 1, 2, 3. to be incapable of being legitimated by the ſubſequent marriage of their parents. But in matters of this ſort we follow the doctrine of the civil and canon Laws, *R. M. l.* 2. *c.* 19. in which a baſtard is oppoſed *filio mulierato, i. e.* a child born by a woman before her marriage to one born after it. *Vide* Skene *Not. ad. d. cap.*

† The words of the *R. M. l.* 2. *c.* 18. § 8. 9. are oppoſite to this argument; *fervore paſſionis, et memoriam et rationem amittit;—unde præſumeretur, quodquod in ſanitate facere noluit, hoc potius ex fervore animi quam ex mentis deliberatione, eveniret.*

§ 350. But children are not legitimated by the ſubſequent marriage of their parents, unleſs it is poſſible to feign theſe to have been huſband and wife of one another both at the conception of the children, and during all the time which intervenes between it and their ſubſequent marriage (§ 346.). Now, this fiction is impoſſible, unleſs both the man and the woman were unmarried at every ſucceſſive point of all that time. For, if the man was married to ſome woman different from the mother of the children at the time, at which they were begotten, both their father and their mother were guilty of adultery. Therefore, the children are not only an unlawful, but an adulterous offspring. So there can be no room for feigning the parents to have been huſband and wife at the time of the conception: for it is impoſſible to ſuppoſe the father, who *ex hypotheſi* had at that time a lawful wife, to have been married to two women at one and the ſame time, becauſe the Law of Scotland has prohibited polygamy. The rights, which the alone lawful wife and her children have honeſtly acquired, cannot be taken from her by any future deed of her huſband. Again, if the father was not, indeed, married, when he begot theſe children, but married ſome time afterwards a woman different from their mother; this woman becomes his alone lawful wife. That one, by whom he had the children, has no right to hinder him from marrying any other he pleaſes; for ſhe was not his wife. As ſoon as he marries another, ſhe acquires herſelf the right of being his alone lawful wife, and to her children that of being his alone lawful children: and the children whom he had by the other woman, are forever incapacitated from being legitimated; becauſe it is impoſſible to ſuppoſe the father to have been married to the mother during the whole time from the conception to their actual marriage, ſince that would be to ſuppoſe him to have two wives at one and the ſame time. 'Tis true, that he may marry the mother as ſoon as his other and lawful wife dies. But the children, born to him by this his preſent wife, either before or while he was married to his former one, will not be legitimated by this ſubſequent marriage of the mother: for his former marriage is an effectual bar to their legitimation. The children, indeed, whom he has by her, *after* he is lawfully married to her, will, according to the common principles of Law, be lawful in all reſpects.

The ſame doctrine holds with regard to the mother; for if ſhe was not unmarried both at the time at which ſhe conceived the children, and during all the period which intervenes between her conception and her ſubſequent marriage of the father, the children cannot be legitimated; becauſe there is not room for the fiction, ſince ſhe cannot be ſuppoſed to be the wife of two huſbands at one and the ſame time. I know, it is the opinion of ſome Lawyers, that the ſubſequent marriage of the parents legitimates, in all caſes, their children, provided they were not begotten in adultery; at leaſt, gives the legitimated children thoſe rights, which they would have had, in caſe they had been born at the time, at which the father marries the mother; ſo that if he has children of former marriages, the legitimated ones, tho they may perhaps be older, are yet poſtponed to theſe, and held to be younger than they. But this opinion ſeems to be entirely contradictory to all the principles of the Law concerning legitimation; it makes a ſtrong encroachment on the rights of the lawful children of the father; and ſeems not to have any foundation either in ſtatutory or in cuſtomary Law (§ 177, 178.). The only caſe therefore, in which it is tolerable, is, when the father has no children alive of former marriages; for in that caſe the rights of other marriages, wives, and children are not infringed; and the innocent are reſtored to the rights of nature.

§ 351. The effect of legitimation, it has been ſaid (§ 346.) is to put the legitimated children into the ſame condition, by giving them the ſame rights and bringing them under the ſame obligations with lawful children; they have the ſame rank and the ſame rights, which they would have had, if they had

been begotten in the moſt unexceptionable and lawful way, and their parents had been huſband and wife at the time of their conception.

In treating of the mutual rights and obligations of parents and children, it may not be improper to treat, *firſt*, Of the duties, obligations and rights of parents; *ſecondly*, Of thoſe of children.

TITLE III.

Of the Duties, Obligations, and Rights of Parents.

§ 352. PARENTS are the immediate cauſes, to which children owe their exiſtence. Theſe are born in an indigent and helpleſs condition, and ſtand in need of the care of others. Therefore, their parents are thoſe, who are bound to take care of them (§ 163, 164.).

But nature knows well, it would be dangerous to leave it to the capricious determination of their humours, whether they ſhould or ſhould not diſcharge their duty to them. Therefore, ſhe hath taken care to implant in the hearts of men the warmeſt affection for their offspring, and impells them, by the irreſiſtible force of a blind inſtinct, to do their duty to ſociety by doing it to their children.

'Tis for this reaſon, that the Law of no country has determined, by expreſs ſtatute and with a rigorous preciſion, the duties of parents and children to one another. It has thought it better to leave them to the ſilent but forcible workings of natural affection, and to truſt the diſcharge of their duty to its powerful energy; ſecure that men will be ſufficiently prompted by it to do by their parents and children, as the dictates of a good heart inform them they ought to do by them. It has not, therefore, determined particular caſes, but has eſtabliſhed only one general rule, by which every particular caſe ought to be decided; *viz.* that every parent and every child ought to be obliged to do that, which it is honeſt, *honeſtum*, they ſhould do, and which it would be baſe, *turpe*, for them not to do by one another.

§ 353. The firſt duty, due from parents to their children, is to *own* them, *l. 9. C. d. pat. pot.* To own a child is 'to own, that one is either the father or the 'mother of the child.' To this both parents are equally bound; becauſe the obligation ariſes from the reality of the filiation of the child, and amounts to no more than the ſimple acknowledgment of a fact. Every one is bound to tell the truth. If it is true, that one is really the father or the mother of a child; it is his duty to own the relation, in which they ſtand mutually to one another. Therefore, the Law hath made it lawful for every child to bring an action declaratory of its legitimacy and filiation either againſt its parents or againſt any others, who are intereſted to deny it. The action may be brought not only by the child itſelf, but alſo by its mother, and by every other perſon, who is intereſted in the matter. Thus, ſuppoſe a father to die without owning his child, either the child itſelf, or, after its death, any other to whom an inheritance which either belonged properly to it, or was deſcendible to it from its father, hath devolved, *v. g.* its own children, may bring an action declaratory of its filiation and legitimacy: for they are entitled to do every thing, which it is neceſſary for them to do, ere they can acquire and be admitted to the ſucceſſion.

It muſt be brought againſt the parents themſelves, during their lives; and after their death, againſt thoſe who are to ſucceed to them, in caſe this child ſhall be found to be not either a lawful or a legitimated one: for they are moſt nearly intereſted in the determination of the queſtion.

It

It muſt be brought firſt * before the Commiſſaries of EDINBURGH and them alone. It muſt be brought before the Commiſſaries; becauſe the eccleſiaſtical judge, the *curia chriſtianitatis*, is alone competent to queſtions concerning the baſtardy and the legitimacy of children, *R. M. l.* 2. *c.* 50. § 3, 4. It muſt be brought before the Commiſſaries of EDINBURGH; for they are, *Aſ.* 28th *Feb.* 1666, declared to have a privative juriſdiction in all queſtions, which have a connection with the lawfulneſs of marriage.

§ 354. Since parents are the immediate cauſes of the exiſtence of their children, it follows, 2) That they are bound 'to maintain them:' for by bringing them into being, they brought them into want, and made them need to be maintained. By maintenance, '*alimenta*,' in this caſe is underſtood 'not only food, 'clothes and lodging, but alſo all thoſe expences, at which it is reaſonable pa-'rents ſhould be in *educating* their children, in *curing* them when ſick, and in do-'ing by them every thing, which a parent of the ſame rank, eſtate, and con-'dition ought to do by his children.' For regard ought always to be had to the circumſtances of the parent and child, *l.* 6. *ult. ff. de alim. vel cibar. leg. l.* 43, 44, 234. *ff. de verb. ſignif.*

This duty is incumbent 1) on the father. For the family is held, by Law, to be his; he is the head of it; and he is the only perſon, whom the Law ſuppoſes to have funds for maintaining it: for it makes him ſole proprietor of the whole moveable eſtate, which either belongs to his wife at her entrance into marriage, or accrues to her during its ſubſiſtence. Therefore, he is held to be bound to maintain it. Of courſe, he muſt be bound to maintain his children, as well as his wife, and his other domeſtics: for they are all parts of it, (§ 205, 210, 225, 226.).

In default of his ability, the obligation, during the life of the father, lies 2) On the paternal grand-father, or his heirs; 3) On the paternal great-grand-father, or his heirs; and then on the other remoter parents on the ſide of the father of the children, or their repreſentatives, one after another. The paternal aſcendents are ordinarily ſubjected to this obligation before the mother. The reaſon is, that every father, who is able, is bound to maintain his own ſon. Conſequently, he muſt be bound to maintain the children of his ſon, thoſe whom his ſon is bound to maintain. For the ſon is, as it were, the ſame perſon with his father; he is ſprung out of his bowels; is, as it were, a part of his body; and is his repreſentative. Beſides, the eſtates of parents deſcend, by Law, to their children; but it matters not, whether the children get the inheritance, before or after the death of their parents. Therefore, the grand-father is bound to maintain his ſons children; the great-grand-father the children of the ſons of his ſon; and ſo on, the parent, who is more near, being always liable before one, who is more remote. But the obligation is limited to the children of the male deſcendents alone: for the children of the female deſcendents are parts of another family, to wit, that of their father, *l.* 8. *ff. de alend. et agn. lib.* (§ 99.).

I ſay, the paternal aſcendents are ordinarily liable before the mother: for circumſtances may make it reaſonable to impoſe either all or a part of the burden upon her, *l.* 5. § 2. *ff. de agn. et alend. lib.*—*Fa.* II. 20.

In default of the ability of the father and of all his aſcendents, the obligation is incumbent 4) On the mother and her aſcendents, one after another, according to the proximity of the degree, in which they ſtand related to the perſon to be maintained.

§ 355. Such is the order, in which parents are brought under the obligation of maintaining their children, *during the life* of the father. After his death, the obligation deſcends to his heirs: for the heirs of every man ſucceed as well to the obligations which were incumbent on him, as to the rights which he had. Beſides,

* In antient times, it might have been brought before the biſhop, and, of courſe, before the official of the dioceſe, within which the perſon lived. It was commenced on a brief iſſued to the biſhop, *R. M. l.* 2. *c.* 50. § 3. *c.* 51. § 4, 5, 6.

ſides, the obligation, under which all parents lie to maintain their children, ariſes from nature itſelf, and muſt be fulfilled; it laſts during the life not of the parents, but of the children; for it depends on a fact, which ceaſes not on the death of the parents, to wit, that parents are the immediate cauſes, by which the children were brought into being and into want. Therefore, children have a right to be maintained by their parents, while the parents are alive, and out of their eſtates, after they are dead. So no parent has a right to diſpoſe of all his eſtate ſo freely and ſo univerſally, as to deprive his children of their maintenance. By conſequence, his eſtate muſt deſcend to thoſe, who ſucceed to it, with the burden of an exhibition to his children. So it has often been expreſsly found in the caſe not of brothers and ſiſters alone, *D.* '*aliment*,' but of others, *St.* 8th *Jan.* 1663, *L. Otter.* Indeed, no reaſon can be aſſigned, why it ought not to be extended to all the heirs of the father: for children have a natural right to ſucceed to the eſtates of their parents, and they are unjuſtly dealt by, when they are deprived of their inheritance. Conſequently, if parents are, at any time, ſo capricious and ſo ill-affected towards their children, as to leave their eſtates to perſons with whom they are not ſo nearly connected; deeds of this kind may well be called highly unnatural. The Law therefore ought ſo far to annul them as to grant to the children, who have been ſo cruelly uſed, a reaſonable maintenance out of the eſtate, which belonged to their parents, and ought to have deſcended by inheritance to them. Indeed, if heirs were not, in all caſes, bound to maintain the indigent children of thoſe, to whoſe eſtates they ſucceed, the children of the richeſt man might be left burdens on the public: for ſuppoſe him to diſinherit his own children, and to leave his eſtate to one, to whom neither himſelf nor his children are, in any degree, related; ſuppoſe alſo that the children are indigent, and that they have no relation, who is either bound, or able to maintain them: 'tis plain, that they muſt become a burden on the public, unleſs we ſay that thoſe, who ſucceed to the eſtate of their father, ſucceed alſo to his obligation, and become, by their acquiſition of the inheritance, bound to maintain them. The Law therefore ought to give check to ſuch deeds, and to ſhew its hatred of them, by derogating from them, at leaſt ſo far as is neceſſary for obliging parents to fulfil the natural obligations, under which they lie in the ſtricteſt and moſt indiſpenſable manner. 'Tis true, it ſeems to have been otherwiſe by the civil Law, *l.* 5. § 17. *ff. de agn. et alend. lib.* But in this the Romans ſeem to have departed from that very principle, which led them to introduce the obligation in any caſe. For that ſame natural equity, which obliges a living parent to maintain his children, obliges him to provide for their maintenance after he ſhall be gone, and ſays, it would be cruel and unnatural for one, who, while he was alive, was obliged to maintain another, not to think of making ſome proviſion for him, when he ſhall be deprived of ſupport from his own hand.

Next to the heirs of the father, the obligation devolves on his aſcendents; whom nature hath called to the diſcharge of this duty, and to the maintenance of thoſe ſprung out of their bowels.

And, perhaps, in default of the aſcendents themſelves, *ex paritate rationis*, the obligation ought to deſcend to their heirs ſucceſſively, thoſe, to wit, who have ſucceeded to their eſtates, and have acquired the property of that fund, out of which the children had a natural right to be maintained, and which ought to have deſcended to them.

After the aſcendents of the father, and their heirs, the obligation deſcends 1) On the mother herſelf, 2) On her heirs, 3) On the maternal aſcendents and their heirs one after another, after the ſame way, and in the ſame order, which, it has been ſaid, ought to be obſerved in transferring the obligation ſucceſſively from thoſe of the paternal line one after another.

But it muſt be remarked, that a judge is not bound to obſerve, in all caſes, the preciſe order, which has been deſcribed. For circumſtances may make it reaſonable to depart from it. *Magis eſt, ut utrubique ſe judex interponat, quorundam neceſſitatibus*

ffitatibus facilius ſuccurſurus, quorundam ægritudini: et cum ex æquitate hæc res de-ſcendat, caritateque ſanguinis, ſingulorum deſideria perpendere judicem oportet, l. 5. 2. ff. de agn. et al. lib.

§ 356. From theſe principles it is plain that the obligation of maintaining the children of one, who is dead, can be impoſed on others in two caſes alone; either 1) becauſe thoſe on whom it is ſought to be laid are the aſcendants or parents of theſe children, or 2) becauſe they are the *heirs* of theſe parents, and having ſucceeded to their eſtates are thereby ſubjected alſo to their obligations. By conſequence a brother or a ſiſter is not, merely by bearing that relation to them, bound to maintain his brothers or ſiſters: for they are not the cauſes of one another's birth, and the connexion ſubſiſting between them is only accidental. *C. F.* 97.—176. *A fortiori* kinſmen, whoſe relation is more diſtant, are not bound to maintain one another. As ſoon therefore as the connexion of parent and child is loſt, the obligation ceaſes to lie on any particular private perſon, and is transferred to the public, which is obliged out of thoſe funds, that are eſtabliſhed by law for the maintenance of the poor, and are levied indiſcriminately from the whole people, to maintain its indigent citizens.

§ 357. One is ſaid to be maintained, who is furniſhed with every thing *ad victum homini neceſſaria, l.* 43. 44. *ff. de verb. ſig.* A parent therefore muſt provide thoſe children, whom he is bound to maintain, 1) with food, 2) with clothes, 3) with lodging. But his obligation is not *ſtricti juris;* it is *uberrimæ fidei;* and he is bound to do by them every thing, which humanity requires he ſhould do (§ 352.): the care therefore, which he is bound to take of them, muſt vary according to the condition in which they are. Their bodies cannot always be in the ſame habit; he muſt therefore during their indiſpoſitions take proper care of them, call phyſicians, buy medicines, and do every thing which is neceſſary and he can afford for getting them cured.

The preciſe extent of the allowance, which a parent ought to afford for the maintenance of his child, cannot in all caſes be the ſame; it muſt depend on the rank condition and eſtate of the perſon who is to be burdened with it, and on thoſe of the perſon who is to be maintained. One can never be compelled to do more than he is able to bear; and the number of his family as well as the other burdens under which his circumſtances bring him, muſt be taken into conſideration. For the ſame reaſon regard muſt be had to the condition of the perſon to be maintained. Thus the ſon of a nobleman ought *cæteris paribus* to have ſomething more allowed for his maintenance than one of inferior rank, becauſe he ought to be enabled to live in a way ſuitable to his quality. In the ſame manner the ſon of a man of an opulent fortune ought to be maintained with more grandeur, than the ſon of one who has got no more than a moderate competency. One, who has had the misfortune to beget an ideot or a madman, ought not to be obliged to be at the ſame expence in maintaining him, which he ought to lay out on a child of abilities. The mere comforts of life, provided in a ſimple and decent manner, ſeem to be all which can be demanded by one who has no ſenſe of diſtinction and no ideas of grandeur. At the ſame time humanity as well as decency requires, that even in this caſe regard be had to the birth and fortune of the unhappy perſon.

§ 358. A parent is the head of his family, and his children are the parts of which it conſiſts. Hence it is optional to him either to maintain them in his own houſe, or to hire lodgings for them in that of another, or to give them a pecuniary allowance for all. They cannot inſiſt to have ſeparate maintenances allowed them, by which they may be enabled to live in houſes apart from their father; all which they have a right to demand, is to be maintained in a reaſonable way; he is the proper judge of the matter, is therefore allowed the option, and is held to diſcharge his duty to them by taking them into his own family and maintaining them in it. *St.* 13th *Jan.* 1666, *Dick.*—23d *Feb.* 1666, *children of the Earl of Buchan.* But one ought not to be forced to live in a houſe, in which he is ſure of being cruelly uſed and of leading a wretched life: hence a child, who has been abuſed by his parent and cannot therefore live any how comfortably with him, has a right to get a pecuniary allowance for all. The ſame thing

may be reaſonable on other accounts *H.* 22.—*D.* I. 32. 19th *July* 1716, *Morriſon.*—30th *July* 1734, *Hepburn.*

§ 359. Mere life is an animal enjoyment; the preſervation of it is not a mighty matter; and a parent is bound to do ſomething more for his children than to *maintain* them, or to provide them with thoſe things which are neceſſary for keeping them alive. They have the capabilities of human nature; it is therefore his duty to cultivate their minds, in order to acquire to their faculties that vigour of which they are capable. Hence he is bound 4) to be at the expence of *educating* them in a manner ſuitable to their circumſtances *.

Property has been introduced into human ſociety; all men are not born to opulent fortunes; and every one, who is able, is neceſſitated to do ſomething for maintaining himſelf. Beſides, thoſe, whoſe birth hath been more fortunate than that of others, may be uſeful both to themſelves and to mankind by exerciſing ſome lawful employment, for which their genius qualifies them. Hence a parent is bound 5) to be at the expence of breeding his children to honeſt employments, by which they may be enabled to do for themſelves and be more uſeful in the world. Theſe therefore ought to be ſuch as are ſuitable to their rank. Much muſt no doubt in this matter depend on the father: for he muſt be ſuppoſed to know beſt what is ſuitable to his own circumſtances, and to the diſpoſitions of his children; and it is ſeldom that there can be room for the law to interpoſe in theſe matters. But extraordinary caſes may happen, and require extraordinary remedies; a parent may uſe his children in a very unjuſtifiable manner; and the law may well interpoſe on theſe occaſions. Thus a man of ample fortune may bind his ſon, as the protector propoſed to have done the children of his Sovereign, apprentice to ſome very mean employment, which every humane man muſt immediately ſee to be abſolutely unſuitable to one of his condition: but it would be extremely hard if the father ſhould not, at the ſuit either of the boy himſelf or of any perſon intereſted in him, be compellable to put him to ſome other more ſuitable to his rank, or to pay the money neceſſary to be laid out on getting him inſtructed in it, and qualified for exerciſing it after it ſhould become proper for him to ſet up for himſelf, *arg. l.* 15. § 1. 2. *ff. de uſufructu.*

§ 360. But a father may be a miſer, may be at a diſtance, and may not lay out the neceſſary ſums on the maintenance or education of his children. One therefore, who hath had the generoſity to advance thoſe ſums which their father was bound to have laid out on them, muſt be entitled both in law and in equity to be re-imburſed of every farthing which he hath laid out *intra modum*; and muſt have an effectual claim againſt their father for payment of thoſe ſums, which he was bound to have expended. For he hath fulfilled the obligations under which the father lay, and therefore *negotium ejus geſſit. D.* II. 25. *Fo.* 20th Dec. 1678. *Strachan.*—*D.* II. 321. *Fo.* 14th *Jan.* 1698, *Hopekirk.*—*June* 1730, *Forguſon.* Hence action lies to him in all caſes, in which the expences were laid out not *donandi* but *repetendi animo*; and whether they were laid out with the one or the other intention, muſt be determined from circumſtances. For the father, the perſon bound to be at them, may be ſuppoſed to have been either abſent or preſent. In caſe he was abſent, action muſt lie againſt him in all caſes, unleſs he proves that they were laid out *animo donandi*; becauſe one who lays out money *bona fide* and *intra modum*, for the benefit of a child during the abſence of the father, *negotium gerit* of the parent and muſt of courſe have an *actio negotiorum geſtorum* againſt him. A parent therefore is bound to reimburſe one, who proves that he laid out money *utiliter* on a child during the abſence of the parent who was bound to have laid it out, un-

* Hence we find it was enacted 1494, *c.* 54. that all barons and freeholders, who were *of ſubſtance*, ſhould put their eldeſt ſons and heirs to ſchools, before they were nine years of age; that the boys ſhould be kept at them till they had acquired perfect knowledge of the latin tongue; and that they ſhould thereafter be put to ſchools in which they might learn the arts and the law. The reaſon of the regulation is plain. Every man of fortune ought to get an education ſuitable to it, and to have ideas ſuperior like his rank to thoſe of his inferiors. Beſides, barons and freeholders had, in thoſe rude times, extenſive juriſdictions; every proprietor of land, who held of the king, had right to a ſeat in parliament; it was therefore neceſſary for them to acquire ſcience, to learn the arts, to get extenſive views of human affairs, and to know the law of their country, that they might thereby be qualified to diſcharge the duties of their reſpective ſtations.

roves it to have been laid out *animo donandi:* for it is incumbent on the pa- to prove this. A father muſt be held to be abſent in all caſes, which will admit of delay.

ut, if either the father is preſent or the matter admits of ſo long a delay, there is time to acquaint him of the circumſtances of the caſe, to adviſe with about them, and to aſk the aſſiſtance of his purſe; in this caſe action will not one, who has raſhly, without conſulting him or aſking his allowance, laid money for the benefit of his child. For his own haſtineſs makes it plain, he had *animus donandi.* If he had not, he ought not to have meddled in a matter, ch did not belong to him, till he had acquainted the father; ſince he did not aint the father, he can impute it to nothing but his own fault, *l.* 36. *ff. d. r.* he ſhall not be reimburſed. For, if the father had refuſed to be at expences hich he ought to have been, the Law provides a remedy; the child, or body for him, may apply to the proper court to have his father decreed to t them; you had no title to lay them out at your own hand.

owever, this rule ſeems to admit of one exception; for, if the father refuſes e at *neceſſary* expences for his child, and the matter admits not of any longer y, it would be cruel to ſay, that one, who has had the humanity to his money, and to lay out ſome of it for the utility of a child, is not entitled e reimburſed by the father. It muſt therefore be allowed, that he is entitled e refunded, and that, even tho he has laid it out *patre prohibente;* provided he done it *cum proteſtatione,* that he does it not *animo donandi* but *miſericordiæ cauſâ,* hat the father ſhall, notwithſtanding his prohibition, be liable. Law ought o allow a parent to make another ſuffer for that humanity, which himſelf not. It ought therefore to preſume that the parent was delirious, and to him, on that account, *abſentis vel quieſcentis loco, l.* 2. § 3. *ff. de jure codicil.* It ought to preſume any thing rather than allow a parent to profit by his arity, and another to ſuffer for his humanity.

361. The obligation, under which parents lie to maintain their children, es 1) When the children are *in facultatibus,* or are able to maintain them- s: for they need not, in this caſe, the aſſiſtance of others. Hence, if they been educated to any trade or employment, by following which they may their bread, they have no right to demand an exhibition from their parents; ided they have health, ſtrength, and ability to work at their trade, and to their buſineſs, *l.* 5. § 7. *ff. de agn. et alend. lib.* For every one, who is able, t to work for his own bread, and has no right to lead a lazy idle life, and, folded arms, to aſk to be maintained by the labour and at the expence of rs; he, who does not work, ought not to eat.

or the ſame reaſon, if a child has an eſtate, which belongs properly to him- and is ſufficient for his maintenance, he can not only not demand to be main- ed at the expence of his parent, but may even be obliged to pay for his d; for no perſon, who is able to maintain himſelf, has a right to be ntained at the expence of another. Conſequently, a father, who maintains ild, that is able to maintain himſelf, has a right to be ſatisfied for his ex- e, and is entitled to demand board for maintaining him during his pupilage minority; becauſe the father cannot be preſumed to mean to maintain him , when the child is able to maintain himſelf, any more than any other on, who maintains a minor, is preſumed to do it *gratis:* and for a very good n; becauſe a father either may have, or may happen to get other children, whom, if they happen not to be ſo well provided as this one, it is his duty o every thing that is lawful to provide. But, if the eſtate of the child is ſo l that it affords not enough for the maintenance of its proprietor, no en- chment muſt be made on the little ſtock itſelf, but the parent muſt add to yearly profits of it as much as will, along with them, make a reaſonable fund he maintenance and the education of the child.

All

All this muſt be underſtood *optimâ fide.* For, tho almoſt the youngeſt b may be ſaid to be able to maintain himſelf by his own labour, ſince he m always find ſomething to do, by which he may gain his meat, clothes a lodging; the Law does not go ſo rigorouſly to account, but attends to thoſe d ferences of fortune and of rank, and admits of the conſequences of thoſe diſtinc ons, which ſociety has introduced among human kind. Therefore, tho the eld ſon of a nobleman may be ſaid to be able, if he is in health, to earn a livel hood, for inſtance, by keeping cattle, or by turning porter, his father will, n withſtanding, be obliged to maintain him in a manner more ſuitable to his ran *l.* 15. § 1, 2. *ff. de uſuf. et quem ad*—*H.* 22. for the Law would apply to this c the general doctrine delivered by PAPINIAN, in the celebrated *l.* 15. *ff. de cond inſtit.* and would not believe it to be *poſſible* for him to gain his bread in t mean way. *Nam quæ facta lædunt pietatem, exiſtimationem, verecundiam noſtram, (ut generaliter dixerim) contra bonos mores fiunt; nec facere nos* poſſe *credendum eſt*

But 2) The obligation, under which a parent lies to maintain his chil ceaſes, if he is not *in facultatibus*, and is not able to do it. For it is, this caſe, impoſſible for him to do it; ſince he has no funds, out of which it c be done: *impoſſibilium nulla obligatio eſt, l.* 185. *ff. d. r. j.* One, who mai tains a family, or is able to keep houſe, will commonly be held to be *in fac tatibus;* becauſe he may fulfill his obligation by receiving his indigent child i his family, which every one, who has a family, may be forced to do: becau the additional expence of one perſon is almoſt nothing, *St.* 13th *Jan.* 1666, *Di* But, if a father is hardly able to maintain himſelf alone, the obligation is tra ferred on thoſe, who, we have ſaid, are ſucceſſively bound to maintain t children, one after another; and if none of them are able to do it, the oblig tion devolves on the public, and the children muſt, like other poor people, maintained out of the funds and in the way appointed by Law.

This obligation is ſaid to ceaſe, 3) When the perſon to be maintained abuſe or injures, in an atrocious manner, him on whom he depends for his maintenance *l.* 5. § 11. *ff. de agnoſc. et alend. lib.* But it muſt, ſurely, be very atrocious ba uſage, which ſhould make one think himſelf looſed from that natural obligation with which every one is bound to maintain his own child or his own paren 'Tis true, the one or the other may behave unnaturally to me. They cea not, however, to be parents and children, and to be regarded with that tend affection with which parents and children regard one another. But it is the rel tion which they actually bear, and the affection which they have to one anothe that is the principal foundation of the obligation, under which they lie to main tain one another. Beſides, in caſe one, who is *in facultatibus*, were, for an ſort of uſage, to be releaſed from being bound to maintain his needy offspring the burden of their maintenance would fall either on ſome remoter relation, o on the public; for every living creature is *entitled* to be maintained.

§ 362. Parents are the immediate cauſes not only of the exiſtence of the children, but alſo of that ſtate ſo helpleſs, ſo dependent, and ſo expoſed, i which they are during their younger years. Therefore, they are bound to pro tect, to defend, and to take care of them during their nonage, while they are un able to take care of themſelves: for this purpoſe, the Law of Scotland conſider ing, that parents are ſufficiently prompted by natural affection to do their duty t their children, and that the management and the intereſt of their children m be moſt ſafely truſted to them, hath veſted fathers* with tutorial and curator al powers over the perſons and the eſtates of their children. With thoſe powers the

* This right, which the father has to be adminiſtrator of the eſtate of his children, is ſo ſtrong, that a fa was found to be lawful adminiſtrator of things which he had made over to a *baſtard* ſon, even tho he had pot the conveyance, retained the right of adminiſtration to himſelf, *Du.* 17th *March* 1624, L. *Touch.* This was pe haps, going too far; no individual can by Law be held to be the father of a baſtard; he always is, and alway muſt be uncertain.

are veſted by the Law itſelf, without a ſervice, or any ſolemnity whatever. For the Law itſelf calls them to theſe offices, and nominates them to be the tutors and curators of their own children, *Ba. tutor*, 23d *April* 1554, *v. L. Parbroth.* Hence they are called, not tutors and curators, but *Adminiſtrators in Law* for their children; a name, which may be accounted for from theſe among other reaſons, *Firſt*, The Law chuſes them, and forces them upon their children, by depriving theſe of the power either of electing other curators, *St.* 14th *July* 1681, *Bartholomew*, or of releaſing themſelves, in any other way, from the curatorial power of their fathers. *Secondly*, It does not require from them ſo much as it requires from ordinary tutors and curators, and gives them a more ample and a more diſcretionary power of adminiſtration; for it preſumes from the beſt reaſons, that fathers are diſpoſed enough of themſelves to do every thing, which may be promotive of the intereſt of their children; and, therefore, that it has no cauſe to define, with a rigorous and minute preciſion, every particular of their duty.

§ 363. So a father has, during the pupilage of his children, tutorial powers both over their perſons, and over their eſtates. The power, which he has over the former, entitles him not only to determine where they ſhall live and how they ſhall be educated, but alſo to correct them for their faults. Indeed, this is not only a right, but the duty of every parent; and not of parents alone, but of every one, who has the care of young people. The only difference between parents and others is this, that the Law will not enquire ſo narrowly into their conduct, and will not regard their ſeverity with ſuch ſuſpicious eyes, as it will that of others; becauſe 'tis ſeldom, that parents exceed in their correction; the violence of natural affection hinders them from extending their authority to an immoderate ſeverity. But if at any time they do it, they are culpable for the cruelty of their diſpoſition. Indeed, they never ought to exceed that, which may be comprehended under the denomination of the *medicina correctionis* of the civil Law. For correction may, in ſome ſort, be called medicine. It is uſed in order to amend the moral conſtitution of the children, to cure the diſeaſes of their minds, and to put bad habits away from them. If it is uſed too frequently, and is carried to an immoderate ſeverity, its violence may make it produce either none, or very bad effects: if it is not uſed at all, the want of it may make diſeaſes, which, if the proper remedy were applied in time, might be cured by it, take ſo deep root in the conſtitution of the children, as to become incurable. Much, therefore, ought to be left to the diſcretion of the parent, who ought to apply it in ſuch caſes, and to give it in ſuch doſes, as he thinks will make it prove ſerviceable: *ut quos ad vitæ decora, domeſticæ laudis exempla non provocant, ſaltem correctionis medicina compellat, l. u. C. de emend. propin.*

Beſides the power which he has over their perſons, a father has alſo, during the pupilage of his children, a tutorial adminiſtration of their *eſtates*. The conſequence of which is, that they cannot, any more than other pupils, do by themſelves alone, any thing regarding the management of their affairs. Every thing is done by their father *alone*, without *their* intervention.

§ 364. In the ſame manner, after their pupilage, a father has, during the *minority* of his children, *curatorial* powers over their eſtates. I ſay, over their *eſtates:* for the Law of Scotland gives every one, who has attained the age of Puberty, the power of diſpoſing freely not only of his perſon, but of his eſtate too, unleſs he has curators aſſigned him either 1) By the Law itſelf, that is, when he has a father alive, whom the Law conſtitutes the ſole adminiſtrator of his affairs, or 2) By ſome deed made by his father, during his *liege pouſtie*, in conſequence of the act 1696. Except theſe two caſes, every minor has the full power of diſpoſing of his perſon, and of managing his eſtate, according to his caprice; for no man can be forced, if he does not incline, to chuſe curators.

Therefore, a father hath, *ſummo jure*, no power over the perſons of his children after their pupilage. I ſay, *ſummo jure:* for if they live in family with him, he ſtill retains the *jus domeſticæ emendationis*, he may correct them for their miſdemeanours. But this his power of correcting is continually diminiſhed, as the years and the faculties of the children increaſe. The chief power which a father hath during the minority of his children, extends to their eſtates alone. In virtue of this power, he has all the rights of adminiſtration, which other curators have. Therefore, his children can do no deed without his conſent. But he is no more than curator of their eſtates. Therefore, he cannot do, by himſelf alone, without their concurrence, any act of adminiſtration: for no curator can; every thing is done by the minor, with the conſent of his curator; ſo the minor is the principal perſon; he does every thing; his curator does no more than conſent. This is the general doctrine of the Law, and it is as true of fathers, who are adminiſtrators for their children, as of other curators.

§ 365. But a father, who is adminiſtrator in Law for his children, tho he is ſaid to have tutorial and curatorial powers over their perſons and their eſtates, does yet, in ſome reſpects, differ from other tutors and curators; for 1) He is not, like other tutors and curators, liable as well for omiſſions as for intromiſſions; that is, as well for thoſe things which he ought to have done, but hath omitted to do, as for thoſe which he hath actually taken upon him to do. He is liable for his intromiſſions alone, or for thoſe things which he hath actually done. The reaſon is; the Law preſumes, that a father will not omit to do any thing, which is for the intereſt of his children. Therefore, it repoſes much confidence in him, and hath not only made himſelf liable for his intromiſſions alone, but hath alſo given him power, 1696, *c.* 8. to nominate others to be tutors and curators of his children and of their affairs, after his own death, and to nominate them with this *proviſo*, that they ſhall be liable, each of them, for his own actual intromiſſions alone, and neither for his own omiſſions, nor *in ſolidum* for his co-tutors and co-curators. For the Law preſumes, that a father is as anxious, as he needs be about the welfare of his children, and that he will not name any body to be their tutor or curator, who will be negligent to do their duty.

But 2) A father is not, like other tutors and curators, obliged to find caution *rem pupilli ſalvam fore:* for the Law repoſes ſuch confidence in thoſe named by him, as not to oblige even them to find it; much more muſt it exempt himſelf from finding it. However, in extraordinary caſes, in which it is evident that the minor or pupil runs a great riſk of loſing, a father may be obliged to find it, *Du.* 12th *Feb.* 1633, *Govan.* Nor is he obliged 3) To make oath *de fideli adminiſtratione*; for neither tutors nominated by himſelf, nor tutors of Law are bound to do it: nor 4) To make a judicial inventary of the particulars, of which the eſtate of his children conſiſts: for he ſeems not to be in any ſort ſuſpected by Law.

Beſides, a father is entitled to the cuſtody of the perſons of his children, tho he ſhould happen to be their next and lawful heir: for, if a child may be ſafely truſted in the hands of any body, he may, ſurely, be truſted in thoſe of his own father, ſince it is the firſt wiſh of every parent, that his children may ſurvive him; and it is the aim and the end of all his labour to provide for their happineſs and independence.

§ 366. But the Law does not only conſtitute a father the adminiſtrator of the affairs of his children during his life; it has even, 1696, *c.* 8. granted him power to name, by any deed made during his *liege pouſtie*, perſons to be their tutors and curators after he ſhall be dead; and to name them, as it has been remarked, with this ſpecial *proviſo*, that they ſhall be liable not for their omiſſions but for their actual intromiſſions alone, and that they ſhall be liable, each of them, not *in ſolidum*, as well for the reſt as for himſelf, but for himſelf and for acts of his own adminiſtration alone.

§ 367.

§ 367. But it muſt be remarked, that theſe tutorial and curatorial powers are peculiar to the father, and are veſted in him alone. They do not belong either to the mother, or to the grand-father, or to any other more antient and more remote progenitor of the children. 'Tis the father alone, whom the Law makes adminiſtrator for his children. Therefore, after his death, the right of adminiſtration does not devolve either to their grand-father, *H.* 713. or to their mother, or to any other. But they become ſubject to the tutorial and curatorial powers of thoſe, who either have been named by their father, are appointed by Law, or are given by the Crown.

§ 368. It remains to be remarked, that the Law having entruſted the tuition of children to their parents, it muſt be competent to their father, in caſe they are wrongfully detained by any one, and are deprived of their liberty, to bring a complaint againſt thoſe who detain them, or to make application to the civil magiſtrate, in order to get his children reſtored to their liberty, and to have thoſe, who unjuſtly detain them, compelled to produce them. And it is competent to him to do it not only during their pupilage, during which his power is very ample over their perſons, but alſo at any time during their life. For a father may, at all times, be ſuppoſed to have ſo great an intereſt in the welfare of his children, as entitles him to do for them that, which is eſſential to their happineſs, to wit, to get them relieved from a violent bondage. Indeed, the Roman Law was ſo mindful of the perſonal liberty of its ſubjects, as to make it competent for every individual of the people to apply for the exhibition and liberation of a free perſon, who was wrongfully detained by any one, *l.* 3. § 9. *ff. de homine libero exhibendo.* How much more, therefore, muſt a father be allowed to uſe every legal mean for obtaining the exhibition or the liberation of his children, if they ſhall happen, at any time of their life, to be unjuſtly deprived of their liberty? Hence, action muſt lie not only to the father, but alſo to the mother; nay not only to them, but to all the relations of the children: for the Roman Law made the action *de homine libero exhibendo* a popular one, and made it lawful for all and every one of the people to bring it. Now, children are by the Law of Scotland accounted free perſons.

But that this action may lie, it is plain, that the children muſt be wrongfully detained, *i. e.* they muſt be detained againſt their will by one, who has no right to detain them. Conſequently, if the perſon, who detains them, has a right to do ſo, action does not lie. Thus, it is not competent to a father to bring an action for exhibition and liberation of his daughter from the company of her huſband. For a huſband and a wife are bound to live together. Therefore a huſband has a right to keep his wife *in domicilio matrimonii*, if ſhe is willing to ſtay with him; nobody can ſay ſhe is wrongfully detained by him, *l.* 1. § 5. *ff. de liberis exhib.* Indeed, a huſband has an action for exhibition of his wife even againſt her father, if he detains her againſt her will from his company: becauſe, tho he is her father, he detains her wrongfully in this caſe, *l.* 2. *ff. eod.*—*Gen. c.* ii. *v.* 24. In the ſame manner, a father cannot ſue for exhibition of his ſon, that he may carry him away from a maſter, to whom he has bound him apprentice; becauſe his maſter has a right to detain him, unleſs he uſes him ill.

It is plain, from the nature of the thing, that all applications of this kind may be made not only to the Lords of Seſſion, but to every magiſtrate who can redreſs the wrong, ſummarily, by petition and complaint; and that they are entitled to be determined ſummarily, without waiting the courſe of any roll. Hence the Roman Law invented for this evil the remedy of an exhibitory interdict, which the magiſtrate pronounced, after taking ſummarily cognizance of the cauſe. See *t.* 29, 30. *l.* 43. *ff.*

§ 369. Laſtly, Fathers have a right to ſucceed to the eſtates of their children, when there is nobody exiſting, whom the Law prefers to the ſucceſſion before them.

TITLE

TITLE IV.

Of the Duties, Obligations, and Rights of Children.

§ 370. CHILDREN not only owe their being, but have commonly the greatest obligations to their parents. Therefore, they ought to regard them with reciprocal love and affection, and ought to obey a dictate of the natural Law, which is so obligatory and so essential to the welfare of society, that it was promulgated from Mount Sinai, by the DIVINITY himself. 'Honour thy 'father and thy mother,' says JEHOVAH, 'that thy days may be long upon 'the land, which the LORD thy GOD giveth thee.' This commandment implies an obligation so indispensible, that no difference of sex, of age, of rank, or of abilities, can free one from its force. For every one is bound, at all times, to reverence and to honour his parents *, *l.* 1. *p.* § 1. *l.* 9. *ff. de obs. parent. et patron. præst.*

§ 371. Hence injuries done them are both accounted to be more atrocious, and ordained to be punished more severely than injuries done to any others; because one, who can proceed to injure his parent, must have arrived at a degree of wickedness and inhumanity, which gives good reason to suspect, that there is hardly a crime so monstrous, which he would not dare to commit.

For this reason the Law of Scotland hath copied after the example of the Divine Law, and hath punished, with a most just and most indignant severity, those who offend against their parents. Hence a son or a daughter, who either beats or curses either father or mother, is ordained by 1661, *c.* 20. in case the delinquent is above the age of sixteen years, to be put to death without mercy; in case he is below the age of sixteen, but past pupilage, to be punished arbitrarily. In this it hath copied after the sanction of the Divine Law, which enacts, that he, who either smiteth or curseth either his father or his mother, shall surely be put to death, EXOD. *c.* xxi. *v.* 15, 17 †.

But, because this is a penal and a correctory statute, its sanction ought not to be extended either *quoad delinquentem*, or *quoad delictum*. Therefore one, who injures after this manner, not his father or his mother, but a remoter ascendent, *v. g.* his grand-father or his grand-mother, ought to be punished not by the ordinary punishment defined by the statute, but by a *pœna extraordinaria*, proportionable to the atrocity of the injury. For, without doubt, an injury, done to a parent, is highly aggravated by this very circumstance of *the person*, to whom it is done, *l.* 7. § 8. *ff. de injuriis*. Therefore, it deserves to be more severely punished than if it were done to an indifferent person, to whom the offender had no extraordinary obligations, and whom he had no extraordinary reasons for honouring and reverencing.

Nor ought it to be extended *quoad delictum*. Therefore, tho one, who does a verbal injury to his father or to his mother, ought to be punished more severely than one, who does the same injury to a person, with whom he is not so connected; yet nobody can be punished with the pains of death for any injury which is merely verbal, unless he has actually gone so far as to *curse* either his father or his mother.

In the same manner, one ought not to be punished capitally for any real injury done to either of them, except he actually beats them. 'Tis true, this seems to admit of one exception: for, if the delinquency was not, indeed, perfectly accomplished

* Hence, a transgression of that veneration, which is due to them, is called *delictum ad* PUBLICAM PIETATEM *pertinens*, *l.* 1. § 2. *ff. de obseq. parent.*

† 'Omnes qui adversus patres armantur, in omni mundi parte infamia notantur,' says the *ff.* *c.* 11. § 4.

compliſhed, but was, as the Lawyers ſpeak, *in actu proximo*, that is, if the delinquent had done all which lay in his power to accompliſh his deſign, but was hindered either by chance or by force from completing it, the puniſhment ought to be the ſame as if the crime had been perfected; becauſe the delinquent ſeems to be as *culpable* in the one as in the other caſe, ſince he not only had the wicked purpoſe of committing the crime, but alſo did all which he could to carry his deſign into execution. Beſides, it was, in no ſort, owing to him, or to a change of his mind, that it was not actually accompliſhed.

§ 372. But if an injury merely verbal is, in any caſe, puniſhed ſo ſeverely, with how much more ſeverity ought he to be puniſhed, who has arrived at ſuch a monſtrous pitch of depravity of heart as to imbrue his Hands in the blood of his parent! Accordingly, the Law of Scotland hath moſt juſtly provided, 1594, *c.* 224. that every one, who ſhall be, by an aſſize, convicted of having ſlain either his father or his mother, his grand-father or his grand-mother, ſhall not only ſuffer the ordinary puniſhment which the Law ordains to be inflicted on murderers, *i.e.* the pains of death, and of eſcheat of moveables, but ſhall alſo loſe all his heritable eſtate, which is, in the act, deſcribed by the words 'lands, heritages, 'tacks, poſſeſſions;' and that, not only for himſelf, but for all his deſcendents or poſterity *in linea recta*: and it is further enacted, that all the heritable eſtate, which belonged to the delinquent, ſhall immediately go and appertain to the next collateral and neareſt of blood, who would have ſucceeded in default of the delinquent and of his deſcendents. In this manner does the Law of Scotland ſhew its abhorrence of a crime, which has been odious to every nation that did not conſiſt of abſolute barbarians.

It is remarkable, *firſt*, that the act mentions fathers, mothers, grand-fathers and grand-mothers alone: but it appears, both from the rubric, from the preamble, and from the purview of it, that it ought to be extended to great-grand-fathers, great-grand-mothers, and every parent or aſcendent, however antient and remote. The reaſon, for which the act makes not expreſs mention of any remoter aſcendent than grand-fathers and grand-mothers, ſeems to be, becauſe it is ſeldom that one can, during the life of a remoter parent, be come to ſuch ripe years as to be capable either of entertaining the moſt diſtant thoughts of killing him, or of putting any ſuch deſign into execution (§ 78, 174.).

But tho it is plain, that it ought to be extended to thoſe who kill any of their aſcendents, it is not true, converſly, that it ought to be extended to parents who kill their children, or to aſcendents who kill thoſe deſcended of them. For the act ſpeaks of the other caſe alone, and ſeems to have purpoſely omitted that of aſcendents killing their deſcendents; becauſe they do not appear to be ſo odious and ſo monſtrous delinquents, and ought therefore to be left to the ordinary ſanction of the Law.

It muſt be remarked, *ſecondly*, that it is not enough, that the delinquent have actually committed the crime; it is neceſſary alſo that he be, by the verdict of an aſſize, convicted of having committed it; elſe his next collateral will not be admitted to enter on poſſeſſion of his heritage. For the ſtatute is *ſtricti juris*, *St.* 3d *Feb.* 1674, *Oliphant;* and means, that he alone ſhall be held to be guilty who has been found, by the verdict of an aſſize, to have committed the crime.

§ 373. Children are bound to reverence and to honour their parents (§ 369.). This honour and reverence, which is due from them, is not peculiar to one parent more than another; it is due to the mother as well as to the father, to more remote parents as well as to thoſe who are more near. No doubt, greater reverence and regard are due to thoſe out of whoſe bowels we are, than to thoſe, of whom we are not immediately ſprung; becauſe we have to the former obligations, which are both greater and more immediate, than thoſe, which we have to the latter.

If children are bound to honour their parents, it is plain, that they muſt be bound to aſſiſt them, when in diſtreſsful circumſtances, and to maintain

them when in want. Hence, the Law of Scotland hath made the obligations of parents and children to maintain one another, reciprocal. So that not only are parents bound to maintain their indigent children; but children are reciprocally bound to maintain their indigent parents, in remuneration of that affection with which their parents regarded them, of that care which they took of them, and of thoſe obligations which they have to them, *l.* 5. § 1, 2, 13, 16, *ff. de agn. et alend. lib. l.* 13. § 2. *ff. de adm. et per. tut. l.* 1. § 4. *ff. de tut. et rat. diſtrah. d. l.* 1. § 13.—*F.* 20th *July* 1710, *Brown.*

The order, in which children are liable to this obligation, is juſt the reverſe of that, in which parents are liable to it, and may be eaſily learned, *mutatis mutandis*, from what has been ſaid concerning it (§ 354. *ſqq.*). For ſons and daughters are liable in the firſt, grand-children in the ſecond, great-grand-children in the third place, *&c.*

The obligation ceaſes, in this caſe, for the ſame reaſons, for which it has been ſaid (§ 361.) it ceaſes in the other: 1) When the parents are not indigent, but *in facultatibus*, able to maintain themſelves; 2) When the children are indigent, and are not *in facultatibus;* and 3) It is commonly ſaid to ceaſe, when the parent has done ſome enormous injury to the child. But one may well be allowed to think, that the obligation, by which children are bound to maintain their indigent parents, ceaſes not on any injury however atrocious, which a parent can do to his child. It ſeems to be ſhockingly inhuman to ſay it does. *Iniquiſſimum enim quis merito dixerit, patrem egere, cum filius ſit in facultatibus.* Children owe greater obligations to their parents, than parents to their children. Therefore, nothing can releaſe children from that obligation; *nam licet legum contemptor et impius ſit, tamen pater eſt.* It is perhaps true, on the other hand, that children may ſo greatly abuſe their parents as to cancel the obligations under which theſe lie to maintain them, not indeed for ever, but till the children amend their temper, their manners, and their behaviour.

§ 374. It may not be improper, in this place, to remark, that *actions of aliment*, that is, actions brought by one againſt another in order to recover a decree for an allowance for his maintenance, are, 1696, *c.* 21. ordered to be diſcuſſed ſummarily, without abiding the courſe of any roll; becauſe queſtions of this kind cannot, by their own nature, admit of delay. If it were neceſſary, that they ſhould go through all the tedious forms of ordinary actions, the perſon, who was ſuing for the exhibition, might ſtarve in the mean time. *Dum Roma deliberat, pereit Saguntus.* Therefore, they are entitled to the benefit of the ſummary roll, that they may be quickly diſpatched.

But they are not ſo highly privileged, as to be allowed to be brought into court *per ſaltum* by petition or bill: for the Lords of Seſſion are, by the act, expreſsly prohibited to grant any aliment to any perſon upon petition or bill, even tho there ſhould be an action depending before the court between the parties concerned; and it is enacted, that aliments ſhall not be granted, unleſs a *libelled ſummons* is iſſued and executed for that effect; which ſummons muſt, like others, be *called* according to the common form, muſt have the *partibus* marked on it, muſt be *given out* by the advocate marked for the purſuer to be *ſeen* by the advocate marked for the defender, muſt be *returned* in common form, and may then be diſcuſſed ſummarily.

Since cauſes alimentary cannot admit of delay, and yet a libelled ſummors muſt be iſſued and ſerved, it is therefore juſtly provided, *Aſ.* 29th *June* 1672, that ſummonſes in cauſes alimentary ſhall be privileged, and ſhall be executed on 6 and 6 days, to wit, ſix for the firſt and ſix for the ſecond *diet*, that is, the *inducie*, allowed the defender, ſhall be no more than 12 days. So that the ſummons can be iſſued, and the cauſe finiſhed in a very few weeks.

I remember to have read, that actions of aliment can be brought before the court of ſeſſion alone. But no ſuch thing ſeems to be inſinuated in the ſtatute; and every body knows, that the Commiſſaries of EDINBURGH are Judges competent

petent to all actions of ſeparation and aliment between huſband and wife. I believe, indeed, that, in all other caſes, actions of aliment uſe and perhaps ought to be brought before the Court of Seſſion; becauſe it has a *nobile officium*, and is therefore the moſt proper court, before which queſtions, like alimentary cauſes, that are by Law left entirely to the equity of the Judge, can be debated. For in them all depends on circumſtances. So the Judge ought to attend to the whole complexion of the caſe, and the circumſtances of all the parties concerned in it, and to do what appears upon the whole to be moſt juſt and reaſonable. *Utrubique ſe judex interponat, quorundam neceſſitatibus facilius ſuccurſurus, quorundam ægritudini: et cum ex æquitate hæc res deſcendat, caritateque ſanguinis, ſingulorum deſideria perpendere judicem oportet, l. 5. § 2. ff. de agn. et al. lib.*

§ 375. But children are not regarded by the Law of Scotland in the ſame light, in which they ſeem, in ſome ſort, to have been viewed by that of the Romans, as the property of their parents: for the *patria poteſtas* does not extend among us ſo far as it did among them. They are conſidered as perſons different from their parents. Of courſe, they are capable of holding eſtates proper to themſelves.

Hence they do not, by the Law of this country, acquire to their parents, but are capable both of acquiring and of holding property for themſelves. Of courſe, they may acquire to themſelves, either by their own induſtry, or by the liberality of others.

§ 376. Every thing, therefore, which children acquire by their own induſtry, that is, either by the labour of their bodies, or by the ingenuity of their minds, or by both, is acquired not to their parents, but to themſelves. And it is ſo, whether they live in the ſame family with their father, or in a different one from him; whether they have or have not employments.

'Tis true, if they have employments, and are able to maintain themſelves, their parent is entitled to demand board from them, in caſe they live in his family. For a parent is not bound to maintain his children, in caſe they are *in facultatibus*, able to maintain themſelves (§ 361.). But, if he neglects to ſtipulate it from them, he is not entitled to demand it: for he is preſumed to maintain them *ex pietate*.

If they have not employments, and depend on their father for their maintenance, it is their duty to do all, which they can do, to recompenſe him for his affection. Therefore, they ought to be as uſeful to him as poſſible. 'Tis true, hardſhips ought not to be impoſed upon them. Indeed, they ſeem not to be compellable to work to their parents. But, in caſe they agree to do it, they are not intitled to demand *hire* for the ſervices, which they may perform, unleſs they make an antecedent ſtipulation for it. For they may well, in theſe circumſtances, allow the profits of their bodily labour to go to their parents, to compenſate for the expence of their maintenance, *Di.* 350.

§ 377. They may acquire not only by their own induſtry, but alſo by the liberality of others. Thus, preſents may be given them; rights may be granted them; deeds may be made in their favour; ſettlements may be made upon them; legacies may be left them; inheritances may deſcend to them; either particular things, or eſtates, may be made over to them; and the things, which are thus conveyed to them, are acquired to themſelves alone. In ſhort, deeds either *inter vivos* or *mortis cauſâ* may be made in their favour, and they may thereby make acquiſitions to themſelves.

§ 378. Since their perſons are different, and they are capable of holding eſtates different from thoſe of their fathers, it is plain, that they may both acquire from their fathers, and bring themſelves under obligations to them as well as to others.

Hence, all onerous contracts may ſubſiſt between them. They may buy and ſell; they may grant and take leaſes; and they may make loans between themſelves. 'Tis true, deeds made between them are, in ſome caſes, more liable than others to be ſuſpected, becauſe of the nearneſs of the connexion, which ſubſiſts between

between them. Therefore, the Law puts it upon him, in whoſe favour a deed is made, to prove otherwiſe than from the deed itſelf, that it was granted for an onerous cauſe. But, if it is proved to be onerous, it gives it the ſame effects, which it gives deeds of the ſame kind in other caſes.

§ 379. But children may acquire from their parents as well without as for onerous cauſes: for gratuitous deeds, made in their favour, are effectual.

Hence property may be conveyed to them; aſſignments may be granted in their favour; ſettlements may be made upon them; and they may become *creditors* of their father. For rights may be *acquired* by them; but they become creditors of their father, who granted theſe deeds, as ſoon as rights are *acquired* by them. Of courſe, they may either demand from him or ſue him for performance of thoſe obligations, under which he has brought himſelf to them, according to the terms of them: for they have all the rights, which other creditors of their father have; provided they have *really acquired* rights, or have actually become creditors.

§ 380. I ſay, provided they have actually *acquired* rights. For rights, which are not acquired without writ, are not acquired by them, till the written deeds, by which the rights are conſtituted, are actually *delivered* either to themſelves, or to ſome body to their uſe. Then, and not till then, do the children *acquire* them, or become creditors of their fathers. The reaſon is, becauſe no unilateral deed is effectual without delivery: for it is in the power of the perſon, who grants it, either to deſtroy or to cancel it, as long as he keeps it in his own cuſtody. Beſides, he, in whoſe favour it is made, as he could not compel the grantor to make it, ſo he cannot compel him either to exhibit or to deliver it, *St.* 10th *Jan.* 1668, *Glencorſe*. But it becomes effectual, as ſoon as it is delivered. Of courſe, the children acquire at that time rights, of which they cannot be deprived by any poſterior deed of their father.

But it muſt be remarked, that delivery is not eſſential to the validity of deeds, made by parents in favour of their children; they are effectual without it. For the Law thinks, that parents are the moſt proper perſons for having the cuſtody of deeds made by themſelves in favour of their children; and that children ought not to be too ſoon independent of them. Therefore, deeds, made by parents in favour of their children, are effectual, ſuppoſe they ſhould be found in the cuſtody of the grantors of them, or in their repoſitories at their death; and that, without reſpect to the time, at which they bear to be dated, *Du.* 11th *Nov.* 1624, *Children of Wallace*.—20th *Feb.* 1639, *Lord Cardroſs*.—*St.* 26th *July* 1677, *Stevenſon*.—*F.* 16th *Dec.* 1712, *Monro*. For a parent, in whoſe cuſtody ſuch a deed is found, is by Law preſumed to have willed, that it ſhould be effectual; and to have renewed it, perpetually and in every inſtant, from its date to the time of his death. And it holds him, in caſe he has not cancelled it, to *deliver* it at that time.

§ 381. Since a *right* is *acquired* at that time alone, at which the deed is *really* delivered, it is plain, that the validity and the effects of it muſt depend on the condition, in which the grantor of it was at that time. If he was *in facultatibus* at that time, the deed is not voidable at the ſuit of creditors, either prior or poſterior: for the perſon, who granted it, had both power and ability to grant it; he was able, after granting it, to pay his debts. Of courſe, he had power to diſpoſe of the ſurplus, which remained after clearing them, as he pleaſed: for every proprietor has abſolute power over his own property. Therefore, he had power to make the deed, granted by him. Of courſe, it is good againſt creditors, *St.* 6th *Jan.* 1677.—11th *Dec.* 1679, *Children of Monſewell*.—*Fo.* 7th *Feb.* 1679, *Hamilton*.—12th *Jan.* 1697, *Creditors of Kinfawns*.—11th *Feb.* 1697, *Campbell*. But, if he either was inſolvent at the time of delivery, or became inſolvent by making it, it is void againſt his creditors, and is liable to be ſet aſide at their ſuit. The reaſon is, that it is held to be granted *a non habente poteſtatem*: for the eſtate of every debtor may, in ſome ſort, be ſaid to be the property of his creditors.

Therefore,

Therefore, he is not allowed to hurt them by making gratuitous deeds; becauſe he has no power to diſpoſe of their property. Of courſe, if his eſtate is not able to clear his debts, he has no ſurplus, which belongs to himſelf, and of which he has power to diſpoſe. A deed therefore made by him in favour of his children, is voidable by his creditors; becauſe by it he diſpoſes, in ſome ſort, of their property.

§ 382. It is, therefore, of the utmoſt importance to know the preciſe time, at which deeds, made by parents in favour of their children, are delivered. For the validity and the effects of them may depend upon it.

Parents have a ſtrong affection for their children, and wiſh to have them liberally provided. Hence, the Law pays no regard to the date, which deeds, made by them in favour of their children, bear: for it ſuſpects, that they may be antedated, in order to render them effectual. Therefore, it preſumes, that they were delivered not at the time at which they are dated, but either at that at which they are produced, or at that of the death of the grantor. Of courſe, it puts it on him, who produces them, to prove, that they were delivered ſooner, if he ſays they were. *Affirmanti, non neganti incumbit probatio.* The Law allows it to be *denied*, that they were delivered ſooner. Of courſe, he muſt prove it, if he affirms they were, *St.* 14th *Nov.* 1676, *Inglis.*—*Fo.* 24th *July* 1701, *Chieſly.*—16th *Nov.* 1697, *Simpſon.* Delivery is proveable either by witneſſes, by oath of party, or by writ.

§ 383. Since deeds, made by parents in favour of their children, become effectual upon their delivery, it is plain, that this maxim muſt apply to all the deeds granted by them. Therefore, all thoſe, which are delivered during the ſolvency of the father, are effectual to the children; thoſe, which are poſterior, do not cancel thoſe, which are prior, *Du.* 20th *Feb.* 1639, *Lord Cardroſs.* Thus, if a father grants more bonds than one to his child, they are all good; the laſt does not cancel all, which were granted before it. The reaſon is plain; the father, in caſe he had intended to cancel the firſt ones, ſhould either not have allowed them to remain in the cuſtody of his children, or *have declared*, that the laſt ſhould cancel the firſt. As long as the deed remains in the cuſtody of him, in whoſe favour it is made, the right remains with him, and he continues to have it. In order, therefore, to deprive him of it, it is neceſſary that he diveſt himſelf of it, either by reſtoring the deed to the grantor or otherwiſe. If the parent grants the ſubſequent deed without getting the former one cancelled, both of them muſt be effectual.

Indeed, he may perhaps have neglected to retain to himſelf a power either of altering, of cancelling, or of revoking it. In this caſe, the child, who is the grantee, cannot be compelled to reſtore it. Therefore, he cannot be deprived of his right, unleſs he is willing to diveſt himſelf voluntarily of it. But it is probable, he will not refuſe to do it, in caſe he ſees that a more beneficial deed is going to be made in his favour.

The ſame obſervation holds, in caſe the grantor declares, that the prior deed ſhall be cancelled by the poſterior one, and that both ſhall not be effectual. 'Tis true, the grantee, in caſe the right which he acquired by the prior one, is independent of the grantor, may refuſe to accept of the poſterior one, and may hold by the firſt. But he may accept of the poſterior one; and, in caſe he accepts of it, he loſes the benefit of the other. For he muſt accept of the deed on the terms, on which it is granted him; both of them cannot be effectual, *F.* 24th *Feb.* 1709, *Burnet.*

But this rule admits of two exceptions.

Firſt; Every deed, made by a parent in favour of his children, is held to be made in ſatisfaction of obligations, under which he brought himſelf to them by his contract of marriage. Therefore, they cannot demand performance both of thoſe obligations, and of the poſterior deeds made in their favour. The reaſon is, that he became, by his contract of marriage, debtor to his children.

But *debitor nunquam præſumitur donare.* The contract could not properly be reſtored to him. Beſides, the obligations, contained in it, are not made to individuals. They are made to perſons unknown. So there is not any reaſon for preſuming, that the father meant both to ſubſiſt, *Home, Dec.* 1683, *Innes.*—*Fo.* 25th *June* 1706, *Davidſon.*—*D.* II. 145. 14th *Dec.* 1739, *Pringle of Symington.*

Indeed, if he appears to intend them both to ſubſiſt, the poſterior deeds will not cancel the prior contracted obligations. *Nam præſumptio cedit veritati.* *Home, Dec.* 1683, *Innes.*

Secondly; A portion, given by a father with his child in marriage, is held to be given in ſatisfaction of all *former* proviſions made for him, either by contract of marriage, or by bonds, or by other deeds. The reaſon is, becauſe one is preſumed to give his child at marriage all, which he intends to give him. Therefore, all former deeds, made in his favour, are extinguiſhed, ſatisfied, and cancelled by the portion, unleſs it is ſpecially declared, that they ſhall remain, notwithſtanding, effectual, and that it is given over and beſides them, *M.* 15th *Dec.* 1569, *Cockburn.*—*St.* 29th *June* 1680, *Young.*—*Fo.* 22d *June* 1680, *Seton.*—24th *June* 1681, *Dowes.*—27th *Nov.* 1685, *M'Intoſh.*—28th *Jan.* 1688, *Aytoun.*—12th *Nov.* 1698, *Sydſerf.*—9th *Feb.* 1699, *Earl of Northeſk.*—*N.* 107.—*H.* 221.—*n.* 56.

I ſay, *former* deeds: for deeds, granted after the portion is given, are not affected by it; becauſe they are poſterior to it, and by granting them the grantor ſhews plainly, that he gave them over and beſides it.

§ 384. It follows from the principles, which have been explained, that deeds, taken by parents in favour of their children, confer no right on the children, as long as the parents keep them in their own power, and do not do that which is neceſſary for completing the right of the nominal grantees. A man, who lends money, may cauſe the debtor to grant his bond payable either to himſelf, or to any other perſon whom he pleaſes; becauſe it is of no importance to the debtor, to whom he binds himſelf to pay; and, in caſe it were granted to the real creditor, it might be aſſigned by him. Therefore, if a parent takes a bond payable to his child, the child acquires no right to it, as long as his parent retains it in his cuſtody, and does not deliver it to him. The parent may either deſtroy it, or demand from his debtor one payable to himſelf. The child has no right to ſue either the debtor for payment, or his parent for exhibition of it. But he acquires right to it, and becomes the real creditor, as ſoon as it is delivered either to himſelf or to another *for his behoof.* I ſay, *for his behoof:* for, if it is not delivered expreſſly for his behoof, it continues under the power of the father as much, as if he had retained it in his own cuſtody, *K.* 6. In the ſame manner an aſſignment, taken by a father in favour of his child, gives no right to the child, as long as the father retains it in his own cuſtody: for he may deſtroy it, or he may demand from the aſſignor another in favour either of himſelf or of another, *St.* 15th *Jan.* 1662, *Grant.*—22d *Dec.* 1674, *Marquis of Douglas.*—5th *July* 1677, *King's Advocate.* But, if he either delivers it to the aſſignee, or does that which is neceſſary for completing his right, he is diveſted of all right to the thing aſſigned; and it is fully veſted in the perſon of the child. Suppoſe it, for inſtance, to be *an aſſignment* to a bond, *which* he takes in favour of his child. The child acquires full right to the bond, in caſe the aſſignment either is delivered to him, or is intimated to the debtor: for intimation made to the debtor veſts the right in the aſſignee. Of courſe, it diveſts the father, and that, tho he retains the aſſignment in his own cuſtody, *Di.* 106. Again, in caſe a father takes a conveyance either of land or of any other thing, which can be *ſeiſed,* in favour of his child, the child acquires a complete right to it, as ſoon as either the deed is delivered to him, or ſeiſin is taken in his name: for the father is then diveſted, *St.* 10th *July* 1669, *Garner.*—*Di.* 106.

But it muſt be remarked, that this holds in thoſe caſes alone, in which the deed is purchaſed with the money of the parent. If it is purchaſed with the proper

per money of the child, the father neither has nor can have any right in it; for he had it not in his power either to have taken it effectually in favour of himſelf, or, in caſe he had taken it in his own name, to have deſtroyed it. He could at beſt be no more than truſtee and adminiſtrator for his child, *St.* 18th *Feb.* 1671, *Dundas.* 'Tis the ſame, in caſe the deed is gratuitous, and is made voluntarily by the grantor in favour of the child: for the father had no power to compel it to be granted. Of courſe, he acquires no right by it; he is not entitled to compel the grantor to make another in favour of himſelf; much leſs is he entitled to deſtroy it; for it is not his deed.

§ 385. Since children are capable both of holding and of acquiring eſtates different from thoſe of their parents, they muſt, of courſe, have the abſolute power of diſpoſing of them: for every proprietor has the diſpoſition of his property. 'Tis true, they are, during their nonage, under the guardianſhip of their father; for he is the lawful adminiſtrator of their affairs (§ 362. *ſqq.*); during their pupilage, he has tutorial powers both over their perſons, and over their eſtates; during their minority, he has curatorial powers over their eſtates. But as ſoon as they come of age, they acquire, like other majors, the power of managing their own affairs: and, if during their nonage they are ſubject to the adminiſtration of their father, their condition is not much different from that of others.

§ 386. *Laſtly*, They have a right to ſucceed to the eſtates of their parents, according to the eſtabliſhed order of ſucceſſion.

TITLE V.

Of Baſtards.

§ 387. WERE men to conduct their amours by the ſuggeſtions of *ſober* diſpaſſionate Reaſon, and to direct them towards that end, for which alone their loves were intended, every male would have his own wife, his own family, and his own chil[illegible]. Mankind, living in pairs, ſatisfied with one another, and ſeeking not after irregular pleaſures, would produce a lawful and a beloved offspring. But nature ſeems not to affect perfection in any of her terreſtrial works; and the folly, paſſions, and poverty of many individuals of human kind impel them, in order to ſatisfy the violence of their luſts, to give being to a ſpurious breed, the unexpected iſſue of dalliances which are wiſhed to be fruitleſs. For their bodies are material, and are organized like thoſe of other animals. They are actuated, independently of their own capricious volitions, by violent luſts which muſt be ſatisfied; elſe they allow not thoſe, poſſeſſed by them, to be at reſt. But the poor and ſtraitened circumſtances of ſome, and the pride, ambition and folly of others, make them think it either impoſſible or inconvenient for them to marry. Hindered therefore by that, which they apprehend to be neceſſity, from ſatisfying, in a lawful way, thoſe paſſions, which muſt yet be gratified, they either plunge themſelves into the poiſonous embraces of proſtitutes, or ſeduce, by their inſinuating language, the modeſt and reluctant to yield to the impulſes of nature, and to admit them to the poſſeſſion of all their charms. Thus, regardleſs of the end, for which the ſexes were diſtinguiſhed, they not only wiſh, but, ſo they enjoy a momentary bliſs, are even uneaſy, till time makes them ſecure, that their amours are vain and fruitleſs.

But, contrary to the wiſhes of the parents, their mutual dalliances are ſometimes crowned with unexpected ſucceſs, and are productive of a ſpurious offſpring.

§ 388. Hence, beſides thoſe, who have been called *lawful* or *legitimated* children (§ 333.), others, called *baſtards*, are ſometimes born. They may be defined

to

to be ‘ children, who are born out of lawful wedlock, and either are not or can-
‘ not be legitimated by the ſubſequent marriage of their parents.’ They are called ſometimes *ſpurious*, ſometimes *natural* children. The Roman Lawyers ſay, they are called ſpurious παρα τὴν σποράν, *id eſt, a ſatione, l.* 23. *ff. de ſtatu hom.* § 12. *J. de nuptiis;* and they are called natural children, becauſe they are the iſſue of embraces, to which *nature* prompts their parents, and which are not conducted by the ceremonies introduced by civil Laws.

But *natural* children are commonly oppoſed to *inceſtuous* and *adulterous* baſtards. Inceſtuous ones are ‘ thoſe who are the iſſue of inceſtuous embraces’ (§ 174, *ſqq.*); adulterous are ‘ ſuch as are the iſſue of adulterous embraces’ (§ 178.); and, ‘ the iſſue of embraces, which are not either inceſtuous or adulterous, and ‘ are therefore not marked by an unnatural turpitude,’ are called *natural* children.

§ 389. Irregular amours are found by experience not only to contribute little, but even to prevent the multiplication of human race. Beſides that they are commonly fruitleſs, they enflame the paſſions of mankind, make them overleap the boundaries which nature has ſet to their powers, and thereby introduce innumerable diſeaſes among human race. Thus, men are frequently debilitated, and women rendered barren by them. So that, when the heat of their voluptuous inclinations is abated, and they would wiſh to leave children behind them, they are become incapable of propagating their kind.

The leſs a man is able to reſiſt the attacks of one paſſion, he muſt be the more liable to be overcome by the violence of every other. He muſt contract an imbecillity, over which every impulſe muſt be able to prevail. Thus, a heedleſs gratification of brutal luſt, unmixed with every refined and delicate idea, muſt become an inlet to much corruption; it muſt make the mind contract by degrees a corrupted taſte and debauched habits, and that the more, that one muſt often be obliged to make light of the morality of his character, and to employ the moſt flagitious means, in order to accompliſh his diſhonourable purpoſes.

But the babes, who are the iſſue of unlawful embraces, are not acceſſary to the guilt of their parents; and they are human creatures. Therefore, the Law ought not to allow them to periſh. It ought to take them into its peculiar protection; becauſe it can hardly expect, that parents will be of themſelves diſpoſed to take care of children, whom they wiſhed never to ſee the light.

For theſe reaſons the Law, at the ſame time that it hath, in order to prevent the propagation of ſpurious children, and to induce men to marry, 1) Appointed puniſhments to be inflicted on ſuch as violate their chaſtity, hath alſo 2) Taken care to provide for the welfare of ſuch natural children, as happen to be propagated.

§ 390. In order to hinder men from giving looſe to every impulſe of their luſt, and thereby to oblige them to marry, the Law ordains ſuch, as commit fornication, as well as thoſe who commit inceſt or adultery, to be puniſhed in an ignominious manner *. For, 1661, *c.* 38. it is enacted, 1) That the Juſtices of the peace ſhall put in execution the Laws made againſt ſuch, as are found to be guilty of the ſin of fornication; 2) That they ſhall either levy or cauſe to be levied from the fornicators pecuniary mulcts proportionable to the quality of the offenders, and to the degrees of their offences, *viz.* for the firſt fault committed by a nobleman, *L.* 400 Scotch; by a baron, *L.* 200; by any other gentleman and burgeſs, *L.* 100; by a perſon of inferior rank, *L.* 10 †; 3) That theſe penalties ſhall be doubled

* Fornication is the delinquency of ‘ thoſe, who have copulation without being married to one another, and ‘ without being guilty either of inceſt or of adultery.’ The puniſhments of the two laſt crimes have been explained already (§ 177, 178.).

† *A propos* to the preſent argument is a caſe reported by Mr. Forbes, 9th *Nov.* 1709, *Sandilands v. Purdie.* The judgment itſelf, and the reaſons aſſigned for giving it are, both of them, curious. I ſhall, therefore, take leave to inſert the words of the report. ‘ *John Purdie*, fined by the Juſtices of peace in one hundred pounds ‘ Scotch for fornication with *Chriſtian Howiſon* his ſervant, conform to the *act* 38. parliament 1661, be ‘ being

doubled *toties quoties*, according to their relapſes, the degrees of their offence, and the quality of the offenders; 4) That they ſhall be levied not only from the man, but alſo from the woman, according to the quality and the degree of the offence of each of them, the one without prejudice to the other; for each of them, the one as well as the other, is guilty of a delinquency, and muſt therefore undergo that puniſhment, which the Law obliges them, as well as other delinquents, to ſuffer for their crimes; 5) That one half of theſe penalties ſhall be applied to pious uſes in the pariſh, within which the offence was committed, or the offenders live; that the other half be divided into two equal parts, one of which ſhall be given to the informer and proſecutor, and the other applied in the firſt place to the ſatisfaction of the conſtable, or others employed to bring the offenders to juſtice; and in the next place, if any ſurplus remains, either to pious uſes or to pay the conſtables for their ſervices in other parts of their office.

But the poor have paſſions as well as the rich. Hence thoſe, who commit fornication, may frequently happen to be unable to pay the fines impoſed upon them. Therefore, it is enacted, 1567, *c.* 13. * 1) That every perſon, female as well as male, convicted of having committed fornication, for the firſt fault ſhall either pay the ſum of *L.* 40 Scotch; or be impriſoned and fed on bread and ſmall drink for 8 days, and then be preſented bare-headed at the market-croſs of the town or pariſh to which the offender belongs, there to ſtand faſtened, ſo that he or ſhe may not remove, for two hours: for the ſecond fault, ſhall either pay 100 marks; or be detained in priſon and fed on bread and water alone for 16 days, and then be preſented at the market-place, with their heads not only bare, but ſhaved: for the third and every ſubſequent fault, ſhall either pay *L.* 100 Scotch; or be impriſoned and fed on bread and water for 24 days, then be taken and ducked thrice in the deepeſt and fouleſt pool or water of the ſaid town or pariſh, and thereafter be baniſhed it for ever: 2) That the provoſt and bailiffs of boroughs, the high court of Juſticiary, or any others commiſſioned by his Majeſty, ſhall judge perſons accuſed of fornication; ſhall ordain the pains of Law to be inflicted on thoſe convicted of it; ſhall cauſe pecuniary mulcts to be levied from ſuch reſponſible perſons, as chuſe rather to pay money than to undergo ignominious corporal puniſhments; and ſhall cauſe the corporal puniſhments of impriſonment, *&c.* to be inflicted on ſuch as either refuſe or are not able to pay the pecuniary mulcts, impoſed by the act.

§ 391. Theſe are the only † acts, which the Scotch parliament enacted againſt fornication. One, if not both of them, muſt be held to be ſtanding in force at preſent. For they were ratified by 1690, *c.* 25.—1696, *c.* 31. 'Tis true, the great change, which the opinions as well as the cuſtoms of Scotland have undergone during the laſt century, hath hindered them from being of late executed ſo rigorouſly as they uſed to be by our forefathers, to whom this appeared to be one of the moſt filthy, abominable, and odious crimes. We, their degenerate poſterity, pretend to have extended our views of human affairs, and have therefore embraced a political, moral, and religious ſyſtem different from theirs. Hence we have been led not only to laugh but to connive at that crime, which they

being the eldeſt ſon of an heritor, and ſo a *gentleman* in the conſtruction of Law: when charged for payment by *Thomas Sandilands* collector of theſe fines, he ſuſpended upon this ground, "that the fine was exorbitant, in ſo far as he was but a ſmall heritor, and the act of parliament impoſeth the one hundred pounds upon *gentlemen* tranſgreſſors; and as all heritors are not gentlemen, ſo he denied, that he had the leaſt pretence to the title of a gentleman. And, further, he had married the woman he offended with; which leſſened the ſcandal, and was a ground to mitigate the fine."

'The Lords ſuſtained the reaſon of ſuſpenſion to reſtrict the fine to ten pounds Scotch; "*becauſe* the ſuſpender had not the *face* or *air* of a gentleman." Albeit it was alledged for the charger, that the ſuſpender's profligateneſs and debauchery, the place of the country where he lives, and the company haunted by him, had influenced his mien.'

* The ſtyle of this act of parliament is curious.

† In antient times a woman, who had never been married, and committed fornication, while ſhe was in the wardſhip of her ſuperior, forfeited her heritage either to her co-heireſſes or to her ſuperior. *R. M. l.* 2. *c.* 49. *Ib.* 55. § 9.

purſued with the moſt indignant ſeverity. But amidſt our refinements we have loſt ſight of morality, and of courſe of the real intereſt of ſociety. Temperance, ſobriety, chaſtity, abſtinence, are virtues intimately connected with the preſervation of the morals of mankind. The contrary vices make them become diſſolute in many reſpects. 'On peut regarder,' ſays the illuſtrious MONTESQUIEU, 'dans un 'etat populaire l'incontinence publique comme le dernier des malheurs et la certi- 'tude d'un changement dans la conſtitution *. — Quand par une impétuoſité gé- 'nérale tout le monde ſe portoit à la volupté, que devenoit la vertu? † — Il n'eſt donc 'pas vrai que l'incontinence ſuive les loix de la nature. Elle les viole au con- 'traire. C'eſt la modeſtie et la retinue qui ſuivent ces loix ‡.' The Law muſt, therefore, amidſt the viciſſitudes of the ſpeculations of Philoſophy, be held to continue the ſame. For the refinements, and thoſe pretended ones too, of a few are not expreſſive of the ſentiments of the people.

Hence it may be inferred, that theſe acts are both in force, the 1567 as well as 1661, in ſo far as the laſt is not derogatory to the firſt. No doubt, the pecuniary penalties, ſpecified in the old one, ſeem to be commuted into thoſe of the ſecond; and for a very good reaſon; becauſe the act 1567 did not attend to the differences of rank, by which offenders might happen to be diſtinguiſhed, but impoſed the ſame penalties on men of every degree. But the act 1661, attending to thoſe maxims of diſtributive juſtice, which ought to be adopted into all human Laws, corrected this error, and ſuited its penalties to the ranks of the offenders.

It does not, however, repeal, but ſeems even to have confirmed the act 1567. The alternative, therefore, of this 1567 ſeems ſtill to remain in force; ſo that thoſe, who either refuſe or are not able to pay the pecuniary mulcts of 1661 may be corporally puniſhed by the ignominious pains of the act 1567. At leaſt, an arbitrary puniſhment may be inflicted upon them. *Nam qui non habet in ære, luat in pelle*, is a general maxim of Law. And it ſeems not to be agreeable to the principles of Law to ſay, that, if the delinquent is either unwilling or unable to pay the pecuniary mulct, nothing more is to be done but to employ the ſame means for levying it from him, which the Law ſays ſhall be employed for compelling a debtor to pay debt, which he owes to his creditor. If we ſay this is the doctrine of the preſent Law, a moſt palpable abſurdity follows: for one, who is poor and is unable to pay the fine, muſt either be detained in priſon during life, for a criminal is not entitled to be liberated on making a ceſſion of his goods, or be ſet at liberty, and then be allowed, as often as he pleaſes, to repeat the crime with impunity.

§ 392. The Law puniſhes thoſe, who, by violating their chaſtity, violate the order of ſociety, and thereby endeavours to *prevent* (§ 389.) the incontinent embraces of fornicators. But it has no enmity at the children, who may happen to be the iſſue of them; it remembers, that they are men, and that they are not partakers of the guilt of their parents. Therefore, it takes them into its peculiar protection, and endeavours to avert all the calamities to which the criminality or the ſhame of their parents may expoſe them (§ 390.)

Incontinence is attended with more pernicious conſequences in women than in men **. 'Hence,' ſays Mr. HUME ††, 'the Laws of chaſtity are much ſtricter 'over the one ſex than over the other;' and all nations have agreed in annexing a certain degree of infamy to the character of an incontinent woman. 'Tou- 'tes les nations ſe ſont également accordées à attacher du mépris à l'incontinence 'des femmes.'

Women,

* De l'Eſprit des loix, l. 7. ch. 8. † l. 7. ch. 2. ‡ l. 16. ch. 12.
** See De l'Eſprit des loix, liv. 7. ch 8.
†† Enquiry concerning the principles of morals, ſect. 4.

Women, therefore, who have loſt the government of their paſſions, have proſtituted their charms to the violence of their luſt, and have happened to conceive, may, in order to conceal their ſhame, bethink themſelves of deſtroying the fruit, which, in embryo, they bear in their wombs. Hence the Law hath appointed ſevere puniſhments for ſuch, as either procure abortions to themſelves, or are acceſſary in procuring them to others (§ 124.).

But the fœtus may eſcape all the attempts made upon its life, and may, contrary to the wiſhes of its mother, come to maturity in her womb; ſhe may be ſtill aſhamed to publiſh her condition; or ſhe may intend to murder her infant at the time of its birth. Hence, ſhe may neglect to call for aſſiſtance in her labour. Her child may thereby be killed during its birth; or it may be ſecretly murdered after it is born. Hence the Legiſlature hath made it a duty incumbent upon every woman, who finds herſelf with child, to reveal her condition to others, and to call for aſſiſtance at the time of her delivery; and, in order to oblige her to do it, it hath introduced a preſumption *juris et de jure* concerning her guilt, in caſe ſhe neglects to do it. For it is enacted, 1690, *c.* 21. that, in caſe *any* woman ſhall conceal, during all the time of her pregnancy, that ſhe is with child, ſhall not call for aſſiſtance at the time of her delivery, and ſhall not make uſe of it in her labour, ſhe ſhall be held to be the murderer of her own child, in caſe it ſhall either be found dead or be a-miſſing.

§ 393. The Law, which is ſo careful to preſerve the fœtus during its geſtation and at its birth, does not forſake it in its helpleſs ſtate, and after it is born. Hence, it provides for the maintenance of baſtards, and ſeeks out ſomebody on whom to throw the burden of it.

Parents, it has been ſaid (§ 354.), are, in all caſes, bound to maintain the children, to whom they have given being. Hence they muſt be bound to maintain their illegitimate as well as their legitimate offspring: for the obligation ariſes from the filiation of the children, and is incumbent on the parents, becauſe they are the cauſes to whom it is owing not only that the children exiſt, but alſo that they exiſt in a dependent ſtate and ſtand in need of maintenance.

But baſtards are the iſſue of women, who have not been true to themſelves, and have preferred the gratification of their paſſions to the preſervation of their honour. It cannot therefore be expected, that they will be true to others, and will not yield to the addreſſes of every lover. Hence baſtards are ſaid to be *vulgo concepti* *; their mothers are held to be *common* women; and their fathers are preſumed, *præſumptione juris et de jure*, to be *unknown*, § 12. *I. de nupt.* Of courſe, the Law has not one, whom it can call their father, and on whom it can, on that account, lay the burden of their maintenance. It is neceſſitated therefore to lay it on him, who, it is *poſſible*, might have been their father; that is, every one, to whom the mother has proſtituted herſelf at the time, about which the child born by her muſt have been begotten, is bound to contribute his ſhare towards its maintenance.

I ſay, to contribute his *ſhare;* for baſtards are the iſſue of parents, who are not huſband and wife one of another, and have not entered into that perpetual ſociety of life, which transfers the property of all the moveable eſtate of the wife to the huſband, and lays the obligation of maintaining the family on him (§ 205, 210, 225, 226.). The perſons, the eſtates, the families, and the duties of the man and of the woman are not confounded by their fornication. Hence the obligation of maintaining their baſtards is not impoſed by Law on any one of the parents, either on the mother alone, or on him who, it is poſſible, might be the father, but is divided between them: ſo that the father is bound to be at the expence of the birth; the mother is bound to give her child ſuck, and to maintain it, till it attains the age of ſeven years; and the father is then bound to take it, to maintain it, to educate it, and to put it to ſome employment, by which it may be enabled to do for itſelf.

Indeed,

* A baſtard is, for the ſame reaſon, ſometimes called *filius populi.*

Indeed, if any one of the parents is unable to fulfil his part of the obligation, the other becomes alone bound to fulfil it all, and to maintain the child. And, if neither of them is *in facultatibus*, the obligation devolves on the public; for children cannot, *delinquendo*, bring their parents under obligations.

'Tis therefore neceſſary for the Law to diſcover the perſon who is obliged to maintain a baſtard; and, in order to do this, it allows proof to be made upon the matter by the beſt evidence which can be got.

Hence regard muſt be had to the affirmation of the mother. For if ſhe ſhall, on oath, charge a particular perſon with being the father of it, this will create a preſumption againſt him. But it is not alone ſufficient to convict him. Of courſe, it will not lay him under any neceſſity of freeing himſelf from the accuſation, by proving either that ſome other is, or that himſelf is not the father. For he is entitled to deny it; and, in caſe he does, it becomes incumbent on her to make good her charge againſt him; *affirmanti, non neganti, incumbit probatio:* but if he owns that he lay with the mother, the Law will preſume him to be the real father of the child, till he finds out ſome other, who is. No doubt much muſt, in all queſtions of this kind, depend upon the character of the mother. If ſhe can be proved to be a common proſtitute, for ſometimes even proſtitutes conceive and bear children, the Law will hardly fix the child on any particular father; becauſe it is very poſſible, that the mother may not know which of her lovers got her with child, or, if ſhe does know, that ſhe may be diſpoſed to lay it at the door not of him who is the real father, but of him on whom her intereſt or her paſſion induces her to fix it.

§ 394. The intereſt of Society requires, that marriage be both encouraged and honoured. Hence, the iſſue of irregular loves have, in all nations, been regarded, in ſome ſort, in an ignominious light.

But baſtards are men: hence they are capable of holding, acquiring, and diſpoſing of property. They may be poſſeſſed of extraordinary talents: therefore they may lawfully exerciſe every employment; offices may be conferred upon them; and they are not excluded from the honours to which others are admitted; for perſonal qualifications give the beſt pretenſions to theſe.

They are capable of propagating their kind: hence they are not prohibited to marry; they may have lawful children, and they may be inherited by them *S.* 11th and 17th *Dec.* 24th *March* 1546, *Dundas.*—*Ba. baſtards,* *Dundas.*—7th *Dec.* 1567, *Auld.*

§ 395. A baſtard therefore is capable of acquiring to himſelf, either by his own induſtry, or by the liberality of others. Thus, preſents may be given him; rights may be granted him; deeds may be made in his favour; ſettlements may be made upon him; legacies may be left him. In ſhort, he may acquire any wiſe *titulo ſingulari*, either by deeds *mortis cauſa*, or by deeds *inter vivos*, made in his favour *nominatim*. For inſtance, an eſtate may be deviſed or entailed to him; and he may be either inſtituted to it immediately after its firſt owner, or ſubſtituted after a ſeries of perſons called in their order to take it. But he muſt be called *nominatim*.

For he can acquire *titulo ſingulari* alone: he cannot acquire on an univerſal title; that is, he cannot take, by legal ſucceſſion, the eſtate either heritable or moveable of any body, his own lawful children excepted. For baſtards, it has been ſaid (§ 393.) are *held* by Law to be fatherleſs; and for a very good reaſon, becauſe it preſumes *præſumptione juris et de jure*, that a woman, who has proſtituted herſelf to one man, will not refuſe to ſubmit herſelf to the embraces of any other. The real father therefore of every baſtard muſt ever be unknown *. Of courſe, he cannot have a father, to whom he can ſucceed; and, having no father, he *cannot poſſibly* have any relations on the ſide of his father. 'Tis true, his mother is always certain; but he cannot lawfully ſuc-

ceed

* Cui pater eſt populus, pater eſt ſibi nullus et omnis.
Cui pater eſt populus, non habet ipſe patrem.

ceed either to her or to any of her relations: for propinquity of blood does not alone entitle one to inherit the eſtate of another. An heir muſt be not only *heres propinquior*, but *heres legitimus*; he muſt be one called to the ſucceſſion by Law. But the rights and the order of ſucceſſion are confined by Law to thoſe, who are born in lawful wedlock. Hence it is ſaid, *ſolus* DEUS *heredem facere poteſt*, *R. M. l.* 2. *c.* 20. § 4. that is, thoſe alone who are born in lawful wedlock, an inſtitution appointed by GOD himſelf, can be heirs. *Nullus baſtardus eſt heres legitimus*; *nec aliquis, qui ex legitimo matrimonio natus non eſt, poteſt eſſe heres*, *R. M. l.* 2. *c.* 50. § 1.

But he may ſucceed to his own lawful children: for he may be not only *heres propinquior*, but *heres legitimus* to them.

§ 396. A baſtard, it has been ſaid (§ 394.), has power to diſpoſe of his property. He muſt, therefore, be entitled to do every deed *inter vivos*, which can be done by any other proprietor. Hence he may not only alienate his *heritage* during his own life, but determine the ſucceſſion to it; that is, he may appoint *an heir* to himſelf: for the ſucceſſion to *heritage* is determined by deeds *inter vivos* alone: it cannot be determined by deeds executed *mortis cauſâ*. Of courſe, he may make over his *heritable* eſtate by *conveyances* proper for making it over to the perſon, whom he intends to honour after his death.

§ 397. But it is otherwiſe with his moveable eſtate. He is inteſtable, and cannot diſpoſe of it by deeds *mortis cauſâ*, in caſe he either has not lawful iſſue, or is not legitimated by his ſovereign. The reaſon of the difference is not obvious, and muſt therefore be deduced from its moſt remote principles.

A baſtard, it has been ſaid (§ 395.), *cannot poſſibly* have any relations on the ſide of his father. The conſequence is, that lawful children procreated of his own body, that is, his own deſcendents, can *alone* be heirs at Law to him. *Nullum heredem habere poteſt, niſi de corpore* ſuo *legitime natum*. In caſe he has no lawful iſſue procreated of his *own* body, he cannot poſſibly have an heir at Law to ſucceed to his eſtate, *R. M. l.* 2. *c.* 52. SK. *n. ad d. cap.* The reaſon is plain; there is not, in this caſe, any one, who can lay claim to his inheritance. His mother cannot; for no cognate, neither the mother, nor any body related to one by her is, by the Law of Scotland, admitted to ſucceed to him: and he has no relations on the ſide of his father; for *ex hypotheſi* he has no lawful iſſue procreated of his own body, and the Law holds him to have no father. Conſequently, he can have no agnates. But all legal ſucceſſion is confined, by the Law of Scotland, to agnates alone, that is, to relations *ex parte patris*. It follows, that the King muſt ſucceed as laſt heir to his eſtate, either on the death of the baſtard himſelf without lawful iſſue; or in default of his lawful poſterity, as ſoon as they ſhall all fail, *Du.* 13th *July* 1626, *L. Halcro*. For the King ſucceeds as laſt heir to every one, to whom no other perſon can ſucceed; ſince he is conſidered as the common father of his people (§ 140.).

From hence it is plain, that a baſtard, who has not lawful iſſue, and has not obtained letters of legitimation from the King, cannot make a teſtament: for he has no agnates; therefore he has no executors; ſo all his moveables are heritable; they go to the King, who is his *heir*. But one is not allowed by Law either to diſpoſe of his heritage by deeds *mortis cauſâ*, or to do upon death-bed any deed, which may be hurtful to his heir. Therefore, a baſtard cannot make a teſtament, or diſpoſe of his moveable eſtate *mortis cauſâ;* becauſe it may, all of it, in ſome ſort, be ſaid to be heirſhip*.

* The reaſons, aſſigned above for the inteſtability of baſtards, may perhaps be thought to be founded on principles contrary to Law: for one may have an only child, who is, of courſe, both his heir and his executor; yet he may make a teſtament. Beſides, the lawful children of a baſtard are teſtable, and have all the rights, which other people have. But it muſt be remembered, that the King is much favoured by Law. Therefore, his rights may ſometimes be founded on principles, which cannot be applied to others; and, if the reaſons given above are not ſatisfactory, I own I have not been able to diſcover any better, *l.* 20, 21. *ff. de leg.* (§ 115.).

§ 398. The corollaries deducible from the principles which have been explained, are obvious.

Baſtards have no agnates. Therefore the King muſt, in default of all the lawful poſterity of a baſtard, ſucceed not only to all the eſtate, which belonged to the baſtard himſelf and has devolved to his poſterity, but alſo to *all* the eſtate, which belonged to his poſterity, and has not been alienated by them by proper deeds executed *inter vivos*. For there is no other who can take it.

The heritage of a baſtard and of his iſſue devolves to the King. Therefore, his right cannot be defeated by any deed made either by the baſtard himſelf, or by his poſterity, either *mortis cauſâ* or on death-bed. For one cannot diſpoſe of heritage by any deed made either *mortis cauſâ* or on death-bed. It follows, that the King, or his aſſignee, is entitled, as ſoon as his right to enter upon poſſeſſion opens by the default of the baſtard and of all his deſcendents, to get every deed, by which the heritage is thus diſpoſed of, ſet aſide: for the deed is void; *a fortiori*, it is voidable.

In like manner, the King, or his donee, is entitled to get voided *every* ſettlement made of it either by the baſtard or by his iſſue, during their minority; becauſe a minor cannot either ſettle or alter the ſucceſſion to his heritage even by a deed *inter vivos*; he muſt leave it to go according to the order eſtabliſhed by Law, *C. F.* 86.

For the ſame reaſon, a teſtament, made by a baſtard, is void againſt the King: for a baſtard, it has been ſaid (§ 397.), is incapacitated from making a teſtament, or from diſpoſing of his moveables *mortis cauſâ*. But this incapacity is perſonal to the baſtard himſelf; it does not extend to his lawful children; they have all the ſame powers and the ſame right of diſpoſing of their eſtates, moveable as well as heritable, either *inter vivos* or *mortis cauſâ*, which other proprietors have. For their birth is not ſtained with baſtardy.

§ 399. Beſides, a baſtard is not, even in all caſes, inteſtable. For, *firſt*, it has been ſaid, that the lawful iſſue of baſtards are heirs at Law to them; they exclude the King; the eſtate devolves to him, only in caſe the baſtard leaves no lawful iſſue. Of courſe, he has the power of making a teſtament, in caſe he leaves lawful iſſue: for he is entitled to exclude them from his ſucceſſion, and the intereſt of the King is not affected by it. For he would, at any rate, be excluded by the children of the baſtard.

I ſay, in caſe he leaves lawful iſſue behind him: for he has not the power of making a teſtament, in caſe all his poſterity die before him, becauſe he is, in this caſe, juſt as if he had never had children.

§ 400. *Secondly*, He acquires the power of making a teſtament, in caſe he is legitimated by letters of legitimation obtained from the King: for the King has the power of legitimating baſtards. He does it by granting them letters of legitimation. Letters of legitimation are ‘ a deed, which is made by the King, ‘ which paſſes the Great Seal, and by which he legitimates a baſtard.’ The tenor of them is uſually moſt ample; but they give the legitimated perſon no other rights than thoſe, which either can naturally be given, or are grantable by the King. They give not any right, which either naturally or legally is not grantable by him. Of courſe, they give him, in truth, no other power than that of making a teſtament, *Du.* 7th *July* 1629, *Wallace.*—*St.* 18th *June* 1678, *Commiſſioners of the ſhire of Berwick.* For that is the only right, which others had and he wanted, as is plain from what has been ſaid (§ 394. *ſqq.*), and which is grantable by the King.

Therefore, various clauſes, which uſe to be inſerted in them, are ineffectual, and muſt be held *pro non ſcriptis*.

Such, for inſtance, is 1) The clauſe, by which power is given the legitimated perſon to diſpoſe of his *heritage* by deeds, done either *inter vivos*, *mortis cauſâ*, or on death-bed. It is entirely ineffectual and uſeleſs; for the Law allows not heritage to be diſpoſed of either *mortis cauſâ*, or on death-bed. Of courſe, the power

of diſpoſing of it in this manner is not grantable by the King (§ 89, 91.). And he has full power of diſpoſing of it *inter vivos* without being legitimated.

Such is 2) The clauſe by which the King gives him a right to ſucceed to others than his own deſcendents, for inſtance, to his father, to his mother, and to all his relations by them both: it alſo is uſeleſs: for he has no father; and a baſtard cannot be heir at Law to any body. Beſides, the King has not power either to impoſe upon people heirs, whom the Law has not called to ſucceed to them, ſince by doing ſo he hurts the intereſts of thoſe others, whom the Law calls to the ſucceſſion; or to alter the Laws which entitle lawful children, and them alone, to the benefits of ſucceſſion.

3) The clauſe, by which a right is given to his mother, and to her relations to ſucceed to him, is alſo ineffectual. For the Law of Scotland admits of no ſucceſſion *a parte matris*. Of courſe, neither his mother, nor her relations can acquire a right to inherit him otherwiſe than by an act of the legiſlature; it is not grantable by the King, for he cannot repeal the Law.

For the ſame reaſon, 4) That clauſe is ineffectual, by which a right is given to the father of the baſtard and to his relations to ſucceed to him. For a baſtard has no father, and *cannot poſſibly* have any relations by him. Of courſe, it may be ſaid to be *naturally* impoſſible for the King to give them a right to ſucceed to him; and ſuppoſe the Law made it grantable by the King, it could not *poſſibly* be made effectual. For it is impoſſible to aſcertain the father of a baſtard *.

It appears, therefore, that the only new right, which the baſtard acquires by being legitimated, is that of making a teſtament.

§ 401. A baſtard may marry. Therefore, his wife and his widow have all the rights, which thoſe of others have. For he makes the ſame acquiſitions, and comes under the ſame obligations with other huſbands.

Of courſe, his relict is entitled to all the ſame proviſions, either legal or conventional, to which others are entitled. Thus, ſhe is entitled to her terce, and to her *jus relictæ*: and ſhe is entitled to them, as well when his eſtate devolves to the King, as when his children ſucceed to it, *S.* 3d *March* 1541, *Earl of Errol.*—*Du.* 7th *July* 1629, *Wallace.*

Her *jus relictæ*, in caſe her huſband leaves no children, extends to the half of all his moveable eſtate, his moveable heirſhip deducted. For the King is entitled to heirſhip-moveables, *Ba. baſtards*, 18th *Feb.* 1542, *relict of William Murray.*—*Sp. baſtard*, 29th *July* 1566.

In all other reſpects, thoſe alone excepted which have been ſpecified, a baſtard, without being legitimated, has, both *quoad jus publicum*, and *quoad jus privatum*, all the rights, which others have.

A SYS-

* This point came lately to be tried; and a judgment was once pronounced agreeable to the principles above maintained; but I care not to enter into the particulars of that caſe: for the judgment was varied. However, the principles which have been maintained, got the ſanction of the houſe of Peers.

A

SYSTEM

OF THE

PRINCIPLES of the LAW of *SCOTLAND.*

PART I.

BOOK VI.

TITLE I.

Of Tutory.

§ 402. A Father, it has been ſaid, (§ 362. *ſqq.*) is lawful adminiſtrator of the affairs of his children during their minority. As long therefore as he is alive, they ſtand not in need of the guardianſhip of any other. But he may happen to die during their nonage, before they have attained that diſcretion, which is neceſſary for enabling them to manage themſelves and their own affairs. Thus, deſtitute and helpleſs, they might eaſily be ruined, did not the Law take them under its peculiar protection, and provide for them perſons, who, it preſumes, may be entruſted with the adminiſtration of their affairs. Theſe are, by the Law of Scotland, called *tutors* and *curators*. The powers, which they have, are ſuited to the neceſſities, and are therefore different according to the different ages of the children. For the Law hath diſtinguiſhed human life into different periods, and hath given thoſe who have the guardianſhip of others powers either more or leſs extenſive according to the different ages of their wards. Thus *tutors*, who have the tuition of pupils, have powers more ample than *curators*, who have the care of *minors*.

§ 403. Tutory may be defined to be ‘ that power over the perſons and the ‘ eſtates of fatherleſs children during their pupilage, which thoſe have, who, it is

'presumed by Law, will faithfully and *gratis* discharge their duty to their pupils, 'and do every thing promotive of their utility.' And tutors, are those, who are, by Law, entrusted with the tuition of the persons, and the management of the estates of fatherless children during their pupilage. From these definitions it is plain, I. That those, who are under tutory, are fatherless children. II. That the power of tutors extends 1) To the persons, and 2) To the estates of their pupils. III. That tutors are bound to manage for the *utility* of their pupils. IV. That the office of tutors is not either lucrative or mercenary. V. That Law presumes they will be faithful in the discharge of their duty, and therefore trusts them with their tutorial power. VI. That the power of tutors lasts during the pupilage of their wards.

From these axioms it will be easy to resolve various questions, which occur on this matter. For we must shew 1) The persons, who are under the tutelage of others; 2) Those, who have the tutelage of them; 3) The order, in which tutors are called to the office of tutory; 4) The method, in which they are legally and duly vested with it, and accept of it; 5) The power, which tutors have, and the duties incumbent on them, after they have accepted and have become duly vested with it; 6) The ways, in which their office determines; 7) The actions, which lie either to or against them on account of it.

TITLE II.

Of the Persons who are under the Tutory of others.

§ 404. THOSE, who stand in need of the tuition of others, ought alone to be subjected to their tutelage. For every man, who is able to manage his own affairs, has a right to do it. Therefore, the persons, who are under the tutory of others, are '*fatherless pupils* alone.'

A father continues, as long as he lives, to have the sole administration of the affairs of his children; during his life, they are not *capita libera*, and they stand not in need of any other to protect them. Those, therefore, who are under the tutory of others, are *fatherless* children alone, *p. J. de tut.*—*l.* 6. § 4. *ff. de tut.*

But all fatherless children are not subject to it: for they do not all stand in need of it. Those alone, who are, by their nonage, rendered incapable of managing their own affairs with discretion, are subject to it; that is *pupils*, or 'father-'less children, who have not attained the age of puberty.' The pupilage of men lasts till they have accomplished the age of 14 years, of women till they have attained that of twelve, *p. J. quib. mod. tut. fin.*—*l.* 239. *ff. de verb. signif.*

§ 405. All *fatherless* pupils may be subjected to the tutelage of others; and that, whether they be 1) boys or girls, 2) poor or rich, 3) nobles or commoners, 4) high or low, 5) wise or foolish, 6) willing or not willing. For tutors may be named to one against his will, *l.* 5, 6. *ff. de tut. et cur. dat. ab his qui jus dandi hab.*

TITLE III.

Of teſtamentary Tutors; and of the Manner in which they become veſted with the tutorial Office, and are entitled to enter upon the actual Adminiſtration of the Affairs of their Pupils, without being liable to be held to have intruded into it.

§ 406. AFTER a father is dead, the Law is not regardleſs of his orphan children, but immediately looks out for ſomebody, to whoſe care, it *preſumes*, it may entruſt them and their affairs (§ 402, 403, *ax.* 5.).

It repoſes its confidence in the fidelity of tutors, and preſumes they will honeſtly diſcharge their duty to the orphans committed to their care, either 1) *Becauſe* they are named by the father, who is juſtly preſumed to be moſt anxious about the welfare of his children, and to provide for their good with the moſt ſerious concern; or 2) *Becauſe* they are ſelected by the Law itſelf, and are called to the office, on account of the relation and regard which they have to the children; or 3) Becauſe they are appointed by thoſe, whom the Law has veſted with power to give tutors to ſuch pupils, as have none. Tutors therefore are of three ſorts; 1) Thoſe named by the father of the pupils; 2) Thoſe called by the Law itſelf to the office; 3) Thoſe given by the Barons of Exchequer.

Tutors of the firſt ſort are called *tutors nominate*, becauſe they are *nominated* by the father of the pupils. They are alſo called tutors teſtamentary, 1) Becauſe they are uſually nominated by him in his *teſtament;* and 2) Becauſe the nomination of them is, like his laſt will, revocable and alterable at any time during his life. For in this matter, as well as in other deeds done *mortis cauſa*, the will of man is alterable to the very laſt breath of his life. Tutors of the ſecond ſort are called *Tutors of Law*, or lawful tutors; becauſe they are called to the tutorial office by the Law itſelf. Thoſe of the third ſort are called *tutors-dative*, becauſe they are *given* by the King, or by his Exchequer.

§ 407. Fathers uſually have ſo warm an affection for their children, and are ſo anxious about their welfare, that the Law preſumes they will do every thing which may promote the good of their iſſue. Hence it not only gives them power to name perſons to be tutors of their children, after themſelves ſhall be gone, 1696, *c.* 8. but alſo pays the greateſt regard to their nomination: for it prefers thoſe, named by them, to all others. So that in all caſes the firſt place is given to teſtamentary tutors: for they exclude all others from the office.

Nay, ſuch entire confidence does it place in the integrity and anxiety of the father, that it gives him powers ampler than thoſe which it aſſumes to itſelf, and allows him to name perſons, whom it declares to be incapable of being either lawful tutors or tutors-dative, to be tutors of his children.

§ 408. Hence every body may be named by a father to be tutor of his children, who is capable of diſcharging the duties of the office. Thus, not only 1) Men, but 2) Women; not only 3) Perſons paſt the age of 25 years, but alſo 4) Perſons below it; not only 5) Majors, but 6) Minors, may be nominated by him.

§ 409. But tutors ought to be capable of diſcharging the duties of their office. Therefore, even a father cannot name perſons, who are incapable, to be tutors of his children; at leaſt he cannot, by naming them, impower them to act, and to take upon them the actual adminiſtration of their affairs. For he cannot make thoſe, who are incapable, capable. Hence, his nomination muſt be *void* in all caſes, in which thoſe named by him labour under either a natural or a legal unremoveable incapacity; it muſt be *ſuſpended* in thoſe, in which they labour under one which hinders them from acting, and may be removed. In caſe

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its effects are ſuſpended, the ſuſpenſion muſt continue as long as the diſability, and the nomination muſt be held to be void during all that time; becauſe ſo long it cannot take effect; and the intereſt of the pupils requires, that their affairs be not neglected in the mean time through the want of proper perſons to take care of them.

It may not therefore be improper, before enumerating the diſabilities of tutors teſtamentary, to obſerve, that in all caſes, in which the paternal nomination cannot take *preſent* effect, and is either void or ſuſpended, the tutors of Law may immediately get themſelves ſerved to the office of tutor; and that, in caſe the incapacity of the tutors nominated by the father is *total*, or ſuch as either makes their powers and their office determine for ever, or it is not probable will ever be removed, the tutors of Law are preferable to all others for a year from the time, at which they may begin to take the proper ſteps for getting themſelves duly veſted with the office; becauſe the nomination made by the father *muſt be held* to be void. 'Tis true, in caſe the incapacity happens, contrary to expectation, to be removed, their power muſt ceaſe, becauſe the will of the teſtator may then become effectual, and his nominees, in whom the Law repoſes the greateſt confidence, are capable of diſcharging their duty. But the tutors of Law may nevertheleſs procure themſelves to be ſerved, becauſe improbable events cannot be regarded, and the affairs of mankind muſt not be regulated by ſuppoſing that they may happen (§ 78.). In caſe the incapacity is not perpetual and total, but ſuch as it is either certain or probable will be removed, the nomination made by the father being no more than ſuſpended, the tutors of Law are not preferable to others. For they are preferred in thoſe caſes alone, in which either the father has not named tutors, or his nomination is *void*. Therefore, tutors-dative may be given by the Exchequer, factors *loco tutorum* may be appointed by the Court of Seſſion, or protutors may aſſume to themſelves the management, as well as tutors of Law cauſe themſelves to be ſerved in the mean time.

'Tis true, it was a maxim of the Roman Law, *Quamdiu teſtamentaria tutela ſperatur, legitimam ceſſare.* The *tutor legitimus* was not admitted, either when the nomination had once become effectual, and determined otherwiſe than by the death of the teſtamentary tutors; or when its effect was ſuſpended, *l.* 11. *ff. de teſt. tut.* becauſe tutory was by them conſidered as an inheritance; the power, which a teſtator had of appointing a tutor, reſembled that which he had of naming his heir; they were both derived from the ſame ſource, to wit, that of the Laws of the twelve tables; and diſpoſing of the office of tutor was like diſpoſing of an inheritance. But in caſe an inheritance is once veſted in the perſon of the heir inſtituted, the heir of Law to the teſtator is for ever excluded; becauſe the inheritance muſt deſcend not to the *heres legitimus* of the teſtator, but to the heir of him who was inſtituted by the teſtator, and has *acquired* the inheritance. Therefore the *tutor legitimus* was excluded, in caſe the teſtamentary nomination had once become effectual, and determined otherwiſe than by the death of the *tutor teſtamentarius*. 'Tis true, if the nomination became void by the death of the teſtamentary tutor, the office devolved to the *tutor legitimus;* becauſe matters then *returned* to the ſame condition, in which they would have been, in caſe the teſtator had died *inteſtate;* and tutory was a perſonal office, not deſcendible to heirs. Therefore the Law ſays, *Si tutor teſtamento datus* deceſſerit, *ad legitimum tutela* redit: *quia hic Senatus Conſultum ceſſat, l.* 11. *ff. de teſtam. tut.* But this caſe excepted, which ſeems to have been determined by particular ſtatute, the general rule, which has been mentioned, took place. For the ſame reaſon, 2) The *tutor legitimus* was not admitted, in caſe the effect of the *tutela teſtamentaria* was ſuſpended; becauſe the heir at Law could not enter upon the inheritance, when there was one inſtituted by the teſtator; he had by his teſtament diſpoſed of the ſucceſſion, and had excluded his heirs at law; during the time therefore, that the heir inſtituted either neglected or was incapable to enter, the other could not ſeize on the inheritance; it remained a *hereditas jacens*, and in caſes

caſes of neceſſity a *curator bonorum* could be appointed to take care of it. By parity of reaſon, the *tutor legitimus* could not aſſume the office, while there was a teſtamentary one nominated by the teſtator, whoſe power to enter upon the actual adminiſtration was no more than ſuſpended; and in the mean time a tutor might be *given* to take care of the pupil and of his affairs, which were, in this caſe, the *hereditas jacens*.

But it ſeems to be otherwiſe by the Law of Scotland. It attends chiefly to the utility of the pupils whom it means to protect, and regards not the ſubtilties maintained by the Romans in this matter. In order therefore to provide more effectually for their welfare, and to give them more chances of not being left deſtitute of guardians, it hath put it in the power of ſeveral different orders of perſons to take them under their care, that thus ſome one of thoſe, whom it invites one after another, may be led to do a humane office to thoſe who perhaps have no other hand to help them. For this purpoſe, we ſhall ſee that it hath conſtituted three orders of tutors, teſtamentary, lawful, and dative, and hath empowered all of theſe to exerciſe the office. 'Tis true the teſtamentary ones are preferred to all others, in caſe they are not diſqualified, and have not renounced; and may therefore exclude them from the management, as ſoon as they think proper to accept. But this hinders not the tutors of law from aſſuming it in the mean time: for they are called to the office by the Law itſelf; they have *ipſo jure* a right to purchaſe briefs, and upon proving their relation to the pupil to be ſerved his tutors, in caſe the tutors teſtamentary do not oppoſe the ſervice. 'Tis true, theſe may either appear and oppoſe it at the beginning, or exclude them from the adminiſtration after they are ſerved; becauſe being preferable and willing to act, they have the alone title to do it. But they have not, in caſe they are incapacitated from taking upon themſelves the preſent adminiſtration, a right to hinder the tutors of Law from being ſerved, unleſs they can ſhew it to be the *enixa voluntas* of the teſtator that they ſhould never be admitted to it, or that they ought on account of perſonal diſqualifications to be removed from it. For the intereſt of the pupils might ſuffer in the mean time; and it would not be doing them the beſt office to hinder others who are proper and willing to take care of their affairs, *Ha.* 3d *Jan.* 1592, *Elliot.*— *Feb.* 1593, *Ker.* For the ſame reaſon a tutor-dative may be given by the Exchequer to manage in the mean time; who may likewiſe be removed from the adminiſtration, as ſoon as the diſability, under which the teſtamentary tutor lies, ceaſeth, and he becomes willing to take the trouble of the office. All therefore, to which each of theſe orders is entitled, is to exclude one another from the management according to their ſeveral preferences, after thoſe, who are preferable, have duly veſted themſelves with the office and become willing to act; provided they have not loſt their right to be preferred. Thus, a tutor of Law loſes his right to be preferred to a tutor-dative, in caſe he neglects to get himſelf ſerved within a year from the time, at which he may be ſerved; and he ſeems not to have any title to preference, in caſe the paternal nomination is not void but ſuſpended, becauſe the teſtamentary tutor either is not impowered immediately to act, or delays to do it. Therefore, in this caſe, the firſt qualified perſon, who becomes duly veſted with the office *medio tempore*, is entitled to retain it, till the tutor teſtamentary becomes capable and willing to act. Theſe principles ſeem to be agreeable to the Law of Scotland; for it attends chiefly to the utility of the pupils, and allows every thing to be done which it appears will be for their intereſt. Beſides, it appears from many of the reports of the caſes adjudged by the Court of Seſſion, that tutors of Law have actually been ſerved, and tutors-dative been given, and have actually managed during the ſuſpenſion of the effect of the teſtamentary nomination; and that they have been *only excluded* from the management, when the tutors teſtamentary have become qualified, and have ſignified their willingneſs to act *.

* See *D.* II. 479, 480.

§ 410. A father, being bound to name perſons qualified for the office to be tutors to his children, cannot therefore name, or rather cannot by naming them entitle to act either 1) Minors, § 13. *J. de excuſat. l.* 10. § 7. *ff. eod. M.* 9th *May* 1558, *Diſhinton;* or 2) Ideots, or 3) Mad men, or 4) Dumb men, or 5) Deaf men, or 6) Blind men, *l.* 1. § 2, 3. *l.* 17. *ff. de tut. l.* 3. *C. qui dar. tut. l. unic. C. qui morbo ſe excuſ.* or 7) Married women, or 8) Papiſts, or 9) Any others who are incapable of managing the affairs of others, *l.* 10. § 8. *l.* 11, 45, § 4. *ff. de excuſ.* For all theſe labour under either a natural or a legal, a temporary or a perpetual diſability; and it would be not only highly inconvenient, but even hurtful for the pupils to have them for their tutors.

Minors are incapacitated by their nonage and their imbecillity; they are not allowed to take care of their own affairs, and ought not therefore to be intruſted with the management of thoſe of others. But their incapacity is not perpetual; they may live till they become major. Of courſe, the nomination of them is not *funditus* void; it is no more than ſuſpended, for they are intitled to aſſume the adminiſtration as ſoon as they come of age, provided they are not otherwiſe diſqualified, *M.* 9th *May* 1558, *Diſhinton.* Therefore the tutors of Law may cauſe themſelves to be ſerved, *Ha.* 3d *Jan.* 1592, *Elliot.*— *Feb.* 1593, *Ker,* tutors-dative may be given, factors may be appointed by the Court of Seſſion, or pro-tutors may act in the mean time, *l.* 10. § 7. *ff. de excuſ.* For the tutors of Law ſeem not in this caſe to have even a temporary preference to others, becauſe the nomination is not void (§ 409.).

Mad men are for the ſame reaſons incapacitated to act. But they may be reſtored to the ſober uſe of their reaſon, and may become qualified to do the duties of the office. Therefore, the nomination of them is not void, but ſuſpended; provided their diſeaſe is only temporary: for they become in that caſe entitled to take upon them the actual adminiſtration, as ſoon as they turn ſober, *l.* 10. § 3. *ff. de teſt. tut.* But if their madneſs is ſuch as uſes to be perpetual and ſettled, either with intervals or without them, it muſt be held to be void; and the tutors of Law are preferable, in caſe they get themſelves ſerved within the year: for it would be inconvenient to allow the tutors teſtamentary to act during every lucid interval; beſides, it might be dangerous, deliriouſneſs not always diſcovering itſelf at once.

Idiotiſm, dumbneſs, deafneſs, and blindneſs being commonly incurable, the nomination of ideots, dumb men, deaf men, and blind men, muſt be held to be void; they are incapable of taking care of themſelves, much leſs ought they to be entruſted with the tuition of others, *quum ſit incivile, eos, qui alieno auxilio in rebus ſuis adminiſtrandis egere noſcuntur, et ab aliis reguntur, aliorum tutelam vel curam ſubire,* § 13. *I. de excuſ.* Therefore, in caſe they are named, the tutors of Law may in the formal manner enter upon the office, and are preferable to all others, provided they are ſerved within the year. 'Tis true, the nominees, if they happen, contrary to all expectation, to be cured and to become qualified, would be entitled to exclude them from the management, *l.* 11. *ff. de tut. l.* 10. § 3. *ff. de teſt. tut.*

Married women are bound to employ their time and their attention on the affairs of their huſbands; they are under their rod, *ſub virga;* and have not the management of their own property (§ 210, 211, 274.). Therefore, they are not allowed to be either the tutors or curators of others. Of courſe, in caſe they are named, the nomination is *funditus* void from the beginning, as we ſhall ſee it becomes, in caſe a woman marries either after ſhe is named or after ſhe has actually entered upon the exerciſe of her office; and it can never become effectual; her powers revive not upon her becoming a widow, becauſe her mind is preſumed to be fixed on the concernments of her deceaſed huſband, and of the children whom ſhe is ſuppoſed to have by him. Of courſe, the office devolves immediately to the tutors of Law, who have the ſame right to be ſerved and to be preferred

preferred to it, which they would have had in caſe there had been no nomination made of tutors teſtamentary, *Ba. tutor*, 14th *July* 1557, *L. Largo.*

Popery has, ſince the Reformation, been ever dreaded in this country; Papiſts might corrupt the minds of their pupils, and are therefore declared, 1700, *c.* 3. incapable of being either tutors or curators. But the Romiſh religion is not tolerated by the Law; thoſe, who profeſs it, are ſubject to its laſh, are looked on with an evil eye, and are laid under ſeveral diſabilities; they are anxious for the propagation of their ſyſtem, and it is more eaſy for thoſe, who conceal their own ſentiments, to ſap the foundations of the faith of others. For theſe reaſons, they may be diſpoſed to conceal their religion. Therefore, the Law obliges perſons ſuſpected of being Papiſts, in caſe they are nominated to be tutors, to purge themſelves of popery, and to ſign the *formula* appointed by the act of parliament, before they can lawfully exerciſe the office. Of courſe, in caſe they refuſe when deſired to do it, the nomination is *funditus* void, and the tutors of Law are preferable to the office.

The tutors named may lie under other diſabilities than thoſe which have been mentioned. But the conſequences of the nomination in all caſes may be eaſily deduced from the general principles which have been explained.

§ 411. The power, which a father has of naming tutors to his children, is moſt extenſive; becauſe the Law preſumes, that he will make his nomination in the manner moſt for their intereſt. Hence, he is allowed to name them either *pure*, *ſub conditione*, *ex die*, or *in diem*; ſimply, conditionally, to a day, or from a day, *l.* 8. § 2. *ff. de teſtam. tut.*

In caſe he names them ſimply, his nomination muſt be effectual, as ſoon as he dies, and the tutors become qualified and accept.

But if he nominates them conditionally, and appoints them not to begin to act till a certain condition exiſts, the effect of his nomination is ſuſpended till this condition exiſts: for till that time he excludes them from the office; and it muſt devolve to thoſe who are entitled to take it, that is, to the tutors of Law, tutors-dative, factors, or protutors, the tutors of Law having not even a temporary preference to the others. But as ſoon as the condition is fulfilled, the power of the intermediate adminiſtrators ceaſes, and the tutors teſtamentary become entitled to act, provided they are not otherwiſe diſabled (§ 410.(

In the ſame manner, in caſe he authoriſes them to enter immediately on the exerciſe of their office, but orders their power to determine on the exiſtence of a condition, they are entitled immediately to aſſume the management; but their power ceaſes as ſoon as that condition is fulfilled, the nomination becomes void, and the tutors of Law are entitled *primo loco* to the office, *l.* 8. § 1. *ff. de teſt. tut. l.* 14. § 5. *ff. de tut.*

In caſe they are named *to a day*, *ad diem*, the nomination becomes immediately effectual: but their power laſts only till that day; for the teſtator ordered it to laſt no longer, and muſt therefore be held to have prohibited them to act after it, as much as if he had never named them, *l.* 14. § 3. *ff. de tut.*—§ 5. *J. de quib. mod. tut. fin.* Of courſe, the office devolves to the tutors of Law, who are for a year preferable to all others; becauſe the nomination becomes in this caſe void (§ 409.).

The deciſion of the Law is plain, in caſe they are nominated to become tutors *ex die*. Their power does not commence till that day comes. Therefore, the office and the adminiſtration devolve to thoſe perſons, to whom, it has been ſaid (§ 410.), it devolves, in caſe the effect of the nomination is ſuſpended by the minority of the tutors nominated. But the power of the intermediate ones ceaſes as ſoon as the day comes, and that of the tutors nominated begins; provided theſe accept of the office: for till they accept, the others, who are in poſſeſſion, may continue to act. The Law muſt allow them to do it, leſt the affairs of the fatherleſs ſhould be neglected in the mean time, and go to ruin for want of ſomebody to look after them, *l.* 11. *p. ff. de teſt. tut.*

§ 412.

§ 412. A father may nominate not only one, but more than one to have the tuition of his children; and when he names more than one, he may name them under what conditions and how he pleaſes.

Thus, he may appoint one of them *ſine quo non*; that is, one without whoſe concurrence the reſt cannot act. Therefore, the nomination muſt in this caſe be either void or ſuſpended for the ſame reaſons which would have made it ſo, in caſe the *ſine quo non* had been the only nominee. Thus, if he is a minor, it is ſuſpended till he comes of age, and muſt produce the ſame effects which it would have produced, if a minor had been ſole nominee (§ 410.): if he is an Ideot, it is void; becauſe the others cannot act without him. For the ſame reaſon, it is ſuſpended, in caſe he delays to accept of the office; and it is void if the *ſine qua non* is a married woman; and becomes ſo, if ſhe marries after ſhe is nominated, *Fo.* 24th *June* 1703, *Aikenheads.*—*D.* II. 385. 14th *Feb.* 1735, *Blair.*

In the ſame manner he may nominate more *ſine quibus non* than one; and the effect, avoidance, or ſuſpenſion of the nomination will take place juſt as if he had named only one. For more perſons appointed *ſine quibus non* are conſidered as if they were named jointly; they muſt all act, elſe none of them can: and the renunciation, diſability, or delay of one of them, has the ſame effect as if they all renounced, were all incapable, or all delayed to accept; unleſs it is ordered expreſsly, by the deed nominating them, to be otherwiſe.

A father may, beſides naming a *ſine quo non*, name alſo a determinate number of the tutors nominated to be a *quorum:* in which caſe a *quorum*, conſiſting of that particular number at leaſt, muſt do every thing, which is done: elſe it will be void. Therefore, if as many of them, as will make this *quorum*, are capable of acting and accept, the nomination muſt be valid and effectual, even tho ſome of them ſhould happen to labour either under a temporary or under a perpetual incapacity. But if ſo many of them are either incapable of acting or delay to accept, that a *quorum* of perſons capable and willing to act does not remain, either the nomination muſt be void, or the effect of it muſt be ſuſpended: for the father truſted the tuition of his children to no ſmaller number than that, which he has ſpecially appointed to be a *quorum* of thoſe he has named to be their tutors.

Of this *quorum* he may appoint certain individuals always to be: ſo that not only the number requiſite for making it muſt concur in doing every thing, but theſe individuals muſt alſo be of this number. Therefore, theſe are, as it were, *ſine quibus non;* and the effect of the nomination muſt be the ſame, which it would be in caſe they had been named ſo.

Beſides, he may name all his nominees to be tutors jointly: and every one of them muſt, in this caſe, concur in order to give validity to every thing done by them. Therefore the nomination muſt be either void or ſuſpended, in caſe any one of them either is incapable, dies, renounces, or delays to accept; becauſe the father committed the care of his children to them *all together*, and has not entruſted it to one or more of them without the aſſiſtance of the reſt, *St.* 17th *Jan.* 1671, *Drummond.*

'Tis otherwiſe, in caſe they are named either ſimply, or jointly and ſeverally: for a majority of thoſe, who are capable of acting and accept of the office, is, in this caſe, alone neceſſary to give validity to every act of their adminiſtration. Therefore, as long as one of thoſe named remains alive and capable, the nomination is effectual, provided that one accepts; and it does not become void, or is not ſuſpended, till all of the nominees either die, or renounce, or become incapable, or delay to accept, *Ha.* 12th *Dec.* 1609, *Fauſide.*—*St.* 14th *Feb.* 1672, *Elies.*

§ 413. A father may name tutors to his children by any deed, either *inter vivos*, or *mortis cauſâ*, by which he can declare his will; for it is his will, which is principally regarded in this matter. If it is evident, 'tis enough: no matter, whether the deed, by which it is declared, be written for that purpoſe alone, or for

for other purpoſes as well as for it; whether the will of the father be declared in clear, expreſs and direct words, or be couched in words, from which it may be inferred by implication, *Ha. pen. Nov.* 1610, *Nimmo.* *July* 1613, *Forbes.*

§ 414. But it is the laſt will of the father, which makes one be entitled to be tutor of his children. For in this, as well as in all other deeds made *mortis cauſâ*, the will of man is alterable to the very laſt breath of his life; therefore, a father may alter his will about the tutors of his children, and may change his nomination of them, as often as he pleaſes, and as often as he may alter his will about any other teſtamentary matter; for every nomination of tutors is revocable by him at any time during his life. Therefore, if he ſhall have named perſons to be tutors to his children in an irrevocable deed, for inſtance, in a ſettlement of his heritable eſtate, it will, notwithſtanding, be revocable *quoad* his nomination of tutors, *i. e.* he may afterwards nominate others inſtead of thoſe named in it, and his laſt nomination will take place, notwithſtanding the irrevocability of the deed, in which he made the former one, *l.* 8. § 3. *ff. de teſt. tutela.*

415. A father may name tutors to all his children, *l.* 1. *p. ff. de teſt. tut.* 1) To his ſons as well as to his daughters; 2) To thoſe whom he has appointed his heirs, or has left part of his eſtate, as well as thoſe whom he has diſinherited, or has left nothing, *l.* 4. 31. *ff. de teſt. tut.* 3) To thoſe, who are born during his life, as well as to his poſthumous children, *l.* 1. § 1. *ff. eod.*

§ 416. But this power the Law entruſts to the father alone. So neither the mother *, *l.* 1. § 1. *ff. de confir. tut.* nor any other aſcendent, either paternal or maternal, can name tutors to their deſcendents, *Ba. tutor*, 17th *Oct.* 1528, *the King.* *A fortiori*, one cannot name them to thoſe, who are not deſcended of him, *d. l.* 1. § 1. *ff. de confir. tut.* But it muſt be remarked, that it is lawful for every one, who leaves any thing to a pupil, to name perſons who ſhall have the adminiſtration of it. This follows from the common principles of Law: for every one, who makes a donation, or does any gratuitous deed in favour of another, may impoſe any lawful conditions, which he pleaſes, both on the perſon in whoſe favour it is made, and on the deed itſelf. But this can hardly be ſaid to be an exception to the rule: for the nomination of one to manage a thing left to another does not conſtitute the perſon, to whom the management is committed, *tutor* of him to whom the eſtate is left; ſince it gives him no power over the *perſon* of the pupil to whom the bequeſt is made, the power, which he acquires, extending to that particular thing alone, which is bequeathed. So that he may be ſaid to be rather adminiſtrator of it, than tutor of the pupil, *l.* 4. *ff. de teſt. tut.* For the other tutors of the pupil, if he has any, continue to be his tutors, and to have not only the guardianſhip of his perſon, but the adminiſtration of all his eſtate, this particular part of it excepted, as much after as they had them before it was left to him, *Ha.* 12th *Feb.* 1611, *Tutors of Gadgirth.*—*Du.* 6th *Feb.* 1633, *Harpers.*—*St.* 10th *Dec.* 1675, *Kennedy.* If he had none, thoſe who are by Law entitled to the office, whether they be teſtamentary or lawful tutors, may take the ſteps neceſſary for making them have right to exerciſe it, and may thus aſſume it to themſelves. Indeed this power, which a mother or any other perſon has to nominate a particular adminiſtrator of any thing left to another, may be exerciſed not only over the bequeſts which they make to fatherleſs children, but even to ſuch as they make to children whoſe father is alive: for they may exclude him from the management of the bequeſt, and may name another to have the adminiſtration of it. Nay, they may do more; for they may exclude not only the father, but even that perſon himſelf to whom they leave it

* The Law of Scotland ſeems to have made one real exception in favour of the mother; for, if ſhe leaves an heritable eſtate to her children, Law allows her to name tutors to them, who will not, indeed, exclude teſtamentary ones, if any have been named by the father, but will exclude and be preferable to the neareſt agnates, or tutors of Law. At leaſt the Court of Seſſion once found ſo. But the deciſion is old, and cannot be ſaid to be entirely agreeable to the principles of Law, *C.* *March* 1589, *Dick.*

from the right of managing it as well after his majority as during his minority, either by veſting it in truſtees, or by naming particular perſons to manage it for his behoof, or in any other way by which the power of every one except the adminiſtrators named may be excluded. For he, who made the bequeſt, might have either left or not left it, and might therefore make it either more or leſs beneficial, according to his pleaſure. The honoured perſon, in whoſe favour it is made, if he is not contented to take it as it is left him, has it in his power to repudiate it, if he pleaſes; but if he does not repudiate, he muſt take it as he finds it.

§ 417. It has been ſaid (§ 407.) that teſtamentary tutors, becauſe they are nominated by the father of the pupil, are preferred to all others, and are merely by his nomination veſted with the office; that is, without any ſolemnity or form, they may immediately enter upon the actual adminiſtration of the concernments of their pupils; they are not bound either to find caution, *rem pupilli ſalvam fore*, the confidence repoſed in them by the father being equivalent to it, *l.* 7. § 5. *C. de cur. fur.* or to make oath *de fideli adminiſtratione*.

Therefore, they have it in their power to accept of the charge at any time during the pupilage of their wards, and to exclude all others from it; no matter how long they delay their acceptance: for tutory, we ſhall ſee (§ 429.), is not an office, of which the Law of Scotland forces every one, who is named to it, to accept, whether he will or no; it is optional to every perſon, who is named to be tutor of a pupil, either to accept or not to accept, as he pleaſes. So teſtamentary tutors are never excluded, till they have formally renounced the office, and have refuſed to accept of it. They are not excluded, becauſe they have not accepted, *i. e.* becauſe they have delayed to accept of it. For they may accept at any time during the pupilage of the child, to whom they are nominated tutors; and the moment they do ſo, the power of all others ceaſes. If the neareſt agnates have cauſed themſelves to be ſerved his tutors of Law, *Du.* 6th *July* 1627, *Campbell*; or if any body hath obtained a gift of tutory from the Exchequer, *Sp. tutor*, 17th *Nov.* 1631, *Auchterlony*; both the one and the other may be immediately excluded by the teſtamentary tutors, and muſt give up the management both of the perſon and of the eſtate of the pupil to them. However, this rule may admit of an exception: for, if a teſtamentary tutor not only hath delayed to accept ſo long that the pupil either hath ſuffered conſiderable loſs, or hath been entirely ruined for want of one to take care of him, but hath alſo become unfit to be truſted with the adminiſtration, he ought not to be admitted; becauſe he might, tho he had accepted before, have been removed as ſuſpected at that very time at which he wants to aſſume it; ſo it would be abſurd to admit him to an office, of which he may be immediately deprived. For it may well be preſumed, that the father would not have nominated him to be tutor of his child, if he had ſuſpected, he would be careleſs in the diſcharge of his truſt, or would have done ſo unkindly by his pupil, *l.* 8, 9, 10. *ff. de confirm. tut. l.* 4. *ff. de teſt. tut. l.* 3. § 3. *ff. de adm. et per. tut.*

TITLE IV.

Of Tutors of Law.

§ 418. BUT, 1) if the father hath died inteſtate, *i. e.* if he hath not nominated tutors to his children, *l.* 6. *ff. de legit. tut.* or, 2) If his nomination either is *ab initio*, or becomes void (§ 410.) *, the Law invites to take care

* For if it is not void, but ſuſpended only for a time, there is room as well for a tutor-dative as for the tutors of Law, (§ 410.)

care of them, thoſe in whom it repoſes the greateſt confidence; becauſe it preſumes they have the greateſt affection for the pupils, and are, beſides, moſt nearly intereſted in the preſervation of their eſtates. For this reaſon, in default of teſtamentary tutors, it calls their neareſt agnates to the tuition of pupils; 1) Becauſe it preſumes, that thoſe, who are connected together by the ties of blood and of nature, have a greater affection for one another, have more concern about each other's welfare, and are more diſpoſed to take care of one another, than indifferent perſons; 2) Becauſe they have a chance to ſucceed to the eſtate, if the pupils ſhould happen to die; and may therefore be preſumed, ſince their intereſt moves them, to be moſt anxious about preſerving it, and hindering it from being dilapidated, *l.* 1. *p. ff. de legit. tut.* 3) Becauſe thoſe, who are to reap the profits of any thing, ought alſo to bear the loſſes, inconveniences and burdens attending it, *l.* 10. *ff. d. r. j.* Therefore, thoſe, who would ſucceed to one, if he ſhould happen to die, ought to take care both of him and of his eſtate, during his pupilage, *l.* 73. *p. ff. d. r. j. quia plerumque ubi ſucceſſionis eſt emolumentum, ibi et tutelæ onus eſſe debet,* § 11. *J. de leg. patron. tut.* *.

For theſe reaſons, the Law of Scotland, 1474, *c.* 51. hath copied after that of the Romans, and hath, in default of teſtamentary tutors, called to the tutory 'thoſe, who are to ſucceed to the eſtate of the pupil,' provided they are not either naturally or legally incapacitated from having the guardianſhip of others.

Thoſe, who would ſucceed to the pupil, if he ſhould happen to die without leaving lawful children procreated of his own body, are his neareſt agnates, *i. e.* his neareſt relations on the ſide of his father, whether they connect their relation to him by males alone, or by both males and females. Therefore, the neareſt relation whom a pupil has by his father, is his tutor of Law. If he has more than one, who ſtand related to him in the ſame degree, the Law does not call them all to the lawful tutory of the pupil. But it prefers that one of them, who would be heir to him, in caſe he ſhould happen to die during his pupilage; that the burden of the tutory may accompany the chance of the ſucceſſion.

§ 419. But, it has been ſaid (§ 418.), nobody ought to be admitted, who is incapable to manage the affairs of others. Hence all, who are either naturally or legally incapacitated from having the guardianſhip of others, are incapacitated from being tutors of Law, tho they ſhould happen to be the neareſt agnates of the pupil.

Therefore, 1) Neither Ideots, nor 2) Mad men, nor 3) Dumb men, nor 4) Deaf men, nor 5) Blind men, can be tutors of Law (§ 410.); for theſe are all *naturally* incapable of diſcharging the duties of the office: nor 6) Women; for the act of parliament 1474, *c.* 51. and the brief of tutory ſpeak of males alone; nor 7) Males below the age of 25 years; for the age of 25 years is that which the Law requires in order to render a man capable of being a tutor of Law †, nor 8) Papiſts; for they are expreſsly incapacitated from being either tutors or curators, by 1700, *c.* 3. Therefore, the lawful tutor of a pupil is 'his neareſt 'male agnate, who is paſt the age of 25 years, and is not incapacitated from be-'ing his tutor.' By conſequence, if the neareſt agnate is hindered by any of the foregoing incapacities from being tutor, the tutory devolves to him who is next in propinquity to the pupil, and in order to the ſucceſſion.

§ 420.

* In antient times every ſuperior was lawful tutor of his vaſſal, who held his land by ward-tenure of him. So he had the management of his eſtate as well as the wardſhip of his perſon; and that, not only during his pupilage, but till his majority: and of this power the father of the pupil could not deprive him: for it aroſe from the nature of military tenures, that lands given and held for military ſervice ſhould return to the ſuperior during all the time that the vaſſal was, thro' nonage, unable to perform it, *R. M. l.* 2. *c.* 41, 42, 68. But other than ward-ſuperiors were not tutors of their vaſſals, *R. M. l.* 2. *c.* 47. § 1.

† I cannot, on this occaſion, help taking notice of the gradual progreſs of our Law from ſlaviſh to free principles, and of the different ſpirit and different maxims, which have prevailed in this country ſince the Revolution, from thoſe which prevailed in antient times. For it appears, from a caſe reported by *Balfour, tutor,* 9th *June* 1548. *Henryſon,* that the King at that time took upon him to diſpenſe with the want of that age, which Law requires in a tutor of Law.

§ 420. He, who is, becauſe of his propinquity to the pupil, entitled by Law to be his tutor, is veſted with the office, ‘ as ſoon as he obtains from the chan-‘ cery a decree or writ, nominating him to be tutor.’ For he is not, like teſtamentary tutors, veſted with it, as ſoon as he accepts of it, and entitled immediately to enter upon the exerciſe of it. The neareſt agnate may happen to be incapable. Therefore, the Law hath appointed a form, according to which he muſt acquire a right to exerciſe it.

Firſt; He muſt purchaſe a brief of tutory out of the chancery. This is one of the ſeven briefs, which are ſtill retained in the Law of Scotland, and is of the following tenor: ‘ Vicecomiti et ballivis de etc. ſalutem. Mandamus vobis et ‘ præcipimus, quatenus per probos et fideles homines patriæ, per quos rei veritas ‘ melius ſciri poterit, (magno ſacramento interveniente), diligentem et fidelem in-‘ quiſitionem fieri faciatis, quis ſit propinquior agnatus, id eſt, conſanguineus ex ‘ parte patris, dilecto noſtro B, filio legitimo quondam A ſui patris? Et ſi ille pro-‘ pinquior exceſſit ætatem viginti quinque annorum completam? Et ſi ſit ſuæ rei ‘ providus, et potens cavere idoneè de adminiſtratione rei alienæ? Et ſi ille pro-‘ pinquior ſit immediate ſucceſſurus ipſi B, ſi ipſum contigerit in fata decedere? Et ‘ ſi ſit, quis tunc ex parte matris idonior, apud quem, uſque ad ejus legitimam ‘ ætatem, poſſit et debet educari? Et quod per dictam inquiſitionem, diligenter ‘ factam, eſſe inveneritis, ſub ſigillis veſtris, et ſigillis eorum qui dictæ inquiſitioni ‘ intererunt faciendæ, ad capellam noſtram mittatis; et hoc breve. Teſte me-‘ ipſo, apud Edinburgum.’

This brief may be directed to any ordinary judge, who has juriſdiction; for the execution of the order made in it is a matter of voluntary juriſdiction, and may be expedited by any judge, who has power to hold a court and to impannel a jury. All, which he is ordered to do, is to enquire into certain facts, and, after he has made inquiſition, to return his anſwer to the Chancery. The enquiry he makes by a jury, whoſe buſineſs it is to aſcertain theſe facts by their verdict, pronounced on the evidence brought before them: and his return muſt be conformable to it. His office, therefore, is merely formal. Therefore, it may be directed 1) To the Sheriff-deputy of any ſhire, 2) To the Stewart-deputy of any ſtewartry, 3) To the Magiſtrates of any borough. For it is not neceſſary, that the Judge, to whom it is directed, be he within whoſe territory either the pupil, or he who wants to be ſerved tutor, dwells, *Du.* 8th *March* 1636, *Stewart.*

Secondly; The brief muſt be preſented to the Judge, to whom it is directed; and he muſt order his officers to execute it.

For, *thirdly*, it muſt be executed; that is, it muſt be proclaimed at the market-croſs of the principal borough within the territory of the judge, who orders it to be executed. It is proclaimed 1) By being read all over, three ſeveral times, with an audible voice, by the officer employed to execute it; and every time, before it is read, he muſt call aloud the word, *Oyez*, three ſeveral times, in order to convoke the people to hear the brief executed. 2) Public notification muſt, at the ſame time, be made by him, of the particular place where, and of the time when it is to be ſerved; that thoſe intereſted may know with preciſion the place and the time, at which they muſt attend on the matter. 3) A charge muſt be given *generally* to *all and ſundry*, that is, to every one, who may be intereſted in the ſervice, to appear at that time and place. And 4) a full copy of the brief and of the execution of it, ſigned by the executioner, muſt be left affixed to the croſs, at which it is read. The day, on which he charges them to appear, muſt be full fifteen days from that, on which the brief is proclaimed, 1540, *c.* 72.—1621, *c.* 19. For it is not neceſſary, that 15 days *intervene* between them. It is enough, if either the day of the execution, or that of appearance be free, and theſe two with thoſe, intervening between them, make in all 16 days, *Du.* 27th *July* 1626, *M'Culloch.* All theſe forms muſt be preciſely obſerved by him before two witneſſes, who muſt be preſent at the obſervance of them, and muſt ſign, along with him, the copy of the execution returned to the judge, to whom the brief is directed, 1503, *c.* 94.

Fourthly;

Fourthly; It muſt be ſerved, that is, the Judge-ordinary muſt, at the deſire of the purchaſer of the brief, impannel an inqueſt of 15 men, who, on a claim preſented to them on behalf of the perſon who deſires to be ſerved tutor of Law, repreſenting the condition of the pupil, and his relation to him, having found it proved, that the claimant is the neareſt male-agnate of the pupil, who is paſt the age of 25 years, and is not otherwiſe diſqualified, ſerve him his tutor of Law, provided nobody objects. The verdict muſt be ſigned by the chancellor of the jury, and the Judge before whom it was ſerved having interpoſed his authority to the ſervice, it is returned to the chancery, out of which it was iſſued.

Fifthly; He muſt, after his ſervice is returned to the chancery, find good caution *rem pupilli ſalvam fore;* that is, he muſt find good ſureties, who muſt bind themſelves that he will faithfully and honeſtly diſcharge the duties of his tutorial office; and that they will make good all the loſs, which the pupil ſhall ſuſtain through his mal-adminiſtration, and ſhall be entitled to recover from him, *p. I. de ſatiſd. tutor. l.* 4. § 1. *ff. rem pup. vel. adol. ſalv. l.* 1. *ff. qui ſatiſ. cog.* In caſe there are more ſureties than one, they muſt bind themſelves jointly and ſeverally. For it is not in all caſes neceſſary, that more than one be given; every thing concerning this matter muſt be determined according to circumſtances, that is, according to the extent of the eſtate of the pupil, and of the cautioner. One good man may frequently be ſufficient.

The tutor muſt find caution before he enters upon the adminiſtration, but he is not bound to find it before the ſervice is returned. For the judge is ordered by the brief to enquire by a jury, whether he is *potens cavere idoneè de adminiſtratione rei alienæ.* Therefore, evidence ought to be brought before the jury that good caution *can be found* by him, in order to enable them to ſay, that he is *potens cavere idoneè.* But it is not the duty of the judge to exact it: for his province is confined within the limits defined in the brief or order ſent him; after he has made the enquiry directed by it, all, which he is ordered to do, is to return it with his proceedings upon it to the chancery; and it is the duty of the officers belonging to it, to ſee caution actually found.

Sixthly; After he has been ſerved, and has found caution, he muſt get from the Chancery a writ nominating him tutor, conformably to the ſervice.

After all theſe forms have been obſerved by him, he may lawfully enter upon the exerciſe of his office. For, in caſe he enters upon it before he has obtained the decree, he cannot be held to be other than an intruder, or at beſt than a pro-tutor. The reaſon is, that he has not ſooner a full legal title to enter upon it.

§ 421. I ſay, the inqueſt ſerve him tutor, in caſe his relation to the pupil and his age are proved to them; provided nobody appears and objects to the ſervice. For, if any body appears and alledges, that the claimant ought not to be ſerved, becauſe he lies under an incapacity either natural or legal; the judge muſt pronounce an interlocutory ſentence on the validity of the objection, and muſt either repel it, if he thinks it is not good, or allow it to be proved, if he thinks it is. Hence a contentious litigation may enſue; and it may happen to be neceſſary either to have ſeveral different ſederunts of the court at different times, or perhaps to have the brief advocated by the Lords of Seſſion from the judge, before whom it was to be ſerved, to the macers, and to have aſſeſſors appointed to them, as in the caſe of the ſervice of a brief of mort-anceſtry. For the ſame remedies by petition, advocation, ſuſpenſion, and reduction, lie in the caſe of the ſervice of the one as in that of the other brief. Each of them muſt be uſed according to the different ſteps, which have been made towards the ſervice. At any time, before the ſervice is actually completed, advocation or petition is the proper remedy for amending that, which has been done amiſs. If the ſervice is abſolutely completed, and the inferior judge is *functus*, either ſuſpenſion or reduction is the proper way of correcting the wrong.

§ 422. Tutors of Law, it has been ſaid, are preferable to tutors-dative. But their preference is not perpetual; they are preferable only, when they cauſe themſelves to be ſerved within the time allowed them for getting themſelves ſerved. For the Law thinks, that the propinquity, which they have to the pupil, lays them under a natural obligation to take care of the affairs of their helpleſs friend; and that they act an undutiful part, in caſe they delay to enter upon the management of them. Therefore, it defines a time, within which it thinks they ought to get themſelves veſted with the office: that is a full year from the time at which the pupil began to want tutors, and it became lawful for them to cauſe themſelves to be ſerved. The nature of the thing ſhews that this year muſt begin to run from different points according to different circumſtances. For the father of the pupil either did not, or did nominate teſtamentary tutors to his child. If he neglected to nominate tutors, the year begins to run from the death of the father, provided the pupil was born before it; for in caſe the pupil was born after the death of his father, it begins to run from the time of the poſthumous birth. If the father named tutors to his children, the year begins to run only from that time at which the paternal nomination fails or becomes void. Thus, if all the teſtamentary tutors die, it runs from the time of their death. If a mother, who had been named either ſole teſtamentary tutrix, or *ſine qua non*, or an eſſential member of a quorum, marries, it runs from the time of her marriage. If a determinate number had been named a quorum, it runs from the time at which that quorum fails; if one had been named *ſine quo non*, it runs from the time, at which the *ſine quo non* either dies, or is incapacitated from exerciſing the office. For the rule is general, that it runs from the time, at which it was the duty of the tutor of Law, and was competent to him to cauſe himſelf to be ſerved, becauſe the pupil began at that time to want tutors, *Du.* 15th *July* 1631, *Grant.*—*St.* 18th *Jan.* 1678, *Gray*. Therefore, if he ſhall have been ſerved within the year, he will be preferable to a tutor-dative, *Sp. tutor*, *Dec.* 1590, *Graham*, tho he ſhould not have found caution *de fideli adminiſtratione*, or *rem pupilli ſalvam fore*, within that time, *Du.* 29th *June* 1632, *Irvine*. 'Tis true, a tutor of Law is bound and may be forced to find caution before he enters upon the management of the affairs of his pupil; and he may be refuſed by the officers of Chancery the writ nominating him, till he ſhall find it. But he does not ceaſe *ipſo jure* to be tutor, becauſe he has neglected to find it and has notwithſtanding preſumed to intermeddle with them. Indeed, no perſon, who has buſineſs with him about the affairs of the pupil, can be compelled either to pay, or to deal with him, till he has found caution. Nay, his ſervice may be ſet aſide, and he may be refuſed a decree of Chancery; or he may be removed on ſuſpicion, if he does not find it, when required by thoſe who demand him to find it for their own ſecurity and that of the pupil. Yet, if the pupil has not been hurt by the omiſſion, his tutor will not, in all caſes, be removed, but may be allowed to find it within a reaſonable time. For it may happen to be more for the intereſt of the pupil to have his affairs managed by his lawful tutor and his relation than by another. Therefore, it muſt depend on circumſtances, whether a tutor of Law, who has been ſerved, but has not found caution, ſhould be hindered from exerciſing the office, and a tutor-dative preferred to him; or ſhould be allowed time to find caution.

If a tutor of Law, who has been ſerved, but has not found caution within the year, is ſometimes preferred to a tutor-dative; much more muſt he be preferred, who has not only been ſerved, but has alſo found caution within it, *G.* 127.

TITLE V.

TITLE V.

Of Tutors-Dative.

§ 423. IN caſe he, who is entitled by Law to be tutor, does not obtain himſelf to be ſerved within the year, he loſes his right of preference; a gift of tutory may be *given* by the barons of Exchequer to any proper perſon, who ſues for it; and the tutor-dative will be preferred to the tutor of Law, if he obtains the gift before the other is actually ſerved, *C.* 1ſt *June* 1574, *Craig.*—*Go.* 4th *Dec.* 1669, *Riddle.*

§ 424. 'Tis eaſy to ſee from what has been ſaid, when there is place for tutors-dative. For there is place for them either 1) When the teſtamentary tutory is ſuſpended, or 2) When the tutors of Law have neglected to ſerve themſelves tutors within the year. In both theſe caſes, the Law, in order to hinder orphans from being deſtitute, and to prevent their affairs from going to deſtruction, hath granted to the King a power of giving, by the barons of his Exchequer, tutors to ſuch pupils as have them not.

§ 425. And in order to provide more effectually for the welfare of the children, and to hinder improper perſons from being appointed their tutors, the Law hath eſtabliſhed certain forms to be obſerved in obtaining and granting gifts of tutory.

Hence it is enacted, 1672, *c.* 2. that every one, who applies to the Barons of Exchequer for a gift of tutory, ſhall either cauſe the next of kin of the pupil on the ſide both of his father and of his mother to be cited *, or obtain their conſent ſignified by a writing under their hands, to the appointment of thoſe, who are ſuing for the gift of tutory. The uſe of the citation is plain. By means of it thoſe, who may be preſumed to have the greateſt regard for the pupil, and to be moſt anxious about his welfare, have an opportunity both of objecting to the nomination of thoſe who ask the gift, if they think them unfit, and of pointing out perſons, whom they think moſt fit for being tutors of their friend. If therefore theſe neareſt relations of the pupil either ſhall not appear and ſhall make no objections, or ſhall by a writing under their hands conſent to the appointment of thoſe who ſeek the gift, Law preſumes they are ſatisfied with the choice, and have no reaſon to object to it.

In order to ſhew that this uſeful form has been obſerved, it is further enacted, that all gifts of tutory ſhall bear expreſsly, that the neareſt of kin of the pupil either were cited, or at leaſt conſented to the paſſing of the gifts: and that all gifts, which either are procured without the citation or the conſent of his neareſt of kin, or do not make expreſs mention of the citation of them, or of their conſent, ſhall be declared null and void, at the ſuit of any perſon, who ſhall obtain a gift of tutory after that manner, which is formal and is required by Law; and that, either by exception, or by reduction.

§ 426. The Barons, before they grant a gift of tutory, ought to cauſe inquiry to be made into the character and circumſtances of the perſon, who applies to them for it, *l.* 21. § 5, 6. *ff. de tut. et cur. dat.* for they are not obliged to give it to any body who aſks it, even tho the relations of the pupil ſhould have been formally cited, ſhould have made no objections, or ſhould have even conſented to the appointment of that perſon, who applies for it. They have, in this matter,

* Agreeably to the ſpirit and intention of this ſtatute, the Court of Exchequer made an act, dated the day of by which they fixed the form of this citation, and ordained it to be by a ſummons, which ſhould paſs the ſignet, like other ſummonſes. The ſtyle of it may be ſeen in DALLAS, *p.* 270. This regulation has been obſerved ever ſince.

ter, a diſcretionary power, and ought to uſe it ſo as to make it turn out moſt for the benefit of the pupil, for whoſe good it is intended.

'Tis true, it is a ſtrong preſumption of the fitneſs of any one, that no objections have been made to him by thoſe, who may be preſumed to have the moſt hearty affection for the pupil. But it is poſſible, that he may have wicked relations, who may enter into colluſive ſchemes with one another, in order to defraud their young friend of his eſtate, and to divide the ſpoil among themſelves. Therefore, all poſſible precautions ought to be uſed for preventing improper perſons from obtaining gifts of tutory. For this purpoſe, the application, which is made to the Barons for the gift, ought to be affixed and remain upon the wall of the Exchequer-chamber the uſual time, that thus people may have an opportunity of reading it, and thoſe, who are intereſted in the pupil, may have as many chances as poſſible of knowing, that the application has been made by the particular perſon who makes it, and of being brought to attend to it. But, before a grant can be made in his favour, he muſt not only, like tutors of Law, find caution *rem pupilli ſalvam fore*, but alſo make oath *de fideli adminiſtratione*.

§ 427. After theſe ſolemnities are obſerved, the Barons may grant the gift. And it is this which veſts the tutor fully with his office, and entitles him to enter upon the exerciſe of it. Till he obtains it, he is at beſt no more than a protutor *. But they muſt grant it to thoſe, to whom Law allows it to be granted; for they ought not to grant it to any, whom the Law prohibits, on account of either a natural or a legal incapacity, to be tutors. Therefore, they cannot grant it 1) Either to Ideots, or 2) To mad men, or 3) To dumb men, or 4) To deaf men, or 5) To blind men; for all theſe are incapacitated by nature from having the tuition of others: nor 6) To minors below the age of 21 years; nor 7) To papiſts; for theſe are incapacitated by Law; nor 8) To married women; for they are bound to devote their attention to the affairs of their huſbands, can do no deed without their conſent, and, beſides, cannot bring themſelves under *perſonal* obligations (§ 211. 240.): nor 9) To thoſe, who, they have reaſon to believe, either were prohibited, or would not have been agreeable to the father of the pupil, *l.* 21. § 2. *ff. de tut. et cur. dat.*

But they may grant gifts of tutory-dative to all others; 1) To women as well as to men; becauſe a woman, for inſtance, the mother of a pupil may be as diligent and as faithful, as any man can be, in the adminiſtration of the tutorial office: 2) To perſons below the age of 25 years as well as to perſons above it; for nothing ſeems to hinder one below that age from diſcharging the duties of a tutor as well as one above it; 'tis true, the Law makes this age neceſſary to qualify one for being a tutor *legitimus*; but the ſame Law allows perſons below it to hold the moſt important offices; ſo the act ought to be ſtrictly interpreted: 3) To perſons in public ſtations as well as to private men: 4) To ſuch, as are abſent as well as to ſuch, as are preſent: 5) To one of their own number as well as to any other, *l.* 19. § 1. *ff. de tut. et cur. dat.* provided he, to whom it is given, make not one of the quorum of the Court which gives it.

They may give it, whether the pupil is preſent or abſent, whether he knows any thing of the matter or not; whether he conſents to it or not; nay, tho it ſhould be againſt his will, *l.* 5, 6. *ff. de tut. et cur. dat.*

§ 428. Every thing, which is done *lege prohibente*, is either *ipſo jure* void or voidable, *l.* 5. *C. de leg.* Therefore, if one, who is by the Law incapacitated to be, is either ſerved or given tutor, the ſervice or the gift muſt be void. Not that every act of the adminiſtration of ſuch a tutor, if he ſhall have taken upon him to exerciſe the office, is null; for nothing could be more prejudicial to the intereſt of the pupil, *l.* 3. *ff. de off. præt.* but that the pupil has a right to have every act of the adminiſtration of this tutor, which is hurtful to him, to be declared to be void; that he has it in his power to get him removed at any time; that he has

* The ſtyle of a tutory-dative may be learned from DALLAS, p. 900.

has him bound in the ſame way as if Law had not prohibited him to be tutor, and to make up to him every loſs which he may have ſuſtained thro his miſmanagement, and his hindering others from aſſuming the office; and that it is competent to every one, who has any either judicial or extra-judicial buſineſs with the pupil, to object the nullity of his right to the tutor, and therefore to refuſe to deal with him about the affairs of the pupil.

§ 429. Tutory, as has been ſaid (§ 417.), is not among us, as it was among the Romans, a public office, which Law impoſed on any one, whether he was or was not willing to accept of it. For with us one does not immediately become tutor, becauſe he has been appointed to be ſo. Nobody becomes tutor, or is brought under tutorial obligations, *till he accepts of the office;* for it is free to every one either to renounce or to accept of it, according to his pleaſure.

But he muſt renounce, as long as matters are entire, *Du.* 14th *Jan.* 1630, *Baird.* He cannot do it, after they have ceaſed to be ſo, *i. e.* after he has once accepted of the office. If he could renounce even after he had accepted, it might be highly detrimental to the intereſt of the pupil; ſince it is of much importance in life to know to what one can truſt, and on whom we can depend. Therefore, the Law does not allow one, who has accepted of the office of tutor, to change his reſolution, *l* 75. *ff. d. r. j.* but obliges him to continue in it, and to do the duties which it implies: for, if he does not do his duty, it makes him liable for his negligence; becauſe he has not done it, *St.* 21ſt *July* 1664, *Scot* *.

§ 430. Since tutors are not bound to accept, 'tis plain that they are bound and become liable only from the time of their acceptance, and that they are not liable for any thing which happens before it †, *Du.* 26th *Jan.* 1628, *Commiſſary of Dunkeld.*—*St.* 19th *July* 1670, *Scrimzeour.*—2d *Feb.* 1675, *Scrimzeour.*

The time, at which a tutor begins to be bound, being the ſame with that at which he accepts, it muſt therefore be of importance to know, when Law holds one to have accepted of the office of tutor.

§ 431. Tutors are either teſtamentary, lawful, or dative.

Teſtamentary ones are tutors *ipſo jure:* they require not either a ſervice or a gift, in order to entitle them to act, but have full power immediately, after the death of the teſtator, to intermeddle with the affairs of their pupil. Therefore, they are held to accept, 1) If they intermeddle with his affairs by doing any thing, which tutors either uſe or ought to do, *ſi pro tutoribus gerant, H.* 982.—*St.* 19th *July* and 6th *Dec.* 1678, *Beatſon;* 2) If they do any thing, which plainly indicates their acceptance, tho it ſhould not amount to a formal and expreſs one, *H.* 969; 3) If they have formally accepted of the office by a writing under their hand.

It can hardly happen to come to be diſputed, whether lawful tutors and tutors-dative have accepted. For it is uſually at their own deſire, that they are either ſerved or appointed. In order to obtain themſelves to be ſerved, they do what imports acceptance: for they cauſe briefs to be iſſued out of the chancery and to be executed; they preſent to the jury a petition claiming to be ſerved; they bring evidence of their propinquity to the pupil and of his condition; ſo they appear, as it were, like purſuers of a law-ſuit. Beſides, ere they can obtain a decree of chancery appointing them tutors, they ought to have found caution *rem pupilli ſalvam fore.* Now, if after all this they find caution, they both have and muſt be held to have accepted of the office.

In the ſame manner, tutors-dative cauſe a ſummons to be executed at their ſuit againſt the neareſt of kin of the pupil, or exhibit to the Barons a petition

* This report ſpeaks of curators alone; but the caſe is the ſame with tutors.

† For this reaſon it was found to be incumbent on him, who had been pupil, to prove, that part of his eſtate was, at the time of the acceptance of his tutor, in ſuch condition, as would make the tutor liable; and not on the tutor to prove, that it was not, *Fo.* 10th *Nov.* 1697, *Muir.*

praying for a gift of tutory; if after this they obtain the gift, they muſt be held to have accepted. Beſides, before the gift can be granted, or they be entitled to adminiſter, they ought to find caution *rem pupilli ſalvam fore*, and to make oath *de fideli adminiſtratione*. Now, nothing can be a ſtronger proof of acceptance, than the finding caution and making oath *de fideli*.

§ 432. For it is not improper on this occaſion to remark, that in this reſpect teſtamentary tutors differ both from tutors of Law, and from tutors-dative. For they are not uſually obliged either to find caution, or to make oath *de fideli adminiſtratione*. Such is the confidence repoſed by the Law in thoſe named by the father. I ſay, uſually: for they may on *extraordinary* occaſions; for inſtance, when it is evident, that the want of caution may be hurtful to the intereſt of the pupil, *Du.* 12th *Feb.* 1633, *Govan*, or that the father intended it ſhould be found by them, *Fo.* 23d *Feb.* 1693, *Counteſs of Calender*.

But both tutors of Law and tutors-dative are obliged to find it: and regularly they ought to find it, before they obtain thoſe ultimate deeds, which render complete their titles to adminiſter, that is, before the decree of chancery or the gift of tutory is granted in favour of them.

It is found by cautioners alone, who bind and oblige themſelves conjunctly and ſeverally for the tutors; that is, to make good to the pupil every thing, which he ſhall be entitled, but ſhall not be able to recover from them, *l.* 12. *ff. rem pup. vel. adol. ſalvam fore*. Not that it is, in all caſes, neceſſary, that more than one ſurety be given: every thing, concerning this matter, muſt be determined according to circumſtances, that is, according to the extent of the eſtate of the pupil, and of the cautioner. One good man, as has been ſaid, may frequently be ſufficient.

Tutors-dative are bound not only to find caution, but alſo to make oath *de fideli adminiſtratione*. This is peculiar to them: for tutors of Law are not bound to make it.

§ 433. Tutors, it has been ſaid, are not bound and cannot be forced to accept of the office of tutory; they cannot, however, after they have once accepted, renounce; becauſe matters are no longer entire, but they are bound to adminiſter, *St.* 21ſt *July* 1664, *Scot*; ſo that their acceptance makes it neceſſary for them to do thoſe things which, before, it was optional to them either to do or not to do.

Let us therefore proceed to conſider the duties, which are incumbent upon them, and the powers which they have, after they are properly veſted with the tutorial office.

TITLE VI.

Of the Duties which are incumbent on Tutors, and of the Powers which they have, after they are duly veſted with the tutorial Office.

§ 434. A Tutor becomes, by his acceptance (§ 433.), bound to manage the affairs of his pupil. He muſt by conſequence be, for every one who manages the affairs of others is, bound to give an account of his adminiſtration, and at the expiration of his office to reſtore every thing, which he has, that belongs to him of whoſe affairs he had the management, *R. M. l. 2. c.* 42. § 12.

His pupil is young and helpleſs. Therefore he is bound to manage them with peculiar fidelity, and to be as careful about them, as a careful man uſes to be about his own affairs, *l.* 10, 33. *p. ff. de adm. et per. tut.* By conſequence, he muſt be bound, if his pupil meets with any loſs through his negligence or mal-

adminiſtration,

administration, to make it up to him. For a tutor *præstat dolum, culpam latam, et culpam levem, l.* 23. *ff. d. r. j. l.* 7. *C. arb. tut.* But he is not bound to make up losses, which arise either from accident, or from so small a degree of carelesness as is hardly distinguishable from it, *l.* 4. *C. de per. tut.*

Every one is presumed to agree to that, which is promotive of his interest. But it is for the interest of the pupil, that his affairs be managed by somebody: else they would go to destruction. Therefore he is presumed to have given his tutor a *mandate* or *commission* to manage them, and to have consented to every lawful act of his administration. But Law allows not one, who has the humanity to do a good office to another, to suffer by it. Therefore it holds the pupil to be obliged to indemnify his tutor of expences, which he may happen to lay out in his administration; because it does not easily presume one to mean to enrich himself at the expence of another, especially of one who is employing his time and exerting himself to do him the best service, *l.* 14. *ff. de con. ind.*

Hence, tutory may in some sort be considered, as it were, 'a contract entered into by the tutor and his pupil, and inferring obligations on each of them.' § 2. *J. de oblig. quæ quasi ex contrac. nasc.* On the one hand, the tutor is held to bind himself, by his acceptance of the tutorial office, 1) To manage with fidelity and care the affairs of his pupil, 2) To give an account of his administration, and 3) To restore to his pupil every thing which he has belonging to him. On the other, the Pupil is held to be bound 1) By every lawful act of his tutor's administration, and 2) To indemnify him of any expence, to which he may be put in the discharge of his duty, *l.* 1. *p. ff. de contrar. tutel.*

From these axioms it will be easy to exhibit a particular of the powers, obligations, and duties both of tutors and of their pupils.

§ 435. Tutors, it has been said (§ 403, 434.), are bound to manage the affairs of their pupils with fidelity, and to make their utility the measure of their conduct. There must therefore be some things, which tutors ought, and are by consequence bound to do, because they are essential to the interest of their pupils; and others, which they ought not, and have not therefore power to do, because they are contrary to it.

§ 436. The powers of tutors extend to the estates as well as to the persons of pupils (§ 403.). Therefore the *first* thing, which *all* tutors are bound to do, is '*formally* to make and to authenticate an inventory of *all* the particulars, 'of which the estates of their pupils consist.'

This is a duty, from which testamentary ones are not, any more than tutors of Law and tutors-dative, exempted; it is incumbent on them all alike. For they are all bound to manage the estates of their pupils; and it would be difficult to know precisely the particulars, for which they should account, if an inventory was not taken, from which a charge may be made upon them, 1672, *c.* 2.—1696, *c.* 8.

They are bound, 2) To do it as soon as possible; for they are expressly prohibited by Law 1672, *c.* 2. to exercise the office of tutor, or to intermeddle with the affairs of the pupil, before they have made it, *l.* 7. *p. ff. de admin. et peric. tut. et cur. l.* 24. *C. de adm. tut. l. ult.* § 1. *C. arbit. tut.* The reason is, that every particular of his estate may be inventoried, as soon as they attain possession or knowledge of it; in order to make it impossible for them to embezzle. But since the necessity of the case requires it, 'tis plain, that they ought to be allowed a reasonable time to do it, according to the situation extent and nature of the estate. Therefore, as they ought not to be obliged to do it *præcipiti festinatione*, neither ought they to be allowed to do it *moratoria cunctatione*, *l.* 7. § 1. *ff. de adm. et per. tut. Fo.* 9th *Feb.* 1698, *Turnbull.*

They ought 3) To do it *formally*, *i. e.* to observe those forms, which the Law of Scotland hath ordained to be observed by tutors, when they inventory the estates of their pupils. These it hath introduced for the utility of the pupils,

pupils, in order to hinder tutors from making or having it in their power to make partial inventories, and from embezzling the goods of their wards. Hence it is plain, why the inventory ought regularly to be made with the advice, conſent and concurrence of ſuch of the neareſt of kin of the pupil, on the ſide both of father and of mother, as are both majors and within the kingdom *i. e.* Scotland, at the time at which it is made. For two of the neareſt relations of the pupil on each ſide, both on that of the father and on that of the mother, ought to be preſent, and to concur with the tutors in making it. Therefore, if the tutors themſelves happen, any of them, to be neareſt of kin to the pupil, thoſe of his kindred ought to be preſent, who are next to the tutors in propinquity to him: for, over and beſides the tutors themſelves, there ought *always* to be preſent the next of kin to the pupil. If they are willing to come and to be preſent, 'tis well; then the inventory is made; after it is finiſhed, three exact copies of it muſt be ſubſcribed by the tutors, and by all the neareſt of kin of the pupil, who were preſent at making it.

But in order to prevent more effectually the poſſibility of fraud, and to hinder the inventory from being altered, or any of the particulars inſerted in it from being deleted by the tutors, it is enacted, that it ſhall be authenticated before a competent judge, *i. e.* that all the three ſubſcribed copies of it ſhall be judicially produced before that Judge-ordinary, within whoſe juriſdiction the chief reſidence of the pupil is, *viz.* either the Sheriff-deputy of the ſhire, or the Bailiff of the royal borough, or the Commiſſary of the dioceſs, *Aſ.* 29th *July* 1752, within which the pupil has his chief reſidence; that they ſhall all three be alſo ſubſcribed by the clerk of court; and that, on this, an act of court ſhall be made bearing the production of them, and expreſſing the names both of thoſe who ſubſcribe them, and of thoſe to whoſe cuſtody they are committed: for one of theſe ſubſcribed duplicates is ordered to be kept by the tutors themſelves; another of them by the neareſt of kin on the ſide of the father of the pupil; and the third by his neareſt of kin on the ſide of his mother.

But it may happen, that the pupil's neareſt of kin will not concur with his tutors in making an inventory of the particulars of his eſtate; therefore it is enacted, that the tutors ſhall raiſe a ſummons, at their own ſuit, for ſummoning the aforeſaid neareſt of kin of the pupil on the ſide both of his father and of his mother to appear before the ſaid Judge-ordinary, in order to hear and ſee themſelves ordered to concur with the tutors in making the inventory; with certification, that, if they either ſhall not appear, or ſhall not concur, the inventory will be made by the tutors, with the advice and conſent either of the Judge-ordinary himſelf, or of one whom he ſhall delegate and appoint.

If the neareſt of kin neglect, notwithſtanding this ſummons, to concur, the inventory is made by the tutors at the ſight either of the Judge-ordinary himſelf, or of ſomebody delegated by him. After it is completed, three duplicates of it are made; are ſubſcribed by the tutors, and the perſon with whoſe concurrence it was made; and are all authenticated after the ſame manner, in which they would have been authenticated if the neareſt of kin had concurred. Only two of them muſt be cloſed and ſealed by the tutors and the perſon delegated to concur with them, and muſt remain in the cuſtody of the clerk of the court, by which they were authenticated, to be delivered to the neareſt of kin of the pupil, both on the ſide of his father and on that of his mother.

The inventory muſt 4) Contain an exact liſt and deſcription of *all* the particulars, of which the eſtate both heritable and moveable of the pupil conſiſts. Conſequently, it muſt contain the lands, houſes, and other heritable things, as well as the horſes, cows, furniture, caſh, and other moveables, of which his eſtate conſiſts. Nay, it muſt contain not only *corpora* of theſe kinds, but alſo all inſtruments of debts due to the pupil, ſuch as bonds, bills, promiſſory notes, accompts, tickets. In ſhort, it ought to contain all the particulars of the viſible eſtate, which they can diſcover, that belong to the pupil. Nay, not only ought

ought it to contain a liſt of all the particulars of the eſtate, but alſo ſuch accurate deſcriptions of them, as will make each of them eaſily diſtinguiſhable from every thing of the ſame kind. Thus, *v. g.* bonds muſt be deſcribed by the names of the creditors to whom they are granted, of the debtors who grant them, of the ſums for which they are granted, of the time at which theſe ſums are made payable; of the rate of intereſt, if they are made to bear it, *&c. l.* 7. *C. de bon. proſcript.*

But pupils may happen to have the property of ſeveral things, which their tutors cannot immediately diſcover. Thus, inaccuracies, errors, and omiſſions may ſlip into the inventory, notwithſtanding the greateſt care. 'Tis therefore enacted, that the tutors, if they ſhall happen afterwards to diſcover and to attain poſſeſſion of any other particulars that belong to the pupil, and are not inſerted in the inventory, ſhall, within the ſpace of two months from the time, at which they attain the poſſeſſion of them, add them to the inventory; ſhall get this additional inventory authenticated by the ſame judge, before whom the principal one was authenticated, and after the ſame manner with it; and ſhall leave two duplicates of the eke, ſealed like the principal one, in the cuſtody of the clerk of court, to be delivered to the neareſt of kin of the pupil.

§ 437. The uſe of the inventory is plain. It ſhews the amount of the pupil's eſtate, the particulars of which it conſiſts, and thoſe for which his tutor is bound to account. So it is the foundation of a charge againſt the tutor, for every particular of which he muſt account at the expiration of his office. Not that he is preciſely bound to *reſtore* every particular, which has been inventoried: for if he can ſhew, that any thing, which did not belong to the pupil, happened to be inſerted in the inventory, he will not be obliged to reſtore it; becauſe it did not belong to the pupil, and ought to be reſtored to its true owner. Therefore, the uſe of the inventory is this; it creates a preſumption againſt the tutor. For Law preſumes, that he would not inventory any thing, which did not belong to his pupil. Therefore it preſumes, that every particular, which it ſees inventoried, was his property; and obliges the tutor to prove, that it was not ſo, but was erroneouſly inſerted in the inventory. So it puts the *onus probandi* on the tutor.

§ 438. The uſe of the inventory being ſo great, 'tis plain, why the Law hath ordained this to be the firſt act of the adminiſtration of every tutor; he cannot do any thing before it, except ſuch as admit of no delay, *l.* 7. *p. ff. de ad.* Therefore the Law hath done well to employ certain means to compel him to make it. Hence it is enacted, 1) That no debtor of the pupil ſhall be obliged to pay to a tutor, who does not ſhew him, that that, which he demands, is particularly contained in an authenticated inventory ſubſcribed by the neareſt of kin of the pupil, or by the clerk of court *.

If tutors neglect to make either principal or additional inventories after the formal manner required by Law, they are 2) Declared to be liable not only for their intromiſſions, but alſo for their omiſſions, not only for what they do, but alſo for what they omit to do. This muſt extend to all tutors, even to ſuch as have been named by the father of the pupil with this expreſs proviſo, that they ſhall be liable not for their omiſſions, but for their intromiſſions alone: for even theſe are not exempted from the obligation of making an inventory of the eſtate of their pupil. Therefore, if they omit to do their duty, and to make one, they muſt be liable to the ſanction of the Law, and to their omiſſions as well as to their intromiſſions. For the father is not allowed to grant them a diſpenſation from the obligation of making inventories; he muſt therefore be preſumed to mean that they ſhall have the privilege of being liable not for their omiſſions

* There is a caſe reported by *Fo.* 24th *June* 1701, *Guthrie*, which ſeems to be repugnant to the ſpirit and the letter of the Law. By it the Lords found, that a debtor had no intereſt to propoſe it as a defence, that the inventory was made without citing of the neareſt of kin on the ſide of the mother, when the tutors were themſelves the neareſt of kin.

but for their intromiſſions alone, only in caſe they neglect not ſo important and ſo eſſential a part of their duty; eſpecially as all tutors are, *jure communi*, liable to their omiſſions as well as to their intromiſſions.

Tutors, who neglect to make inventories, are 3) Not entitled to get allowance of the expences, at which they have been in managing the affairs of their pupils. Hence they are not entitled to be indemnified either of the expences, to which they have been put by their perſonal attendance on the affairs of their pupils, or of ſuch ſums as they have laid out on *purſuits or legal diligences*; even tho theſe have been both neceſſary and profitable: but they are entitled to thoſe, which they have diſburſed on the maintenance, education, houſes and eſtates, as well as to thoſe, which have been diſburſed, in order to complete the titles of their pupils, *H.* 984.—*Fo.* 25th *Feb.* 1686, *Kennedy*. — 16th *Feb.* 1693, *Carleton*.—*Aſ.* 25th *Feb.* 1693.—*Da.* 83. —*F.* 11th *June* 1709, *Lady Riddoch*.

4) Tutors, who omit to make inventories according to Law, are removeable from their office, becauſe they are ſuſpected of intending to conceal the amount of their pupil's eſtate, and to make it eaſy for them to defraud him, *St.* 7th *July* 1681, *Gibſon*.—9th *Feb.* 1698, *Turnbull*.

Theſe are the puniſhments inflicted by Law on tutors, who omit to inventory the eſtates of their pupils. Therefore, there ſeems not to be room for others. 'Tis true, by the Roman Law, a pupil was allowed to make his charge upon a tutor, who had neglected to make an inventory, by his own oath *in litem*. The reaſon was, becauſe ſuch a tutor was held *dolo feciſſe*, *l.* 7. *p. ff. de admin. et peric. tut.* But this can have no place with us; ſince it is excluded by the ſtatutory penalties, *June* 1741, *Parkhil v. Geddes*.

However, a pupil is always allowed to charge his tutor with every thing, with which it can be otherwiſe proved, he either hath or might have intermeddled; whether an inventory has or has not been made of his eſtate.

§ 439. The powers of tutors, it has been ſaid, extend as well to the eſtates as to the perſons of their pupils: therefore the firſt thing, which they are bound to do upon the acceptance of their office, is to make an authentic inventory of the eſtate. But the primary end of tutory is the tuition of the perſons of their wards: therefore I ſhall conſider the tutorial duties with regard to the perſons of their pupils.

§ 440. Children, during their pupilage, are not able to take care of themſelves. They have not either that maturity of judgment, or experience of the world, which are neceſſary for enabling them to diſtinguiſh things which are good, from thoſe which are bad for them; things which may be profitable, from ſuch as may be hurtful to them; thoſe which they ought, from thoſe which they ought not to do. 'Tis neceſſary therefore that they be governed by others, who, having more ſenſe and more experience, are fit for directing them concerning their conduct.

But, tho tutors have the guardianſhip of their pupils, they have not always the cuſtody of their perſons. The Law, in this matter, pays the greateſt regard to the will of the father; becauſe it preſumes, that he was both moſt willing and moſt able to provide for the good of his children. Hence it entruſts the cuſtody of the perſons of his children to thoſe, with whom he deſired them to live. Not that it is, in *no* caſe, lawful to depart from his appointment; thoſe, whom he has appointed to have the cuſtody of them, may be liable to ſome malignant ſuſpicion; it muſt therefore be competent to the Law to interpoſe its authority, and to provide for the ſafety of the pupils, by taking them out of the hands of thoſe whom it ſuſpects, and putting them under the protection of others whom it can truſt, *l.* 1. § 1. *ff. ubi pup. educ.*—*R. M. l.* 2. *c.* 47. § 4.—SKENE's *not. ad d.* § 4.

But in default of the appointment of the father, it repoſes its confidence in the mother of the children. Hence a mother, provided ſhe is not liable to ſuſpicion, is allowed

allowed to have the cuſtody of her children, till they attain the age of ſeven years, *Ba. minor*, 4th *Auguſt* 1516, *the King*.—1ſt *March* 1517, *Durie*.—22d *May* 1527, *Foreman*.—SKENE *not. ad R. M. l.* 2. *c.* 41. § 3.—*ad c.* 47. § 4. For Law thinks it cruel to deprive a mother, immediately after ſhe has loſt her huſband, of the pleaſure of the company of her children. It lets them therefore ſtay with her to comfort her for the loſs which ſhe has ſuſtained. Beſides, till children have attained the age of ſeven years, they are unfit for learning or doing much. Their mother, therefore, who, it muſt be preſumed, loves them moſt affectionately, and will not grudge the trouble of taking care of them, ought to be allowed the endearing taſk of foſtering them during their childhood; ſince one will not eaſily be found, who will take ſuch an anxious concern about them, and attend ſo minutely as ſhe to all their little wants, neceſſities, deſires and complaints.

But even ſhe is not allowed to have the cuſtody of them during their childhood, unleſs ſhe is above ſuſpicion. For if ſhe is a woman of a bad character, ſuppoſe, for inſtance, ſhe is a bawd, a drunkard, a thief, or a papiſt; it would be cruel to truſt her with the cuſtody of her young children, and to allow them to run the riſk of being corrupted or ſeduced by her example. In the ſame manner, if, forgetful of the memory of her former huſband, ſhe marries another, the Law of Scotland, for the beſt reaſons, does not allow her to have the cuſtody of her children: becauſe it preſumes, that the influence of her preſent huſband might lead her to think of committing horrid actions; that ſhe might ſoon become regardleſs of their intereſt; that the ſight of them might create jealouſy in the breaſt of her preſent huſband, and if ſhe appeared to be too anxious about their welfare, might make him ſuſpect that ſhe had too warm an affection for the memory and the remains of her former one, and that her love of himſelf was cold; from whence ſhe might, in order to prevent the diſturbance of their mutual love, be led ſoon to become regardleſs of her children. Beſides, the Law obliges a wife to employ her time in the ſervice of her huſband, and in the management of his domeſtic affairs. Conſequently, he might look on her with an evil eye, if he ſaw her employ in taking care of others, that time which he was entitled to have employed on the management of his own affairs alone. *Plerumque novis maritis non ſolum res filiorum, ſed et vitam addicunt, l.* 22. § *ſervi etiam, C. de adm. tut.* Thus diſtracted by her attention to two different departments, ſhe might miſmanage them both. For theſe reaſons the Law of Scotland does not, in any caſe, allow a married woman to have the cuſtody of children, whom ſhe had of former marriages, *l.* 1. *C. ubi pup. educ.*—*Nov.* 22. *c.* 38. No matter, whether they be boys or girls, be below or above the age of ſeven; whether the mother offers to maintain them *gratis*, or not; whether, on being taken from her, they will be obliged to pay for their maintenance, or will be maintained by ſome other perſon *gratis*. Therefore, in caſe the mother is either dead, or married, or unfit, the tutor hath the right to the cuſtody of the perſon of his pupil; for he is given *perſonæ*, and no other can juſtly pretend to it, *R. M. l.* 2. *c.* 47. § 4.—*Du.* 14th *July* 1627, *Noble*.—4th *July* 1629, *L. Langſhaw*.—*Sp. tutor*, 22d *Feb.* 1631. *Finnie*.—*Du. ult. Feb.* 1632, *Gordon*.—*St.* 6th *Feb.* 1666, *Laird of Durie*.—5th *Feb.* 1675, *Fullerton*.—*l.* 1. § 1. *ff. de tut.*

After the age of ſeven years, the education of the pupil begins*. Therefore, his tutor hath after that time the diſpoſal of his perſon. Neither his mother nor any

* In antient times the ſuperior was preferred, before *all* others, to the cuſtody of his vaſſal, that held of him an eſtate by ward-tenure, and was paſt the age of ſeven years. *Vide Dict.* II. 484, 485. Indeed, in antient times, the ſuperior was the tutor of Law; the lawful guardian of his vaſſal, who held his land ward of him (§ 418.): ſo he had not only the management of his eſtate, but alſo the wardſhip of his perſon; he had all the powers, and lay under all the obligations of other tutors, *R. M. l.* 2. *c.* 41, 42, 44, 68. If the pupil held lands *ward* of more ſuperiors than one, the eldeſt was preferred to the cuſtody of the *perſon* of his vaſſal; and every ſuperior was entitled to enter upon poſſeſſion and management of thoſe lands which were held of himſelf, *R. M. l.* 2. *c.* 44. § 1. *et ibi not.* SKENE.

any other relation ought to be preferred to him, *Ba. minor*, 18th *Feb.* 1551, *Clephan.*—29th *March* and 7th *June* 1561, *Spalding.*—16th *May* 1548, *Crawford.*—19th *May* 1558, *Dishinton*; unless the utility of the pupil evidently requires it, *Ba. minor*, 16th *Dec.* and *penult. Feb.* 1553, *Gorthie.*—*M.* 12th *May* 1558, *Dishinton.*—*l.* 1. § 1. *ff. de tut.*

For if the utility of the pupil requires it, his person is not entrusted to the custody of his tutor. Hence, if a tutor happens to be that person, who, if the pupil should happen to die during his pupilage, would succeed to any part of his estate, Law will not trust him with the custody of his person; because, as Mr. ERSKINE says, it suspects he would not be over-careful to preserve a life, which stands in the way of his own interest, *l.* 2. *C. ubi pup. educ. l.* 1. § 1. *ff. eod. R. M. l.* 2. *c.* 47.—SKENE *not. ad d. c.* 47. *L. B. c.* 106.—*Ha.* 19th *Jan.* 1611, *Chalmers.*—*Jan.* 1606, *Elgar.*—*N. tutor*, 24th *Jan.* 1622, *Taylor.*—*St.* 6th *Feb.* 1666, *L. of Durie.*

In general, the age, the sex, the circumstances, and the condition of the pupil as well as of his tutors and of his relations, ought to be considered, and the custody of his person given in all cases to him, to whom it appears, upon the whole, to be most advantageous for the pupil to give it, *l.* 1. § 1. *ff. ubi pup. educ.*

§ 441. Mere life is not a mighty matter; it is rational life, which man should value; one, whose mind is not cultivated, but rude like the beasts of the forest, is hardly worthy of the vast capabilities of his nature. Therefore, a tutor is bound to take care both of the maintenance and of the education of his pupil, *R. M. l.* 2. *c.* 42. § 5.—SKENE *n. ad d. l.*

The precise sum, which he ought to lay out on these, must be left to be determined by his own discretion. Indeed if the father has specified a sum, his will ought to be the rule; unless that named by him is more than the circumstances of the pupil can afford. For if a tutor shall adhere strictly to the will of the father, who, thro pride, or thro ignorance of the state of his affairs, hath named an immoderate sum, and shall lay this all out on his pupil, the excess, that is over and above the sum which he ought to have laid out, will not be allowed him in his accompts; because he did wrong in laying out so much, *l.* 2. § 2, 3. *ff. ubi pup. educ.* In the same manner, if a father has been excessively sordid in naming a sum to be laid out on his child, the tutor may lay out as much more, as is necessary for maintaining and educating his pupil, and will be entitled to get allowance of it, even tho he should have taken it upon himself to lay it out without obtaining leave from the Court of Session; provided he has laid out no more than was reasonable, and suitable to the condition of the pupil, *l.* 2. *p.* 1. *ff. eod.*

But, if the father has not defined a particular sum, a discretionary power is entrusted to the tutor of laying out on the maintenance and education as much as is suitable to the age, the rank, and the estate of his pupil, *l.* 2. § 1, 2. *l.* 3. § 2, 3, 4, 5. *l.* 4. *ff. ubi pup. educ. l.* 6. § 5. *ff. de Carbon. edicto.*—*R. M. l.* 2. *c.* 42. § 5. and SK. *not. ad d. c.* 42. So that he ought not to be either too parsimonious or too profuse, but to observe that just mean, which is pointed out by the circumstances of his pupil to be proper.

Therefore, a tutor ought never to lay out yearly on his pupil more than the total amount of the annual profits of his estate. This is the *maximum* to which he is limited by Law, *l.* 3. § 1, 3. *ff. ubi pupil. educari.*—*St.* 17th *Nov.* 1680, *Sandilands.*—*B.* 110. I own, extraordinary cases may happen, in which the rigour of this rule ought to be something abated, *D.* II. 488. *Fo.* 26th *June* 1678, *Pearson*; for instance, in case the pupil is sick, expences ought not to be grudged, which are laid out in order to preserve his life.

Indeed, the expences laid out annually on a pupil ought to be so far from exceeding, that they ought not to exhaust the whole annual profits of his estate: except the amount of these is so small, as to be no more than is necessary for educating and maintaining him. For a surplus ought always, if possible, to be saved

ved after his yearly expences are paid, and to be ſucceſſively, year after year, added to his capital ſtock, in order to increaſe it, *l.* 3. § 1. *ff. eod.* The yearly income of ſome pupils is ſo great, that it would be a piece of groſs miſmanagement to lay it a l out on them, *l.* 3. § 3. *ff. eod.*

A tutor, tho he ought not to exceed due bounds, ought however to act ſuitably to the condition of his pupil. Therefore, he ought to maintain him and provide him with clothes, food, and lodging ſuitable to his ſtation. Indeed in this article he ought to be as frugal as is conſiſtent with decency, and with the health of the child, for money, ſaved on articles of this kind, if it is not hurtful to the health of the pupil, is all well ſaved.

But he ought to be far from being ſordid in the expences of his education: frugal ſchemes are the worſt ſchemes of it. Therefore he ought to incline rather to profuſion than to frugality in every thing relating to it. He ought to beſtow liberally upon it, ſo as to have his pupil not only taught every thing which it is proper for him to learn, but taught it after the beſt manner and by the beſt maſters, *l.* 12. § 3. *ff. de admin. et per. tut.*

His education ought alſo to be ſuited to his rank in the world. Therefore, if it is ſuch as does not allow thoſe who hold it to be educated to any trade or employment, the pupil ought to be educated in the moſt liberal manner, ſo as to become a wiſer and better man than thoſe, who have not the ſame advantages, and to be rendered fitter for being uſeful to his country, to his friends, and to himſelf. Hence a tutor is ſaid to be ſet over the *manners* of his pupil, *l.* 12. § 3. *ff. de admin. et peric. tut.*

But if it is proper, or if the circumſtances of his pupil make it neceſſary for him to be educated to ſome employment, the tutor, after conſulting the inclination of the pupil, and adviſing with his relations, ought to educate him ſo as to render him fit for exerciſing his employment to the greateſt advantage. If it is a liberal one, his education ought to be liberal: but it ought, at the ſame time, always to be conducted with a principal view to the profeſſion for which he is deſigned. If it is thought proper to breed him to an illiberal trade, his education ought to be ſuitable to it; and a tutor ought in this caſe to take particular care to teach him nothing that may give him a diſtaſte of the buſineſs for which he is intended. Thus, if he is to be bred to a laborious, mechanical employment, *v. g.* to that of a black-ſmith, it would be cruel to allow him to paſs a full courſe at the univerſity; for 'tis odds, if after his views ſhall have been extended, and he hath acquired a taſte of knowledge, he will be able to give attention to his proper buſineſs, or to have any reliſh of it; ſo a ſource of unhappineſs may be created to him. In truth, the leſs one, who is intended to be bred to an illiberal employment knows, the better; provided he is taught every thing, which may be uſeful to him in the exerciſe of it. One, who has a reliſh of MILTON, of BACON, or of the NEWTONIAN philoſophy, will make ſmall profits by merchandiſe.

In order therefore to have him properly inſtructed in his buſineſs, his tutor may be allowed, if it is neceſſary, to encroach upon the capital ſtock of his pupil, *v. g.* to pay an apprentice fee to a maſter. The ſame thing may be done, in order to enable him, after his education is finiſhed, and he has learned his trade, to ſet up for himſelf, *B.* 110. Indeed, this cannot happen during his pupilage.

§ 442. A tutor is alſo bound to manage both the moveable and the heritable eſtate of his pupil; for his power extends to all of it: and it is his duty to take care both of his extrajudicial and of his judicial affairs, *R. M. l.* 2. *c.* 42.

§ 443. Tutors are bound to manage for the utility of their pupils, (§ 403); 'tis this which ought to be the rule of their conduct. But it is unprofitable for one to keep a large quantity of uſeleſs moveables. Hence, it is the duty of tutors to ſell thoſe moveable *corpora*, for which the pupil has no uſe; that, having turned them into ready money, they may lend out the price on intereſt. Not that

this is a duty so strictly incumbent on them, that, if they shall not sell them, but preserve them for the use of their pupil, they will be liable to pay interest for the value, at which they might have been sold. All which I mean is, that the tutors do well, if they sell them; for they are not *civilly* bound to do it. Therefore, if they have not sold them, they are not liable for damage or interest; provided they take care of them, and keep them entire.

Hence, if the pupil has any moveables which are *sua natura* corruptible, and which it is impossible to preserve entire, or to hinder from being deteriorated; the tutor is strictly and civilly bound to dispose of these, and to hinder them from going to destruction. This, therefore, tho he is not bound to do *præcipiti festinatione*, he ought however to do not *moratoriâ cunctationê*, but so that the money, which is got for them, may be put out to interest, as soon as possible. Consequently, if he delays to do it, he is culpable, and is therefore liable to repair the damage to his pupil, *l.* 7. § 1. *l.* 50. *ff. de adm. et per. tut. l.* 3, 4. *C. de per. tut.* Such, for instance, are fruits, which go to destruction, if they are kept too long.

But there are other moveables, which it is the duty of a tutor not to sell, but to keep for his pupil. These are all those moveables, which admit of a price of affection, or are more valuable to the pupil than they can be to any other, because of something which attaches him to them, and makes him, according to the common customs of mankind, have a singular regard for them. Such are pictures of his ancestors, presents which he may have received from particular friends, curiosities that are not every day to be had, and things of this sort. These, therefore, and every other thing which he thinks proper not to dispose of but to keep for the use of his pupil, he is bound to take care to preserve entire; and for that purpose he ought either to keep them in some place, in which they may be safe from danger, or commit them to the charge of some careful person, *l.* 24. *C. de adm. tut.* He ought, in particular, to take care of the titles, instruments, writings, and deeds, belonging to his pupil. For these are the documents and the evidence, by which he proves his right to his estate.

§ 444. A tutor hath also the care of the heritable estate of his pupil (§ 442.). Hence, he ought not to allow his lands to be deteriorated either by those who cultivate them, or by others. If his houses stand in need of reparations, he ought to take care, that they be repaired, and be hindered from becoming ruinous, *l.* 22. § *nec vero domum*, *C. de adm. tut.* and to disburse, for this purpose, as much of the money of his pupil, as is necessary for defraying the charges of the reparations.

But a tutor is not bound himself either to cultivate or to rent the lands of his pupil. All which he is obliged to do, is to let them for the best terms, at which he can get any one to tenant them. 'Tis true, he should not, at his own hand, let them for a lower rent than that at which they were rented, when he accepted of the office of tutor. If no body will bid that for them, he ought *regularly* to apply to the Court of Session for a warrant to expose them to auction, and to let them to him who shall bid the highest rent, whatever it be, *St.* 5th *Feb.* 1670, *tutor of Cobzean.* But this is inconvenient, and is seldom done; and a tutor is allowed to let them without exposing them to auction, provided he does not let them for a rent lower than that which they are *really* worth. For a tutor is bound to manage the affairs of his pupil in the same way, in which a careful diligent man would manage his own. Therefore, if he does, in the case of his pupil, what a man of this character would have done in his own, he does his duty, and is in no sort culpable, *l.* 12. § 1. *l.* 33. *p. l.* 10. *ff. de adm. et per. tut. Fo.* 16th *July* 1680, *L. of Drummelzier.* Indeed, as to his houses he seems to have more ample powers; and is not obliged to expose them to auction, but may let them at the best terms he can.

A tutor can let the lands, houses, and other immoveables belonging to his pupil, not only for one year, but for several, *i. e.* he can *set tacks* or grant leases of them.

them. But theſe cannot be granted by him for a term, which may laſt longer than his office, *R. M. l.* 2. *c.* 42. § 4. For every leaſe granted by a tutor or by any other who has only a temporary right, determines at the ſame time, at which the right of him, who granted it, determines, *l.* 54. *ff. d. r. j.*—*H.* 16.

But it is *poſſible*, that the tutor may not be able to find any to tenant them. 'Tis his duty in this caſe to employ proper perſons to cultivate them for the benefit of his pupil, to diſburſe the money neceſſary for this purpoſe out of his pupil's eſtate, and to take care of the fruits yielded by them. For he ought not to allow his lands to lie uncultivated. But it is plain, that his power is in this caſe diſcretionary, and that he ought not to be made liable for accidents, provided he acts *bona fide* and to the beſt of his judgment. For it would be hard to make every farmer anſwerable for the conſequences of his labours. At the ſame time, he ought not either to throw out the money of his pupil on making experiments, or to depart from the uſual eſtabliſhed methods of culture, unleſs he is *almoſt* certain, that others will turn to good account. One may riſk ſome of his own money; but he ought not to take it upon him to throw away that of another, eſpecially of an infant, on hazardous adventures, *arg. l.* 11. *ff. de neg. geſt.*

§ 445. Beſides; a tutor, being bound to manage for the utility of his pupil, ought not to omit doing any thing, which it may be for the intereſt of his pupil he ſhould do, and which may be hurtful to him, in caſe it be omitted to be done. Hence it is the duty of every tutor to exerciſe the right of preſenting to every church, of which his pupil is patron: for the intereſt of the pupil may be hurt by neglecting to exerciſe his right; and by the ſettlement of his preſentee he apprehends *poſſeſſion*, and may thereby ſecure his title to the *patronage itſelf* by the poſitive preſcription, *R. M. l.* 2. *c.* 42. § 1.

§ 446. A tutor has the management of the eſtate of his pupil; he muſt therefore be bound to do, in his name, every thing which the pupil himſelf is obliged, and if he was major, could be compelled to do; becauſe thoſe, to whom the pupil is bound, ought not to be hurt by his nonage. They ought to have all the obligations, by which he is bound to them, fulfilled in the ſame way as if he were come of age. But his tutor has alone power to manage his affairs. Therefore, he ought to fulfil all the obligations, with which his pupil is bound. Hence, if they are pecuniary, he ought to perform them by paying the debts due by his pupil, *R. M. l.* 2. *c.* 42. § 6. If they conſiſt *in factis præſtandis*, he ought to fulfil them by doing inſtead of his pupil thoſe things, which his pupil is bound to do.

And becauſe he ought to manage for the utility of his pupil, he ought therefore, in all caſes in which it is clear that the pupil is obliged, not to delay fulfilling his obligations, till he be compelled by Law in conſequence of the pronunciation of a decree againſt him. For it is for the intereſt of the pupil, that his tutor refuſe not to pay his juſt debts. Therefore the Law not only allows a tutor to pay debts which are truly due by his pupil, before a ſentence is pronounced againſt him, *St.* 9th *July* 1667, *Steven;* but reckons he does wrong, if he refuſes to pay voluntarily, allows an action at Law to be brought againſt his pupil, and puts him to the expence of maintaining a ſuit, in which he muſt be caſt. By conſequence, a tutor, who is ſo fooliſh as to throw away money on a groundleſs plea, is culpable, and is not entitled to be reimburſed or to get allowance of the coſts of ſuit in his accompts. *Nec enim prohibentur tutores bonam fidem agnoſcere, l.* 9. § 6. *l.* 10. *ff. de adm. et per. tut.*

Nay, not only is he not entitled to be repaid the money which he may have fooliſhly thrown out on an idle law-ſuit, but is even obliged to indemnify his pupil of the loſs which he may have happened to ſuſtain thro his fault. Thus, if by his delay he is obliged either to pay intereſt for money which did not bear it; or to pay more than he would have done, in caſe no delay had been committed; or has been ſubjected to any legal or conventional penalty; or has ſuffered any

ſort

ſort of damage; the tutor, whoſe delay was culpable, is bound to make up to him, all the loſs which has been ſuſtained thro his fault, *l.* 23. *C. de adm. tut. l.* 78. § 2. *ff. de leg.* II.

It is no matter to whom the debt is due, 1) whether to the tutor himſelf or to any other. For a tutor not only has power, but is even obliged to pay debts due to himſelf, as well as thoſe due to others by his pupil, *l.* 9. § 5. *ff. de adm. et per. tut.* provided the pupil has funds out of which payment may be made, and it is for his intereſt that the debt due to his tutor be paid rather than any other. Conſequently, if a tutor ſhall in a caſe of this kind neglect to pay himſelf, his delay ought not to hurt his pupil. So the pupil will be bound to pay him no more than he was obliged to pay at that moment, at which it became the duty of his tutor to pay himſelf. Therefore, the courſe of intereſt begins then to ſtop, and the tutor muſt bear every other loſs, which may happen to ariſe from his own fault, *l.* 3. § 4, 5, 6. *ff. de contr. tut. et act.*

Since he is bound to pay debts due to himſelf as well as thoſe du uto others, and has the management of the effects of his pupil, hence law preſ mes, that he has done his duty, and has actually paid himſelf. Therefore, action commenced by the tutor, in order to recover payment of a debt due to him by his pupil, cannot be ſuſtained, at leaſt decree cannot be made in his favour, till he has accounted; for till that time he is preſumed *intus habere*, to have the effects of his pupil in his poſſeſſion, and to have applied them towards clearing the debt due to himſelf. Conſequently, he muſt account for his adminiſtration, in order to ſhew that he either has not paid or could not pay himſelf, ere action can be ſuſtained to him for payment, *Go.* 13th *Dec.* 1676, *Lord Melvil.*—26th *July* 1677, *Lord Raploch.*—*Home*, *Nov.* 1685, *Niſbet.*—*H.* 990. This preſumption is ſo ſtrong, that a tutor cannot, even after the courſe of the decennial preſcription of tutorial accompts is run, ſue his pupil for any debt due by him before the expiration of his office, *or before he accounted for his adminiſtration.* I mean not, that the preſcription of the tutorial accompts is an abſolute diſcharge of the debt; but that action does not lie to the tutor, unleſs he is, even after his pupil has, by the decennial preſcription, loſt his right to call him to accompt, yet willing to enter into an accompt, and to ſhew, that it is not paid, *Da.* 124.—*B.* 16.—*D.* II. 51. 17th *June* 1737, *Sir John Scot of Ancrum.* For Law preſumes, *præſumptione juris et de jure*, that it was paid, unleſs he ſhews, that it was not.

This preſumption ſtriking ſo ſtrongly againſt the tutor, it is plain, that it muſt ſtrike as ſtrongly againſt all who are held to be the ſame perſons with him, *v. g.* his heirs, *Da.* 124.—*B.* 16. or his aſſigns, *Di.* 376.—*St.* 2d *Dec.* 1679, *Cleland.*

§ 447. But it may happen, that a tutor will not fulfil an obligation of his pupil, till he is compelled to do it. Hence it may be neceſſary to uſe legal diligence, in order to compel him. But he is not himſelf the perſ n, out of whoſe eſtate payment of the debts of his pupil can be exacted: for he does not owe them. Therefore, a decree pronounced againſt the pupil for payment of money or recovery of ſomething pecuniary out of his eſtate, cannot be executed upon the eſtate of the tutor. For he is not bound to pay a debt due by his pupil, ſince he is only, as it were, his procurator. But execution of a ſentence pronounced againſt one cannot be made upon his procurator, *l.* 4. *p.* § 1. *ff. de re jud. l.* 2. *ff. de adm. et per. tut. l.* 7. *ff. quando ex facto tut. Officium ſuum nemini debet eſſe damoſum. l.* 61. § 5. *ff. de furtis.* Nor can it be executed on his perſon: for he is not the principal debtor. 'Tis otherwiſe, in caſe the obligation conſiſts *in facto præſtando*, that is, not in *giving*, but in *doing*. Execution may, in that caſe, paſs againſt his perſon, in order to force him to *do* that, *præſtare factum*, which it is his duty and is in his power to do. For it cannot be *done* by his pupil, who is incapable of doing any thing; and conſiſting *in faciendo*, it cannot be recovered out of the eſtate of the pupil. Therefore

fore it muſt be done by the tutor. Thus, if any thing arreſtable has been arreſted in his poſſeſſion, action may be brought, and execution be done againſt him, in order to force him to make it forthcoming. In the ſame manner, he may be compelled to give ſeiſin to vaſſals, who hold their lands of his pupil. In ſhort, every act, which it would be incumbent on the pupil to do, if he was major, the tutor is bound to do in his ſtead; becauſe a tutor ſupplies the place of his pupil, and is obliged to act for him.

§ 448. A tutor may not only pay debts due by his pupil, but alſo receive payment of thoſe due to him, and grant acquittances of them when paid. Nay not only has he power to receive payment of them, but it is his duty to take care, that they be paid. Conſequently, if the debtors refuſe to pay him, he has right to demand payment from them, and to bring actions againſt them, in order to have them decreed and compelled to pay, *R. M. l.* 2. *c.* 42, § 7. provided it be for the intereſt of the pupil, that payment be exacted. For if it is not for his intereſt, 'tis the duty of the tutor not to demand it.

Hence, a tutor is bound to get payment of all ſuch debts due to his pupil, as bear no intereſt. For it is evidently promotive of the utility of the pupil to have money, which is barren and unfruitful, paid him and lent out on intereſt. Conſequently, if a tutor neglects to demand, and does not do what it is his duty to do in order to recover payment, he begins to be culpable, and muſt therefore be bound to pay intereſt for the money which he ought to have exacted from that moment, at which he ought to have had it lent out.

Therefore, a tutor is bound to do diligence, in order to get payment of all the money, which does not bear intereſt, and is due to his pupil *before* the commencement of his office, and to have it lent out at intereſt, within a year from and after that time, *St.* 9th *July* 1667, *Steven.* No matter 1) Whether the monies, due to his pupil, be principal ſums bearing intereſt; rents of lands or of houſes; intereſt of money due for ſums bearing intereſt; annual-rents out of lands; or what they be; provided they are ſums, that bore no intereſt, and were due and demandable before the tutor accepted of the office, *St.* 27th *Feb.* 1673, *Douglas.*—*Fo.* 16th *Jan.* 1696, *Irvine.* By conſequence, if he neglects to do his duty, and to lend them out on intereſt, he muſt himſelf be bound to pay it for them; becauſe he ought not to allow the money of his pupil to be idle, *l.* 15. *ff. de adm. et per. tut.* No matter, 2) Whether he has let it lie idle, or has interverted it to uſes of his own, or what he has done with it, *l.* 7. § 3. 4, 5, 6, 7, 9, 11, 12, 13. *ff. eod.* He is himſelf liable for intereſt, till he lays it out, and in caſe he does not at ſome time during his office lay it out, till he repays it, *Du.* 18th *March* 1628, *Naſmith.*—17th *July* 1630, *Vallanges.*—5th *July* 1637, *M'Duffs.* No matter 3) By whom the money is due, whether it be by himſelf or by any other, for he not only has power, but, if it is for the utility of his pupil, is obliged to pay debt due to his pupil by himſelf. Otherwiſe, he will be at leaſt as ſtrictly liable, as if he did not get payment from another, *l.* 7. § 4, 5, 12. *ff. eod. l.* 9. § 1, 2, 3, 4, 5. *eod.*

If he has not neglected his duty, but has done all which Law requires of him in order to recover payment, and has not been able to recover it, he will not be liable for intereſt; for one, who does his duty, is not culpable.

Nor, if he has recovered payment, will he be himſelf liable for intereſt, tho he ſhould not have lent out the money within a year from his acceptance of the office of tutor; provided he has done all which he could, but has not been able to find any reſponſible perſon, to whom he could lend it. For neither in this caſe is there any thing, for which he can be ſaid to be culpable, *l.* 12. § 4. *ff. de adm. et per. tut. l.* 3. *C. de uſu. pupil.* But it can ſeldom happen, that a tutor will not be able to find proper perſons, to whom he may lend the money of his pupil; this excuſe therefore will not eaſily be admitted: indeed, it cannot be admitted at all, if the tutor lent out his own money at the ſame time, at which he

ſays he could not find proper perſons, to whom he could lend that of his pupil, *l.* 13. § 1. *ff. de adm. et per. tut.*

§ 449. A tutor is bound to get payment not only of ſuch debts as were due to his pupil, before he accepted of the office of tutor, but alſo of ſuch as become due to him during his continuance in it. All theſe he is bound not only to have got paid, but alſo to have lent out on intereſt within a year from and after the time, at which they become due. This is a general rule relating to all debts, which become due to the pupil during the tutory. It extends, therefore, 1) To rents of lands, of houſes, and of all other immoveables, whether they be due by vaſſals of the pupil as to their ſuperior, or by his tenants as to their land-lord; 2) To annual-rents out of lands; 3) To tithes; 4) In ſhort, to every debt, which becomes due to the pupil during the tutory, *v. g.* to the intereſt of the prices of his goods, which have been ſold by auction, *Fo.* 20th *Nov.* 1678, *Hay of Drummelzier.*—16th *Jan.* 1696, *Irvine.*—29th *Nov.* 1683, *Wilſon.* Nor is there any difference, whether the debts be payable in money, in grain, or in any other thing: for the Law reckons it gives a tutor full time, when it allows him a year both to turn the goods into money, and to lend out the price, *Fo.* 2d *Dec.* 1679, *Hamilton.* Therefore, if he has not them lent out within that time, Law conſiders him as culpable, and, of conſequence, makes him liable for intereſt from the time, before or at which the money ought to have been lent out, except he has not been able either to recover payment, or to find reſponſible perſons to whom to lend it; becauſe, in caſe he has done his duty either to recover payment, or to get the money lent, he is not culpable.

However, there is an exception to this rule: For a tutor is not bound to lend out *intereſt*, which becomes due to his pupil during the tutory for ſums of money bearing intereſt, within a year from the ſeveral terms at which it becomes ſucceſſively due. All, which the tutor is in this caſe bound to do, is to accumulate into one principal ſum the whole intereſt that becomes due at ſeveral ſucceſſive terms during the tutory, and to have it all lent out on intereſt before or at the expiration of his office. Conſequently he is liable for intereſt of theſe intereſts only from the time, at which the tutory expires, *St.* 27th *Jan.* 1665, *Kintore.*—*Fo.* 20th *Nov.* 1678, *Hay of Drummelzier.*—16th *Jan.* 1696, *Irvine.*—2d *Dec.* 1679, *Hamilton.*—*Home*, *Dec.* 1682, *Irvine.*—*Nov.* 1686, *Inglis.*—*Fo.* 10th *July* 1688, *Wilſon.* But as theſe are the only ſums belonging to the pupil, which his tutor is not obliged to lend out on intereſt; 'tis plain, that they, in the firſt place, ought to be applied towards defraying the expences of the maintenance, education, *&c.* of the pupil; that the tutor ought not to be allowed to make diſburſements out of other funds belonging to the pupil, till they are exhauſted; and, if he has made them, he ought not to be allowed to ſtate them ſo in his accompts. For if he were, it would be a manifeſt gain to him; ſince he muſt be preſumed to have interverted them to his own uſe. But a tutor, who applies the money of his pupil, whether it be principal or intereſt, to the uſe not of his pupil but of himſelf, is, in all caſes, liable for intereſt of it, *l.* 7. § 4. 12. *ff eod. quia lucrum facere ex tutela non debet*, *l.* 58. *p. ff. de adm. et per. tut.*

§ 450. A tutor being bound to exact payment of the debts due to his pupil, if it is for the utility of the pupil, that it be exacted; he muſt of courſe be bound from the moment, at which he accepts of the office till the expiration of it, to watch over the debtors of his pupil, and to hinder him from loſing his money by their inſolvency. Therefore, as ſoon as he ſuſpects or has reaſon to ſuſpect, that they may happen to become inſolvent, 'tis his duty to uſe all diligence, in order to obtain payment. For if a tutor delays to demand and to do diligence, in order to recover payment of a debt due to his pupil, and the pupil happens, in conſequence of the negligence and the culpable delay of his tutor, to loſe any or all of his money; the tutor, through whoſe fault the loſs has been ſuſtained, is bound to make it up, and to pay the money to his pupil, *l.* 15. *ff. de adm. et per. tut.* But, a tutor is not bound to make up loſs ſuſtained by his

his pupil, unleſs he has done ſomething for which he can be ſaid to be culpable; therefore 1) If the money of his pupil was in the hands of one, who was in no ſort liable to be ſuſpected, but happens to give way and to become bankrupt all of a ſudden, when nobody ſuſpected him of being inſolvent; the tutor cannot be liable to make up a loſs occaſioned by ſuch an accident: *quia nemo caſum præſtat, l. 50. ff. eod. St.* 9th *July* 1667, *Stevens.—Fo.* 7th *July* 1699, *M'Murdoch.—Da.* 19. He is not liable 2) In caſe the inſolvency happens after the expiration of his office; becauſe a tutor, as ſoon as his office expires, ceaſes not only to be bound, but to have right to intermeddle in the affairs of his pupil, *l.* 39. *p. l.* 43. *p. l.* 47. § 5. *ff. eod. St.* 18th *Nov.* 1671, *Caſs.* Nor 3) If he has done all the diligence the Law requires of him to do, in order to recover payment.

The Law requires a tutor to do diligence in order to recover payment in all caſes, in which he has reaſon to believe, that he will recover more than will pay the expence of the diligence; becauſe it is evident that this is for the utility of the pupils. Therefore, if it is impoſſible for him to recover more, he is not bound to do any diligence; becauſe he would only, by doing it, give himſelf trouble, and could bring no profit to his pupil. Conſequently, he will not, in this caſe, be bound to make up the loſs to his pupil, *Ha.* 6th *Feb.* 1623, *Watſon.—Du.* 2d *July* 1628, *Hamilton.—Fo.* 16th *Jan.* 1696, *Irvine.* But if he would have recovered ſomething, he muſt be bound to make good to his pupil that, which he might have recovered by doing diligence, *Go.* 17th *Feb.* 1670, *Balfour.—Fo. Duff.*

The diligence, which he is bound to do, muſt be ſuited to circumſtances. For he ought, in all caſes, to uſe that diligence, by which the eſtate of his debtor may be attached, and which may be moſt beneficial to his pupil. Thus, 1) If the debtor has lands or other immoveables, he ought to adjudge, *Fo.* 15th *Feb.* 1693, *Cathcart;* 2) If he has moveable *corpora*, he ought to poind; 3) If he has ſums of money in the hands of others, he ought to arreſt them; and 4) If it will be uſeful, he ought to do perſonal execution, *St.* 9th *July* 1667, *Steven.*

From all this it follows, that if a tutor omits to do diligence for debts due to his pupil, he muſt make up the loſs which his negligence has cauſed his pupil to ſuſtain. Not that the tutor is bound to ſue at random every one, who is ſaid to be a debtor of the pupil; he is not bound to ſue thoſe, who, it is evident, are not indebted to him; and, if he is ſo raſh as to ſue them, he will not be entitled to get from his pupil allowance of the coſts of ſuit. The Law looks on groundleſs ſupervacaneous pleas, commenced in appearance by tutors in order to promote the intereſt of their pupils, with as much diſfavour as it does on thoſe, which tutors, tho it is clear that they are well founded (§ 446.) againſt their pupils, are yet ſo litigious as to defend. But, if the plea of his pupil is doubtful, he ought to proſecute it either in a judicial or in an extra-judicial manner, *Fo.* 11th *Feb.* 1702, *Elphinſton.*—14th *Dec.* 1710, *Smith.*

§ 451. Since a tutor is bound to proſecute the doubtful claims of his pupil, and ought to manage for his utility, 'tis plain, that he may, in ſome caſes, compound them either by an extra-judicial tranſaction, or by ſubmitting them to the deciſion of arbitrators; becauſe it may happen to be moſt promotive of the utility of the pupil to determine them in this manner, *l.* 54. § 5. *l.* 5. § 4. *ff. de furt.* Hence, both tranſactions, and the awards of arbitrators called in Scotland *Decreets-arbitral*, concerning the affairs of pupils, uſe to be either ſuſtained or ſet aſide by the Court of Seſſion, according to circumſtances, *Fo.* 24th *Jan.* 1700, *Balfour.*—14th *Nov.* 1711, *Aitkenheads.*—18th *Jan.* 1711, *Aiton of Kinaldie.* Whether they ſhould be ſuſtained or ſet aſide, muſt depend chiefly on two things, 1) On the doubtfulneſs or certainty, 2) On the greatneſs or ſmallneſs of the claim of the pupil. For if it is clear, that the pupil has a good claim, and that he would prevail on bringing an action at Law, the tutor ought not either to tranſact it and to agree to accept of leſs, or to ſubmit it to the determination of arbiters, becauſe

cauſe his pupil may happen, in conſequence of their ſentence, to get leſs than he has a juſt and undoubted claim to. A tranſaction, therefore, of a claim of this kind would be referred to thoſe, which are ſaid in the Law, *l.* 56. § *ult. ff. de adm. et per. tut.* to be made *deminuendi cauſa.* 2) If the extent of the claim is ſo great that the expence of a law-ſuit would be but a trifle compared with it, and ought not to be regarded, when ſo great a matter is at ſtake; a tranſaction concerning it ought not to be ſuſtained. Hence the Law has, in all caſes, rejected tranſactions made by tutors about the immoveable eſtate of their pupils, *l.* 4. *C. de præd. et aliis reb. min.* becauſe it thinks immoveables too valuable to be allowed to be alienated by tutors, without the leave of the Court of Seſſion. Therefore, *ex paritate rationis*, a tranſaction of a great moveable claim ought to be rejected. For moveables of value are, in ſome ſort, at leaſt, they were by the Roman Law, regarded in the ſame light with immoveables, *l.* 22. *C. de adm. tut.* The difference between tranſactions relating to immoveables, and thoſe relating to moveables, is this, that a tranſaction made by a tutor about an immoveable, claimed by his pupil, is *ipſo jure* void, and may be declared to be ſo at any time either by exception or by reduction, if by it the pupil is deprived of the immoveable he claims, *l.* 4. *C. de præd. et aliis reb. minor.* Whereas one concerning a moveable claim *ſummo jure* ſubſiſts, and is effectual, unleſs it be ſet aſide by a decree of the court of Seſſion. Therefore, it is not liable to be rejected as void by way of exception, *l.* 1, 2. *C. ſi adver. tranſact.* And, *ex paritate rationis*, every thing, which has been ſaid concerning tranſactions, is equally true of ſubmiſſions; for they are a ſpecies of tranſactions.

§ 452. Since a tutor may both receive and ſue for payment of debts due to his pupil, it muſt follow, that payment, made to him, muſt releaſe the debtors from their debts; that diſcharges, granted by him to them, are as valid, and extinguiſh their obligations as effectually as diſcharges granted by the pupil himſelf, if he had been come of age; in ſhort, that payment made to a tutor, and diſcharges granted by him on payment of debts due to his pupil have all the effects of diſcharges granted by any, who have a full and free power of managing their own affairs; for it would be hard to compel one to pay, and at the ſame time not to allow that payment releaſed him from his obligation, *l.* 46. § 5. *ff. de adm. et per. tut. l.* 12. *p. l.* 14. 49. 96. *p.* § 1. *l.* 100. *ff. de ſolut. l.* 1. *C. ſi adver. ſolut. l.* 25. *C. de adm. tut. Go.* 24th *Feb.* 1670, *Applegirth.—A. tutor*, 8th *Jan.* 1629, *Geddes.* But payment cannot be made to the pupil himſelf: for he might throw away the money. Therefore, if it is made to him, the debtor is freed not *in totum* of what he has paid, but only in ſo far as the money has been turned to the profit of the pupil, *quatenus pupillus locupletior factus eſt;* becauſe no body can be in *bona fide* to pay to a child.

§ 453. Tutors are alſo bound to watch over the conduct of one another, and to hinder their pupil from being hurt by the negligence of thoſe who are liable to be ſuſpected, and ought therefore to be removed either altogether from their office, or at leaſt from the exerciſe of it, *l.* 3, § 2. *ff. de adm. et per. tut. l.* 14. § 1. *ff. de ſolut.* In ſhort, tutors, ſince they have the care of ſuch as are not able to take care of themſelves, ought to be attentive to the intereſt of their pupils, to do every thing which may promote it, and to hinder any thing from being done which may not be for it.

But it is impoſſible to define by particular Laws every caſe which may happen, and every duty which may be incumbent on tutors: for the variety of human affairs is greater than that of human imaginations. Caſes therefore muſt frequently fall in, which muſt be left to be directed by their diſcretion; and tutors may, on particular occaſions, be entitled to do ſeveral things, which they are not civilly bound to do. Thus, they may employ the money of their pupil on buying land, if a purchaſe convenient for him offers. In the ſame manner if his eſtate is either extenſive, or ſo ſituated that it is not eaſy for them to manage it, they may name factors, ſtewards, or chamberlains to manage it under them, and

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may appoint ſalaries to them, *l.* 1. § 6. *ff. de tut. et rat. diſt.* Theſe and deeds of the ſame kind will be adjudged to be juſtifiable acts of adminiſtration.

§ 454. Their office is not either mercenary or lucrative. Therefore, they cannot turn their adminiſtration to their own profit, ſo as to make gain by it, *l.* 58. *p. ff. eod.* Of courſe, if they employ the money of their pupil on the affairs, and intervert it to the uſe not of their pupils but of themſelves, 'tis plain, that they muſt be liable to pay *legal* intereſt for it, *l.* 7. § 4. *ſqq. l.* 54, 58. § 1. *ff. eod. l.* 1. *C. de uſur. pup.*

For the ſame reaſon, a tutor cannot be *auctor in rem ſuam;* that is, he cannot do any thing in the adminiſtration of his truſt, or authoriſe his pupil to do any thing, which is directly and principally promotive of his own intereſt, *l.* 1. *p. l.* 7. *p. ff. de auctor. et conſen. tut. et curat. C. March* 1583, *Lord Sanquhar.*—*St.* 7th *Dec.* 1666, *M'Kenzie.*—25th *July* 1667, *M'Kenzie.* Hence a tutor cannot do any thing by which it is directly and principally intended to bring his pupil under an obligation to him. Thus, he cannot lend him money, *l.* 5. *p. ff. eod.* he cannot buy the goods of his pupil, becauſe he cannot be both buyer and ſeller at one and the ſame time; beſides, it is probable he would be more careful of his own intereſt than of that of his pupil, *l.* 34. § 7. *ff. de cont. empt. l.* 5. § 2. *ff. de auct. et con. tut.* However, there is one exception to this rule; for if any of the goods of the pupil happen to be expoſed to auction, a tutor is as free as any other to buy them; becauſe there is no danger of loſs to the pupil, ſince the goods muſt be ſold to the higheſt bidder, *l.* 5. *C de contrah. empt. l.* 5. § 4, 5. *ff. de auct. et con. tut. et cur.* In the ſame manner, if any action at Law is brought either by a tutor againſt his pupil, or by the pupil againſt his tutor, the tutor cannot authoriſe his pupil in it, § 3. *J. de auct. tut.* In theſe caſes, and in all others of the ſame kind, Law apprehends, that tutors would prefer their own intereſt to that of their pupils. To hinder them, therefore, from dealing doubly, it deprives them of the right of authoriſing their pupils in them; leſt they ſhould be tempted to do unjuſtly by them.

Conſequently, if it happens, at any time, to be neceſſary for the tutor to do with his pupil any thing, by which the utility of the tutor himſelf may be promoted, the pupil cannot do it by that tutor, whoſe intereſt it may promote; he muſt do it by ſome other.

If the pupil has more tutors than one, the reſt of them may act for him; provided they have power to act without the concurrence of that one, who is immediately intereſted in the matter, *l.* 5. *p. l.* 4. *ff. de auct. et con. tut. l.* 24. *ff. de teſt. tut. l.* 1. *C. de in lit. dand. tut.* For, if the reſt have not power to act without him; if he is a *ſine quo non;* or if ſo many of the tutors are intereſted, that a quorum does not remain to act; in ſhort, if thoſe, who are not intereſted, have not power to act without either all or ſome of thoſe who are, it is neceſſary either to procure a gift of tutory-dative, if the matter is extrajudicial; or to get ſomebody legally impowered, if it is judicial, to authoriſe the pupil; or to get authority from the Court of Seſſion for doing it.

Since tutors are prohibited to be *auctores in rem ſuam* in thoſe caſes alone, in which their own utility is directly and principally promoted; it muſt follow, that they may authoriſe their pupils in all caſes, in which the utility of the tutors is not directly and principally, but only indirectly and conſequentially promoted. For they are bound to manage for the utility of their pupils, and to do every thing, which is neceſſary and lawful to promote it; no matter, though that, which they do, happens to bring ſome advantage conſequentially to themſelves, *St.* 20th *Feb.* 1672, *Carſtairs.* Hence, a tutor may do what is neceſſary for acquiring an inheritance to his pupil, tho the pupil ſhould, by acquiring it, become bound to pay either a debt due or a legacy left to the tutor, by him whoſe inheritance is acquired by the pupil, *l.* 1. *p. l.* 7. *p. ff. de auct. et con. tut.*

§ 455. Since a tutor is bound to manage for the utility of his pupil, and cannot either turn his adminiſtration to his own profit or be *auctor in rem ſuam*, it muſt follow, that he cannot acquire any right affecting the eſtate of his pupil; and that every right affecting it, tho it ſhould ſeem to have been acquired by him for his own behoof and to himſelf, is preſumed to have been really acquired for the behoof of his pupil. The benefit of it muſt, therefore, inure to the pupil. Thus, he cannot take an aſſignment to a debt due either by the pupil or by one whom he repreſents, *Ho. tutor*, 25th 1616, *Dewar*. For the aſſignment will be held to be taken in favour of the pupil. Nor can he accept of an aſſignment to a leaſe of the lands of the pupil: the aſſignment will be preſumed to have been taken to the pupil, and will produce the ſame effects, which it would have produced, in caſe it had been taken directly in favour of him, *Du.* 28th *March* 1632, *L.* of *Ludquhairn*. Nor can he acquire to himſelf any other right, relating to the eſtate of his pupil. He is preſumed in all caſes to mean to have acquired as truſtee for the behoof of his pupil. Conſequently, the benefit of every deed acquired by him muſt accrue to the pupil, *Du.* 30th *Jan.* 1629, *Earl of Rothes*.—*H.* 982.—*D.* II. 492. 17th *Feb.* 1732, *Cochran*; and the tutor is bound either to diveſt himſelf of it, or to do any other thing which may be neceſſary for conveying it to his pupil.

But rights, affecting the eſtates of minors, accrue to their pupils in thoſe caſes alone in which they are acquired by their tutors. Therefore, if they are acquired by perſons who were not their tutors at the time at which they made the acquiſition, but happen to become ſo afterwards, the benefit of them does not accrue to the pupil. For there is no reaſon for preſuming, in theſe caſes, that the perſon, who has acquired them, acquired either *mala fide*, or for the behoof of one with whom he had no connection at the time he made the acquiſition. Beſides, he did not in theſe caſes deal with himſelf; for he was not the tutor of his pupil, and either his eſtate or the management of it was veſted in others, *Go.* 27th *July* 1677, *M'Alexander*.—*H.* 990. *A fortiori*, if one, who has been tutor, ſhall acquire a right affecting the eſtate of one who was his pupil, after he has ceaſed to be ſo; the benefit of the acquiſition muſt belong to himſelf, and accrues not to him who was the pupil.

§ 456. From the ſame principles it follows, that tutors cannot make gratuitous alienations either of part or of all of the eſtates of their pupil, *R. M. l.* 2. *c.* 42. § 4. for that would be to hurt him, not to manage for his utility. Conſequently, they cannot give gifts or make preſents of any thing, which belongs to him, *l.* 22. 46. § *ult. ff. de adm. et per. tut.* Therefore, they have not power to compound with his debtors, or to remit any part of the debts due by them; no matter who the debtors are, whether they be or be not related to him. 'Tis true, they may, in caſe his debtor is inſolvent and they ſee that he has no proſpect of recovering all which is due to him, make the beſt of a bad market, and accept of as much as they can expect to get, rather than throw away money uſeleſsly in order to recover more; for they may do every thing, which particular circumſtances make reaſonable to be done.

§ 457. It can ſeldom be for the intereſt of the pupil to be involved in debt. Therefore, a tutor is not allowed to borrow money in the name of his pupil; and, if he preſumes to do it, the pupil is not regularly obliged to pay it to the creditor, who lent it. But it may *ſometimes* happen to be for the intereſt of the pupil, that his tutor borrow money for his behoof; he may not have immediate acceſs to his eſtate; and he may have no money to lay out on his maintenance. But it would be hard to tie up the hands of the tutor from doing what is neceſſary in order to keep his pupil from wanting either the neceſſaries, or ſuch of the comforts of life, as are ſuitable to his condition. In all caſes, therefore, the Law declares the pupil to be bound for money borrowed on his account by his tutor, *in quantum* it has been employed for his utility and profit, or, as the Lawyers ſay, *in quantum* it has been *in rem pupilli verſa*, *l.* 3. *C. quan-*

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do ex fact. tut. vel. cur. l. 2. *C. de cur. fur.* for it is a general as well as a moſt equitable rule, that pupils ſhould, in all caſes, be obliged in ſo far as they are *locupletiores facti, l.* 5. *p. ff. de auct. præſt.*

But the Law does not preſume, that every ſum of money, for which the tutor has granted bond in name of his pupil, was truly employed to his utility: for it is an eaſy matter for the tutor to cauſe the bond to be drawn in any terms, and after any manner, that are agreeable to himſelf. Law therefore preſumes, that none of the money was employed for his utility; relieves him of the *onus probandi*, that it was not employed for it; puts it either on the creditor or on the tutor to prove that it was *in rem verſa* of the pupil; obliges the pupil and ſuſtains action againſt him for ſo much and for no more, *St.* 21ſt *Feb.* 1671, *Armour.*

§ 458. Tutors have, it has been ſaid, (§ 443.), power to ſell the moveable *corpora* belonging to their pupil. But they cannot aſſign debts due to him, to others than thoſe individual debtors who pay them, *arg. R. M. l.* 2. *c.* 42. § 4. 'Tis true, they may receive payment of them, and may grant to the debtors diſcharges of thoſe paid by them: for this is an act of adminiſtration, which is ſometimes neceſſary and may often be profitable to the pupil. But to grant aſſignments of debts due to him, before receiving payment, can hardly be ſaid to be a proper act of adminiſtration, ſince it can ſeldom be for the utility of the pupil. Therefore, a tutor is not allowed a power, which at every time, at which it is exerciſed, is exerciſed not for the benefit of the pupil, but for the ſatisfaction merely of the wanton or capricious humour of his tutor, *A. tutor*, 8th *Jan* 1629, *Geddes.*—*Du.* 29th *Jan.* 1629, *Lauds.*—*St.* 14th *Dec.* 1667, *Campbell.*—*Fo.* 24th *July* 1694, *Cramond.*

But this reſtriction of the powers of tutors extends to ſuch debts alone, as are not paid. For a debtor, when he pays a debt due by him to a pupil, may inſiſt to have not only a diſcharge but alſo an aſſignment of it, granted to him by the tutor to whom he pays. The pupil, having received full payment of all that is due to him, can never be hurt by the aſſignment; ſince he has got all he could demand from his debtor, and is no more intereſted in the affair. Therefore, he muſt be, like every other creditor, bound to give his debtor a thing, which may be uſeful to the debtor, and can never hurt himſelf. So that the debtor, or he who can either be compelled to pay or compel payment to be received, has a right, upon making it, to inſiſt, that an aſſignment be granted to him by the tutor, *D.* II. 489. 31ſt *Jan.* 1735, *Graham.*

But a tutor cannot, on receiving payment of a debt due to his pupil not from the debtor himſelf, but from ſome other, grant to the perſon, who pays, an aſſignment of the debt due to his pupil by the original debtor; becauſe, if he were allowed to do ſo, he might eaſily defraud that Law, by which he is prohibited to borrow money in the name of his pupil; ſince it would be eaſy for him to pretend, that the perſon, from whom he had borrowed the money, had not lent it, but paid a debt due to the pupil by ſome other perſon. Beſides, it would be eaſy to defraud the Law, by which tutors are prohibited to grant aſſignments of debts due to their pupils; for it is always in their power to cauſe the aſſignment to be expreſſed in any terms, and to inſert in it any clauſes which they pleaſe. In order, therefore, to prevent fraud of every ſort, the Law holds all aſſignments of debts due to pupils, granted by their tutors to others than the real debtors who owed, but have not paid them, to be void. Nor is this either hard or whimſical: for the Law ought to take the greateſt care of pupils, and ought not, in order to ſave a little circuit or expence, to allow a thing to be done which may be hurtful to their intereſt. By conſequence, if the debtors who have paid, intend that the debts ſhould be aſſigned to others than themſelves, either they muſt in the firſt place get aſſignments of them granted to themſelves by the tutors, and then transfer theſe aſſignments by any proper deed, by which they may be conveyed to the perſons, to whom they intend to convey them; or they muſt be parties granting, agreeing, and ſubſcribing to the principal aſſign-

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ments made by the tutors to thoſe, to whom they mean the debts ſhould be aſſigned. Indeed, the Law is, in this caſe, ſo ſuſpicious of fraud, that it will not even allow one, in whoſe favour an aſſignment of a debt due to a pupil is granted, to prove, that it was granted for an onerous cauſe, for inſtance, for money employed to the utility of the pupil, *Fo.* 24th *July* 1694, *Crawfurd.* For he ought not to have taken an aſſignment of a debt, but to have got a bond expreſſive of the cauſe for which it was granted, and to have preſerved proofs of the uſes to which the money was truly applied.

§ 459. If a tutor is prohibited to aſſign debts due to his pupil, much more muſt he be hindered from making voluntary alienations of his heritable eſtate, *R. M. l.* 2. *c.* 42. § 4.—Sk. *not. ad d. l.* For all heritable things are of a durable and laſting nature, and are therefore conſidered by Law as the moſt valuable part of one's eſtate. Hence tutors are not allowed at their own hand to diſpoſe of the heritage of their pupils.

I. 'Tis the *heritage* of pupils, which their tutors are not allowed to alienate. Therefore, this prohibition extends not only 1) To lands, 2) Houſes, and, 3) All other immoveables; 4) But alſo to all the acceſſories of immoveables, and 5) To all thoſe things which are held by the Law of Scotland to be heritable, *l.* 1. § 2. *l.* 3. § 4. *ſqq. l.* 4, 5. *p.* § 1. *ff. de reb. eor. qui ſub. tut. l.* 22. *C. de adm. tut. l.* 13. *C. de præd. et al. reb. min.* For alienation is an act of extraordinary adminiſtration of the propriety, fitneſs, utility, or neceſſity of which, therefore, a tutor ought not by to himſelf be allowed to judge, when the thing, which is to be alienated, is held by Law to be ſo valuable as all heritables are preſumed to be.

II. To *alienate* is to transfer property, or to do a deed by which the property of a thing is transferred from one to another. Therefore, tutors cannot do any voluntary deed, by which the property of any thing heritable is transferred from the pupil to any other, either totally or partially, either perpetually or temporally. So that they are hindered not only 1) From ſelling, and 2) Exchanging, but alſo 3) From wadſetting the heritage of their pupils, 4) From granting annual-rents out of it, 5) From granting rights and infeftments upon it in ſecurity; 6) From impoſing ſervitudes on it; and 7) From doing every other thing, by which any right, that the pupil has in heritage, may be transferred from him to another.

III. But this prohibition is reſtrained to alienations alone. Conſequently, it extends not to ſuch neceſſary acts of adminiſtration, as can hardly be ſaid to be alienations; for inſtance, 1) To the power of granting leaſes of the pupil's lands; for it is neceſſary to let them to ſomebody, ſince the tutor is not himſelf obliged to cultivate them, and ought not to allow them to lie idle; nor 2) To the renewal of rights to vaſſals, becauſe nothing, which belongs to the pupil, is, in either of theſe caſes, conveyed away from him.

IV. It extends to *voluntary* alienations alone, that is, to ſuch as the tutor cannot be compelled to make. Therefore, it does not extend to *neceſſary* ones, that is, to ſuch as the tutor is compellable to make. For he is not incapacitated from making voluntarily ſuch as he may be compelled, and it is therefore neceſſary for him to make. *Nec enim prohibentur tutores bonam fidem agnoſcere, l.* 9. § 6. *ff. de adm. et per. tut.* 'Tis his duty to do voluntarily every thing, which he may be legally compelled to do; ſince he ought not to defend a ſupervacaneous, idle, or groundleſs plea. So the prohibition extends not 1) To renunciations of wadſets, *D.* II. 489. 31ſt *Jan.* 1735, *Graham;* 2) To diviſions of commons; 3) To the giving of ſeiſin to the heirs of vaſſals; or 4) To any other deed, which the tutor grants voluntarily, becauſe he knows that he may be forced to grant it.

V. Such alienations are alone prohibited, as are the voluntary deeds of tutors. Therefore thoſe are not prohibited, which are made by the Law itſelf. Conſequently, the prohibition extends not to thoſe diligences, by which the heritage of the pupil may be either attached or conveyed from him at the ſuit of ſuch, as have right to uſe them. Such are 1) Creditors, who either adjudge or arreſt

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the heritage of the pupil; 2) Proprietors, who ſue for the diviſion of commons belonging *pro indiviſo* to the pupil and them; becauſe theſe perſons have a right to attach the things themſelves, of which they ought not to be fruſtrated by the accidental condition of their owner.

An alienation made voluntarily by a tutor of heritage belonging to his pupil is made *a non habente poteſtatem*, by one who is incapacitated from making it. Therefore, it is held to be *ipſo jure* void, and the right of the pupil remains entire; ſo that he can get the alienation ſet aſide, and can claim the thing alienated at any time, before he, in whoſe favour the alienation is made, hath acquired an abſolute and indefeaſible title by preſcription, in caſe he has not ratified it. For, if the pupil or his heirs neglect their right, if they allow preſcription to run its full courſe, ere they attend to their own intereſt, they muſt be held to have loſt and to be content to loſe their right of getting the alienation ſet aſide; provided always the preſcription does not begin to run till that pupil, by whoſe tutor the alienation was made, comes of age, and ceaſes to run during the minority of any of his ſucceſſors. For the times of the minorities of thoſe, againſt whom even the poſitive preſcription is running, are not counted in order to complete the full courſe of it, *C. F.* 118. But if, after deducting theſe, preſcription hath run its complete courſe, the right is indefeaſibly acquired by him, to whom it was granted by the tutor. The pupil is alſo barred from getting the alienation ſet aſide, in caſe he hath ratified it after his majority, either expreſsly or tacitly; for inſtance, 1) By ſuing the purchaſer for the price; 2) By renewing rights to his heirs; 3) By accepting of payment of their *reddendo;* 4) By accompting with his tutors for the price; or 5) By any other deed, by which he confirms, ratifies, or *homologates* the alienation, *l.* 10. *ff. de reb. eor. qui. l.* 1, 2. *C. ſi maj. fact. alien.*—*C. F.* 169.

All reſtitutions are reciprocal. Therefore, if the pupil deſires to get back that, which his tutor has alienated, he muſt reſtore to him, from whom he claims it, the price which was paid, or the thing which was given for it to his tutor; provided this has been employed to his utility, *in rem jus verſum.* For this is no more than is required by equity, and has therefore place in all reſtitutions, *l.* 4, 10, 16. *C. de præd. et al. reb. min. l.* 24. § 4. *ff. de min.*

But the pupil is not obliged to have recourſe to the thing itſelf, which has been alienated. He may, if he pleaſes, allow the alienation to ſubſiſt, and bring an action againſt his tutor for the damages which he has ſuſtained by it, *l.* 5. § 15. *ff. de reb. eor.* For a tutor, who takes it upon himſelf to alienate the heritage of his pupil, is guilty of mal-adminiſtration; but he is bound to manage for the utility of his pupil; therefore, he ought to make up the damage, which his pupil may have happened to ſuſtain through his fault, *l.* 6, 7. *C. arb. tut.* The action, by which the pupil ſues his tutor, is the very *actio tutelæ directa.*

§ 460. But the Law, tho it hath prohibited tutors to take it upon themſelves to judge, when it is proper to alienate the heritage of their pupils, hath not however enacted, that it ſhall never and in no caſe be alienated. For circumſtances may make it not only reaſonable, but abſolutely neceſſary to alienate it. Therefore, on ſuch occaſions, it ordains application to be made by the tutors to the Court of Seſſion for leave to alienate it.

A ſummons * therefore muſt be iſſued, at the ſuit of the pupil and his tutors, againſt his creditors, his heir, and his neareſt relations, and ſerved upon them, citing them to appear before the Court of Seſſion, to hear and ſee it found and declared to be neceſſary, and leave granted to alienate the heritage of the pupil. After the previous formalities have been obſerved, the cauſe proceeds; and the neceſſity of the caſe is, on the part of the tutors, repreſented to the Lords, who, if they are of opinion, that the alienation is neceſſary, authoriſe it to be made.

It is held to be *neceſſary* to diſpoſe of it, in all caſes, in which it would be either abſolute ruin for the pupil to keep it, or much for his advantage to ſell it. Of

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* For it cannot be done on a ſummary petition, *l.* 1. § 2. *l.* 11. *ff. de reb. eor. l.* 6. *C. de præd. et al. reb. min. l.* 71. *ff. d. r. j.*

courſe, there muſt be many cauſes, which may make the alienation neceſſary. The principal as well as the moſt common one is debt, *l.* 1. § 2. *l.* 5. § 9, 10, 11, 12, 13. *ff. de reb. eor. l.* 12. *C. de præd. et al. reb. min.* the pupil may be over-burdened with it, and may not have any other way of paying it than by ſelling his heritage; the intereſt, which he muſt pay, may exhauſt either the whole annual profits of his eſtate, or ſo much of them as to leave no overplus for his maintenance. It is plainly in this caſe for his intereſt to part with his land; and the Court of Seſſion will authoriſe the ſale.

Beſides this one, there may be many other cauſes, for which it is lawful to authoriſe the ſale of the eſtate of a pupil; for many others may make it for his intereſt to part with it. A part of his eſtate may be vaſtly more valuable to another than it is to him, and he may get much more for it than it is worth. The price may be employed in making a purchaſe in itſelf more valuable and equally convenient for the pupil. In theſe circumſtances it is perhaps lawful to authoriſe the ſale, becauſe it is much for his advantage. But it is needleſs to make a particular enumeration of all the caſes ſtated by the Lawyers. 'Tis ſufficient to remark in general, that the Lords of Seſſion have, in this as well as other matters, a Prætorian power, and may determine every caſe brought before them according to the circumſtances of it, making the utility of the pupil, and juſtice, the meaſures of their deciſion.

For this reaſon, they ought to take an accurate cognizance of the cauſe, to hear the allegations of parties, to conſider the evidence brought them of the ſituation of the affairs of the pupil, and to form their judgment on the whole complexion of the caſe after that manner, which may be moſt for his good, *l.* 1. § 2. *l.* 5. § 9, 10, 11, 12, 13 *ff. de reb. eor.*

If the Lords ſhall, after they have taken cognizance of the caſe, be of opinion, that the heritage ought to be ſold, they find, that it is for the intereſt of the pupil to ſell it, authoriſe the ſale, and order it to be made.

One reaſon for obtaining the authority of the Court of Seſſion upon a proof made of the neceſſity of the caſe, is, that people chuſe not to have unneceſſary dealings with pupils, becauſe they know that minors have the privilege of reſtitution, and that they may thus be involved in a Law-ſuit concerning their purchaſe. But a decree of the Lords authoriſing the ſale prevents ſuſpicions; and the pupil will not be reſtored againſt it, unleſs he ſhall prove that the Court was impoſed on by falſe allegations, and that they had not the true ſtate of the caſe laid before them, *l.* 1. § 2. *l.* 5. § 15. *ff. de reb. eor. l.* 5. *C. de præd. et al. reb. min.* Beſides, the ſale is not, even in this caſe, *ipſo jure* void: the minor muſt ſue to be reſtored againſt it, within his *quadriennium utile;* becauſe a ſale, ſolemnly authoriſed by the Court of Seſſion, ought not eaſily to be ſet aſide, ſince this would occaſion the greateſt uncertainty in the rights of mankind; tranſactions made *bona fide*, after obſerving all the forms invented by Law for preventing fraud, ought not to be annulled.

§ 461. A tutor is not a proprietor, but an adminiſtrator. Conſequently, he cannot exert his powers capriciouſly, ſo as to do neither good nor ill to his pupil. Hence, he cannot at pleaſure alter the nature of the eſtate of his pupil from heritable to moveable, or from moveable to heritable, becauſe no pupil has a power to diſpoſe of the ſucceſſion to it. If he happens to die during his pupilage, the Law diſpoſes of it for him, and makes his heritage paſs to his heirs, and his moveables to his executors. Therefore, his tutors cannot wantonly do a deed, by which the intentions of the Law are fruſtrated.

But they are not incapacitated from doing *reaſonable* deeds of adminiſtration, tho the conſequence of them ſhould be to alter the nature of the rights and the order of the ſucceſſion to the eſtates of their pupils, *l.* 25. *ff. de leg.* All, which they are hindered from doing, is to do capricious deeds, on purpoſe to alter the order of ſucceſſion, and to make them deſcend to others than thoſe to whom

whom they would deſcend, in caſe theſe deeds had not been made, *St.* 5th *Dec.* 1665, *Hill.*—*H.* 14.—*Fo.* 12th *July* 1688, *v.*

§ 462. Pupils have rights: thoſe, who are bound to them, may refuſe to fulfil their obligations; but they ought to be compellable to do it. Therefore, all actions may be brought by pupils againſt thoſe, whom they have occaſion to ſue.

They may themſelves be bound to others; and their tutors may not be diſpoſed to fulfil their obligations. Therefore, all actions may be brought againſt pupils by thoſe, who have occaſion to ſue them *.

But pupils are not alone and by themſelves perſonable; they have not *perſonam ſtandi in judicio.* But the tutorial office extends to the management, for tutors are bound to take care of the judicial as well as the extra-judicial affairs of their pupils, *l.* 30. *l.* 1. § 2. *ff. de adm. et per. tut. l.* 28. *p. C. de adm. tut. l.* 4. *C. de auct. præſt.*—*tit. C. qui legit. perſon. ſtandi in jud.* Therefore, pupils cannot be alone either purſuers or defenders of any action; their tutors do every thing for them.

Hence, tutors have right to commence and to proſecute every action, which it is neceſſary for the intereſt of their pupils to bring. But the action cannot be brought in the name of the pupils alone, for they are not perſonable by themſelves; as little can it in that of the tutors alone, for they are not immediately and principally intereſted in it: it muſt be brought in the name of the pupil and of the tutors, *R. M. l.* 2. *c.* 42. § 7. *l.* 2. *C. qui legit. perſon.*

In the ſame manner, if any action is brought againſt the pupil, the tutor is bound to defend him, and for that purpoſe muſt be ſummoned as well as the pupil to appear in judgment.

But the pupil is the principal defender; the tutor is intereſted in the ſuit only ſecondarily, *qua* tutor. Hence the ſummons muſt be ſerved upon the pupil after the ſame manner, after which it behoved it to have been ſerved upon a major. But it is ſufficient, that his tutors be ſummoned generally at the market-croſs of the territory of that judge, within whoſe juriſdiction the pupil dwells: for it is not neceſſary, that they be ſummoned particularly and by name, either perſonally or at their dwelling-houſes. Indeed, it would frequently be impoſſible to ſummon them in this manner; for they are not known, and the pupil may have none.

For the ſame reaſon, 'tis plain that tutors are bound to defend their pupil in his own forum: for he is convenable not in their forum, but in his own, ſince he is the principal defendant. Conſequently, his tutors muſt be bound to anſwer for him in that forum.

§ 463. A pupil is not perſonable by himſelf; he muſt appear by others, who are council to maintain his cauſe. Therefore, he muſt appear either by an advocate, by a procurator, or by his tutors. In caſe he appears by one, who is *preſumed* to have a mandate to appear for his clients, and is not bound to produce a written one, he is held to be legally authoriſed, provided his council ſays that he appears for him and his tutors. For it becomes then incumbent on his adverſary to prove, either by producing a deed diſclaiming the ſuit, or otherwiſe, that the tutors do not authoriſe it. In caſe he appears by one, who muſt produce a written mandate in order to entitle him to appear for his client, the mandate ought regularly to be granted by as many of the tutors, as are neceſſary to make the deed valid. But in ſome caſes, the concurrence of any one of them will be enough: for the reſt will be preſumed to concur, unleſs it ſhall be proved, that they do not, *l.* 1. *C. ſi ex plur. tut. vel cur. Du.* 8th *March* 1628, *Muir.*

§ 464. Tutors having the power of acting alone without the concurrence of their pupils, are, in judicial matters, conſidered in ſome ſort as the ſame perſons with them. Therefore thoſe, who are engaged in law-ſuits with pupils, muſt have a right to refer any thing, which would be proveable by the oath of the

* See one exception explained below, *Title* XV. of this book.

the pupils themſelves, in caſe they were come of age, to that of their tutors: for the oath of a tutor, given on a reference made to him by his adverſary, is as good evidence either for or againſt his pupil, as that of the pupil himſelf would have been, if he had been major, the reference had been made to himſelf, and the oath made by himſelf; provided the point, referred to the oath of the tutor, be ſome thing done by him in the adminiſtration of his office, and relating to it, *St.* 12th *Dec.* 1661, *Hepburn.* For things, which did not fall under his adminiſtration, cannot be proved by references made of them to his oath, *Du.* 1ſt *July* 1628, *Forbes.*—*St.* 7th *Dec.* 1664, *Eccles.* Nor can any thing be referred to his oath, or proved by it after the expiration of his office; becauſe he has then ceaſed to be the ſame perſon with him, who was his pupil, *F.* 16th *July* 1707, *Waddels.* 'Tis true, tutors may, in both caſes, be cited and be compelled to depoſe as witneſſes. But their teſtimony will in theſe have only the weight of that of witneſſes, and will not be evidence like an oath made by the party himſelf.

§ 465. But tutors cannot be *auctores in rem ſuam:* hence, if any action is commenced and is depending between a tutor and his pupil, for an action or law-ſuit may be between them, *Ho. heir,* 1619, *Whiteford.*—*tutor,* 25th *July* 1616, *Dewar.*—*minor,* 23d *June* 1617, *Paterſon.*—*Du.* 7th *March* 1623, *Lord Bargeny.*—30th *July* 1625, *Lady Stonyhill.*—*A. tutor,* 13th *Nov.* 1629, *Donaldſon,* 'tis plain, that the pupil muſt be authoriſed by ſome body different from his tutor: for Law does not allow him, becauſe he is not capable, to manage his own affairs. Therefore, if he has other tutors, who have power to manage them, and of courſe to authoriſe him in the law-ſuit, the action muſt be managed by them. But, if he has none, who have authority to act, he muſt get a curator named by the judge to manage it. He is called a curator; becauſe a tutor is never given to a pupil, who has one already. Beſides, his power is confined to the management of this particular plea: for after it is decided by a final ſentence, he is *functus;* his power is at an end; and he cannot even do that, which is ordered by the decree, or exact performance of it. He is therefore called a curator *ad litem.* As ſoon as the cauſe is decided, his power is at an end; and that of the tutor ſucceeds to manage the affairs of the pupil, according to the deciſion of the queſtion, *d. Dds.*

§ 466. The tuition both of the perſons and of the eſtates of pupils is entruſted to their tutors, becauſe the pupils themſelves are unable to take care of them. Hence every act of the tutorial office is done by the tutors alone, without the intervention of their wards. For pupils are conſidered by the Law of Scotland in the ſame light, in which infants were regarded by the Romans; and are held to be abſolutely incapable of managing their own affairs. Their judgment is weak; their experience is ſmall; and their advice, opinion, or concurrence could be of little uſe either to themſelves or to their tutors. Therefore, the Law of Scotland, ſince it does not allow them to do any thing by which they may render their condition worſe than it is, removes them entirely from the adminiſtration of their own affairs, and commits it to their tutors alone. By conſequence, every thing, which concerns them, muſt be done by their tutors. If a verbal order is to be given, it muſt be given by the tutors; if an agreement is made, it muſt be made by them; if a contract is to be entered into, it muſt be entered into by them; if a leaſe is to be granted, it muſt be granted by them; if a writing is to be ſigned, it muſt be ſigned by them; if a deed is to be drawn, it muſt be drawn by their direction; if payment is to be made, it muſt be made to them; if a diſcharge is to be granted, it muſt be granted by them; if a vaſſal is to be received, he muſt be received by them. In ſhort, every thing, relating to the adminiſtration of the affairs of the pupil, is done by his tutors alone; and may be done without his knowledge, concurrence or conſent.

§ 467. But every act of adminiſtration, muſt, if the pupil has more tutors than one, be done by that number, which is neceſſary for rendering it valid: for, in

in many caſes, one tutor has not power to act alone, and cannot alone bind his pupil. Therefore every act of adminiſtration ought *regularly* to be done by all thoſe whoſe concurrence is required, in order to entitle them to act. Thus, if one is appointed tutor *ſine quo non*, every thing ought regularly to be done with his concurrence: for nothing can be done *without* him: ſo he ought to be one of thoſe, by whom every thing is done. If a determinate number of thoſe, who are named to be tutors, is appointed to be a quorum; every thing ought, in this caſe, to be done by a quorum, conſiſting of that particular number at leaſt: for the adminiſtration was entruſted to no ſmaller number than that, of which it has been ſpecially appointed this quorum ſhould conſiſt. If it is appointed not only that a determinate number ſhall be neceſſary to make a quorum of the tutors, but alſo that a particular perſon ſhall be one of that quorum; every thing ought, in that caſe, to be done by a quorum conſiſting of that number, and of it that particular perſon ought to be one. If they are named jointly, they muſt all concur: for the management is entruſted to them *all jointly*. If they are named ſimply, without either a *ſine quo non* or a quorum, every thing ought regularly to be done by the majority of thoſe who have accepted (§ 412.). If they are ordered to act with the conſent of certain perſons, 'tis not neceſſary, that they get it on all occaſions; 'tis ſufficient, if they require it: for they muſt not allow the affairs of their pupil to go to deſtruction, becauſe theſe perſons will not give their conſent, *Fo.* 17th *Dec.* 1696, *Clarks.*

I ſay, every thing ought *regularly* to be done by that number, to which the care of the affairs of the pupil is entruſted. But there are many acts of *ordinary* adminiſtration, which fall in, every day, to be done, and admit not of delay. Theſe it would be hard, if it were neceſſary on all occaſions to delay doing, till a number of the tutors could be convened to order them to be done. Beſides, if tutors were on every occaſion liable to be called off from the management of their own affairs, in order to look after thoſe of their pupil, tutory would be ſo burdenſome an office, that nobody would be found to accept of it. So the affairs of pupils would be neglected. But the Law allows not that, which was intended for the good of any one, to be perverted to his ill. *Nulla juris ratio, aut æquitatis benignitas patitur, ut quæ ſalubriter pro utilitate hominum introducuntur, ea nos duriore interpretatione contra ipſorum commodum producamus ad ſeveritatem, l.* 25. *ff. de leg.* Therefore, it muſt allow all acts of *ordinary* adminiſtration to be done by one tutor; and requires the authority of that determinate number, whoſe concurrence is *ſtrictiſſimo jure* neceſſary, to ſuch alone, as are *ſolemn* and *important to the intereſt of the pupil.*

Hence every thing, which uſes to be done in conſequence of verbal orders, may be done by one tutor; becauſe theſe are incidental matters, which fall in at every turn, and muſt therefore be immediately deſpatched.

But every deed which is to be ſigned, bonds, bills, diſcharges, leaſes, charters, *&c.* muſt be granted; every bargain muſt be concluded; in ſhort, every thing of importance muſt be done by the lawful number, ere it can bind the pupil.

I ſay, ere it can bind *the pupil;* for it follows from the obvious principles of Law, that every thing, even the moſt ſolemn deed, done by one tutor alone, muſt bind that perſon, with whom the tutor contracts in the name of his pupil, provided the pupil is willing to ſtand to the bargain, and to be bound by it. For one, who contracts or does buſineſs with a tutor, ought to know, whether he, with whom he contracts, has power to do buſineſs with him. Conſequently, he muſt be held to be bound, in caſe the pupil is willing to be ſo: for the contract is complete on his ſide, ſince he had full power to bind himſelf. But on the ſide of the pupil it is not complete, if the tutor had not alone power to act. Of courſe, he or his other tutors muſt be at liberty either to be off with the bargain, or to ſtand to it, as they pleaſe. This follows from thoſe ſame principles, from which we ſhall ſee it follows, that thoſe, who contract with the pu-

pils themſelves, are bound, provided the pupils are willing to be ſo. Indeed, one, who contracts with a tutor in name of his pupil, may in ſome ſort be ſaid to contract with the pupil himſelf. He ought therefore to be bound in the ſame manner, in which he would have been bound, in caſe he had contracted with the pupil himſelf.

§ 468. A pupil being entirely removed from the adminiſtration of his own affairs, every thing, done by him alone, is *ipſo jure* void againſt himſelf, *R. M. l.* 1. *c.* 30. § 2, 5. 2, *A. c.* 29. § 1. Hence he cannot diſpoſe of his eſtate either *inter vivos* or *mortis cauſa*, either for onerous, for rational, or for gratuitous cauſes.

Being incapacitated to diſpoſe of it *mortis cauſa*, it is plain, that he cannot make a ſettlement either of his heritable or of his moveable eſtate; that he cannot make a teſtament; that he can do no deed, by which any part of his eſtate can be made to paſs to others than thoſe, whom the Law calls to ſucceed to it, that is, either his own heirs at Law, if no valid ſettlement has been made by any of his predeceſſors, or to thoſe on whom it is ſettled, if a ſettlement has been made by any of thoſe who had power to make one.

Since he cannot diſpoſe of it *inter vivos*, all alienations either of part or of the whole of it, made by him, are *ipſo jure* void; whether they be made by donations, by ſales, or in any other way, § 2. *I. quib. alien. lic. l.* 11. *ff. de acq. rer. domin.*

Therefore payment cannot be made him; at leaſt, it cannot releaſe him, who pays, from his obligation to pay, *l.* 5. § 1. *l.* 9. *p. ff. de auct. et conſen. tut.*— *l.* 8. *ff. de acq. vel omit. hered. l.* 15. *ff. de ſol.* § 2. *I. quib. al. lic.* becauſe, if payment made to a pupil freed the payer from the obligation of paying, 'tis plain, that the pupil would thus make an alienation of part of his eſtate: for a right would be alienated by him. Therefore one, who is ſo fooliſh as to pay to the pupil himſelf, is not freed, but remains bound to pay over again, unleſs he proves, that that, which he paid, was employed to the utility of the pupil: for he will be releaſed in ſo far, as he is able to prove it to have been employed in this manner; becauſe equity requires, that a pupil be, in all caſes, bound *in quantum locupletior factus eſt*, *l.* 1. *p. l.* 5. § 1. *ff. de auct. et con. tut. l.* 46. *ff. de oblig. et act.*

From hence it follows, that diſcharges granted by him muſt be null; ſince they ſerve not either to free the debtor, or to prove that the money was *in rem verſa* of the pupil.

Incapacitated to alienate, he muſt alſo be incapacitated from obliging himſelf; for he, who brings himſelf under an obligation, alienates a right, *l.* 9. *p. ff. de auct. et conſ. tut.* § 9, 10. *I. de inut. ſtip.* Therefore every promiſe which he makes, and every obligation granted by him, is *ipſo jure* void; whether it be by word or by writ.

Incapacitated from obliging themſelves, it is plain, that pupils cannot *borrow* money: for they might throw it away. Hence, if any one is ſo ſilly as to lend it them, they are not obliged to pay it, unleſs the *lender proves* it to have been *in rem verſa pupillorum.*

For the ſame reaſon, they cannot make bargains or enter into contracts with others; for contracts infer mutual obligations. Therefore neither a ſale, a leaſe, a partnerſhip, a mandate, nor any other contract, into which a pupil enters, is binding on him.

But, tho it is not binding on him, it binds the other party, with whom he contracted, *p. J. de auct. tut. l.* 13. § 29. *ff. de act. empt. l.* 1. *p. l.* 5. *p.* § 1, 2. *ff. de auct. et conſen. tut.* So that, if the contract is beneficial to the pupil, and his tutors incline to ſtand to it, the other party has not liberty to be off; he muſt ſtand to it, whether he will or will not; and muſt fulfil every article of it in the ſame manner, in which he would have been bound to fulfil it, if the perſon, with whom he had contracted, had not been a pupil, but been come

of

of age; nothing can be more equitable than this: for one, who has entered into a contract with a pupil, may well be preſumed to have done it, on purpoſe to take advantage of his facility, and to circumvent him. If, therefore, he ſhall happen to be caught in his own cunning, nothing can be more reaſonable than that he ſhould be bound to ſtand to the bargain, in caſe it be profitable to the pupil.

Therefore it may be affirmed in general, that every agreement, bargain, or contract, made with a pupil, tho it is not obligatory on the pupil, binds that perſon, who agreed, bargained, or contracted with him; for one, who had the adminiſtration of his own affairs, and knew the condition of him with whom he contracted, muſt be held to have meant that himſelf ſhould be bound, if the pupil inclined to be ſo.

Pupils cannot oblige themſelves. They are, however, in all caſes obliged, *in quantum locupletiores facti ſunt, l.* 5. *p. ff. de auct. et con. tut. et cur.* for Law allows no one to enrich himſelf unjuſtly at the expence of another, *Jure naturæ æquum eſt, neminem cum alterius detrimento et injuria fieri locupletiorem, l.* 206. *ff. d. r. j. l.* 14. *ff. de cond. indeb.*

§ 469. The tutorial power is intended for reſtraining children from doing ill to themſelves. Therefore the Law allows not a pupil to do any deed which may be hurtful to his intereſt. But it would be abſurd to extend it beyond its original deſign, and to hinder him from bettering his condition, *p. J. de auct. tut.* Hence he can make to himſelf lucrative acquiſitions of all ſorts, *l.* 11. *ff. de acq. rer. dom.* either by accepting of preſents, by bringing others under obligations to him, or by apprehending poſſeſſion, *l.* 32. § 2. *ff. de acq. vel amit. poſſeſ.*—*R. M. l.* 1. *c.* 30. § 6.—*l.* 9. *p. ff. de auct. et conſ. tut. l.* 2. *ff. de accept.*

§ 470. But a pupil, tho he is not obliged by his own deeds, muſt however be bound by thoſe of his tutor; provided they are lawful, and relate to the adminiſtration of his office. For a tutor being bound to manage the affairs of his pupil, and being liable for his negligence, the Law ſuppoſes a certain fictitious unity to ſubſiſt between his perſon and that of his pupil; from hence it preſumes, that the perſon of the tutor is the ſame with that of the pupil; that the tutor has received from his pupil a mandate to manage his affairs, and to do every thing which he does; and that every thing done by the tutor is done by the pupil. From whence it follows, that the pupil muſt be bound by every deed, which his tutor does in his name. *Videtur enim geſſiſſe, qui per alium geſſit, l.* 4. § 3. *ff. de adm. et per. tut. R. M. l.* 3. *c.* 17. *rubric.* § 4, 5, 6. Indeed, if he was not liable, no body would accept of the tutorial office. So the affairs of pupils would be entirely neglected, and go to deſtruction. Law therefore gives to deeds done by a tutor the ſame obligatory force, which it would give to deeds done by the pupil himſelf, if he had the free adminiſtration of his own affairs.

But nobody either has power or can be preſumed to have a mandate, *l.* 6. § 3. *ff. mandat.* to do deeds, which are unlawful. Hence, a pupil is not obliged by the unlawful deeds of his tutor; he is bound by ſuch alone, as are lawful. By lawful ones, I mean thoſe which Law allows tutors to do. Conſequently, pupils are not obliged either by deeds which are fraudulent, are done *dolo malo*, or by ſuch as, tho they are not fraudulent, tutors are incapacitated to do (§ 454. *ſqq.*), ſuch, for inſtance, is loan: for a tutor has not power to borrow money on the account and in the name of his pupil. But one ought not to make rich at the expence of another. Therefore, a pupil, tho he is not commonly bound by the unlawful deeds of his tutor, muſt however be bound, in caſe he is enriched by them, *in quantum locupletior factus eſt;* for a pupil is, as has been ſaid, in all caſes, bound *in quantum* he is enriched.

Deeds done by a tutor muſt, in order to be obligatory on the pupil, be not only lawful, but alſo tutorial; *i. e.* they muſt be deeds done by him *qua* tutor, in the adminiſtration of the affairs of his pupil; for deeds done by him in the adminiſtration

miniſtration either of his own affairs, or of thoſe of others than his pupil, can never be obligatory on the pupil.

§ 471. Since lawful tutorial deeds are obligatory on pupils, they muſt be alſo productive of actions proper for rendering theſe obligations effectual. Therefore a pupil is ſuable in conſequence of the adminiſtration of his tutor, as well before as after the expiration of the tutorial office. If he is ſued before it expires, his tutors muſt be ſummoned (§ 462.), for they muſt be made parties to the ſuit. If he is ſued after it is determined, the tutors, being *functi*, cannot be ſued, and can be obliged to depoſe only as witneſſes.

But, tho a tutor muſt be made a party to all actions brought againſt his pupil during his tutory, execution cannot be awarded againſt him, *arg. R. M. l.* 3. *c.* 17. § 4, 5. except he has it in his power to do that which is contained in the ſentence, either becauſe he is poſſeſſed of the eſtate of his pupil, or becauſe that, which the ſentence orders to be done, is ſome act which it is the duty of the tutor to do in the place of his pupil. For perſonal execution can alone be made againſt a tutor; execution can never be done againſt his eſtate, for he is never the true and principal obligee. In all caſes but theſe two, it muſt be done againſt the *eſtate* of the pupil: for the *bodies* of pupils are free from impriſonment, and cannot be taken in execution for civil cauſes 1696, *c.* 41.

The Law endeavours, as much as it can, to maintain an equitable reciprocity in all caſes. A pupil is himſelf obliged; therefore he muſt alſo have others obliged to him by the lawful tutorial deeds of his tutor. Having others bound to him, he muſt of courſe acquire rights of action correſponding to the obligations of thoſe others, in order to render them effectual. Theſe he has a right to commence at any time either during his pupilage, or after the expiration of it, according to the neceſſity of his affairs.

Such are the duties, the powers, and the obligations of tutors and of pupils during the continuance of the tutorial office. It remains to explain the various ways in which tutory determines.

TITLE VII.

Of the different Ways, in which the tutorial Office determines, or Tutors are diveſted of it.

§ 472. THE power of tutors, being ſuited to the age and to the neceſſities of their wards, extends both to the perſons and to the eſtates of their pupils. Therefore, it laſts during their pupilage alone (§ 402, 403.); and tutory commonly determines 1) With the pupilage of the pupil. By conſequence, as ſoon as the pupil attains the age of puberty, *i. e.* as ſoon as a boy attains the age of 14, or a girl that of 12 years, the power of the tutors is at an end, *l.* 3. *C. quando tut. vel cur. eſſe de: n.*

§ 473. But it may happen to determine ſooner. Thus, the pupil may happen to die before he attains the age of puberty; and the tutory muſt neceſſarily be determined 2) By his death; for one, who is dead, ſtands not in need of tutors.

In the ſame manner, it determines 3) With the death of the tutor. For tutory is an office, which is conferred by Law on tutors, becauſe it preſumes that they may be truſted with it, and will diſcharge their duty with fidelity; hence it is perſonal, and is not deſcendible to heirs; ſince the character of theſe is, like themſelves, unknown, *l.* 16. § 1. *ff. de tut.* Therefore, if there are more tutors than one, and one of them is named *ſine quo non;* the tutory determines as ſoon as that *ſine quo non* dies, *Fo.* 27th *Jan.* 1688, *Marquis of Montroſe.*—24th *June* 1703, *Aikenheads.* If a certain number is appointed to be a quorum, it determines as ſoon

ſoon as ſo many of them die, that there is not a ſufficient number left to make the quorum, *D.* II. 385. 14th *Feb.* 1735, *Blair.* If they are named *jointly*, it determines by the death of any one of them: for they are all preſumed to be neceſſary for making a quorum, and for adminiſtring, *St.* 17th *Jan.* 1671, *Drummond:* but, if they are named either ſimply, or *jointly and ſeverally*, it does not determine, till they are all dead, *Ha.* 12th *Dec.* 1609, *Fawſide.*—*St.* 14th *Feb.* 1672, *Elies* (§ 412.).

It may alſo determine 4) On the exiſtence of a condition, or 5) The arrival of a day (§ 411.); for if one has been named tutor under a certain condition or to a particular time, his power muſt end, as ſoon as the condition exiſts or the time comes, *l.* 14. § 3, 5. *ff. de tut.* § 2, 5. *J. quib. mod. tut.*

§ 474. But it is not in theſe ways alone, that the power of a tutor may come to an end; it may alſo determine 6) In conſequence of his mal-adminiſtration; for Law entruſts tutors with their tutorial powers, becauſe it preſumes they will be faithful in the diſcharge of their duty (§ 402, 403.). Hence, if they are not faithful in diſcharging it, Law will not truſt them: for every preſumption muſt yield to the truth, eſpecially in a caſe like the preſent one, in which it is the very reaſon of the diſpoſition of the Law: for, as ſoon as the reaſon for making a Law ceaſes, the Law itſelf ought alſo to ceaſe. Hence it muſt follow, that tutors muſt ceaſe to have the adminiſtration of the affairs of their pupils, and may be removed from the tutorial office, as ſoon as they ceaſe to manage for the utility of their pupils, and begin to be ſuſpected of infidelity to their truſt. Beſides, their perſonal characters may be bad, and may make it very improper to allow them to continue in their office: for they may corrupt the minds of their pupils, or *may* miſmanage their eſtates.

Thoſe tutors who either do not manage the affairs of their pupils with fidelity, or are unfit, on account of their perſonal characters, to be tutors, are ſaid to be *ſuſpected*, becauſe one who has begun to miſmanage, or whoſe character is bad, it may well be *ſuſpected*, will continue to do ſo.

Hence all tutors, as well tutors-teſtamentary as tutors of Law and tutors-dative, *l.* 1. § 5. *ff.* § 2. *J. l.* 4. *C. de ſuſpectis tut.* rich as well as poor ones; as well thoſe who have, as thoſe who have not found caution; § 12, 13. *J. l.* 5, 6, 8. *ff. l.* 5, 6. *C. eod. l.* 17. § 1. *ff. de teſtam. tut.* are liable to be removed, ſince they are all liable to be ſuſpected.

'Tis needleſs, indeed it is impoſſible to make a particular enumeration of the cauſes for which tutors may be removed from their office. The general rule is, that they are removeable in all caſes, in which they are liable to be ſuſpected of mal-adminiſtration. They may be ſuſpected on account either of their behaviour in the exerciſe of their office, or of the badneſs of their characters.

It would be dangerous to particularize the acts of mal-adminiſtration, for which they may be removed; for thoſe, which had been omitted to be mentioned, might be thought to be excluded. One of them however is remarkable, becauſe it is made by particular ſtatute a good cauſe of removing them; and that is the neglecting to inventory the particulars, of which their pupil's eſtate conſiſts. This omiſſion makes the Law ſuſpect them of having an intention to embezzle his effects; beſides, it renders it impoſſible for him to know, whether he has loſt any part of his property; for one can hardly retain in his memory a full and minute view of the particulars of which his eſtate conſiſts. But it is plain, that there muſt be many other acts, which may make them be ſuſpected of mal-adminiſtration, and very improper to be allowed to continue in their office. Much therefore muſt be left to the ſagacity of the judge, who ſhould attend to all the circumſtances of the caſe, and ought to form his judgment from them.

But tutors may be removed, tho no particular act of mal-adminiſtration ſhould be proved upon them; for the badneſs of their characters may make them liable to be ſuſpected of it. They may not be *ſuæ rei providi;* they may be

diſpoſed to throw away all the money, which they can get into their hands; they may be debauched; they may have given proofs of villainous diſpoſitions. For theſe and for other reaſons they may be very improper perſons for being entruſted with the education or with the management of the eſtates of young people, and may be removed from their office.

From hence it is plain, that tutors may be removed not only for actions done by them in the exerciſe of their tutory, but alſo for ſuch as they have done on other occaſions, even before they entered upon it; for their real characters may be aſcertained by theſe, and it may appear from their conduct before, as clearly as from their conduct after they have become tutors, that they are liable to be ſuſpected, and ought not to have the tuition of others, *D.* II. 492. 29th *July* 1680.

At the ſame time it muſt be remarked, that one can ſeldom be removed for actions anterior to his acceptance of the office, provided he manages prudently and carefully the affairs of his pupil; for his preſent conduct extinguiſhes the ſuſpicions, which aroſe from his former behaviour. People may grow wiſer, better, and more careful both of their own affairs and of thoſe of others. 'Tis in this ſenſe, that the texts of the Roman Law, *l.* 3. § 5. *l.* 4. § 4. *ff. l.* 7. § 3. *ff. de ſuſ. tut.* ought to be underſtood. For it would be dangerous to the intereſt of pupils to ſay, that their tutors ought in no caſe either to be *ab initio* excluded from entering on their office, or to be removed from it as ſuſpected for their behaviour anterior to it. Indeed, a bad character, joined to the ſlighteſt miſmanagement, will go far to get a tutor removed as ſuſpected.

Tutors are liable to be removed at the ſuit of any of the relations of the pupils, or of their co-tutors, *l.* 3. *p. ff. eod.* on an action brought againſt them before the Lords of Seſſion, who are alone competent judges of actions brought againſt tutors in order to get them removed. Indeed, it is lawful to bring ſummary complaints againſt ſuch as are named in the terms of the act 1696, *c.* 8. and to diſcuſs them without abiding the *courſe* of any roll; but other removals muſt be effectuated by ordinary actions, commenced in the common form. 'Tis true, extraordinary caſes require extraordinary remedies, and may ſometimes make ſummary complaints competent; and ordinary actions brought for this purpoſe ought in all caſes to be determined ſummarily.

But Law-ſuits are frequently long of being concluded, and it may happen to be abſolutely neceſſary for the intereſt of the pupil to have his tutor inſtantly excluded from the *adminiſtration*, even before it be determined, whether he ought or ought not to be totally removed from his office. In theſe caſes it is, no doubt, competent for the Court, if cauſe is ſhown for doing it, immediately to exclude the tutor from intermeddling with the affairs of his pupil till the event of the ſuit commenced againſt him, and to appoint one to take care of them in the mean time. Or, in caſe he has not found caution, he may be obliged inſtantly to find it. For it is not uſual with us to exclude one immediately from adminiſtring the moment he is accuſed; becauſe one is held to be innocent, till proof is made of his guilt; and it would be hard to throw a ſtain upon one's character by excluding him immediately from his office, before evidence be brought that he deſerves to be removed from it.

The Law is careful of minors; the obligations, which it impoſes on ſuch as intermeddle with their affairs, are ſtrict; and people may not be fond of interfering with them. Therefore the Court of Seſſion is not bound to wait till application is made to them; but they may, in caſe in the courſe of any action brought before them they ſee cauſe for removing a tutor, remove him *ex proprio motu:* for they have a prætorian power, and may well be allowed to interpoſe in behalf of thoſe who have no other to protect them, *l.* 3. § 4. *ff. de ſuſp. tut.*

But the tutor may be connected with his pupil by the ties of blood, and it may not be proper to fix a ſtain on the character of one nearly related to him. Therefore, in ſome caſes, the honour of the pupil may make it more eligible for

for him not to have his tutor found to be liable to be ſuſpected, and to be on that account removed from his office, but to provide for his own ſecurity in ſome way which may be leſs injurious to the reputation of his friend. Either a factor may be appointed to manage, the tutor being allowed to remain nominally in his office, but excluded from the actual adminiſtration; or the tutor may be obliged to find caution; or ſome other remedy may be uſed, *l.* 9. *ff. de ſuſp. tut. l.* 6. *C. eod.*—*Fo.* 16th *Feb.* 1705, *Balfours.* One ought not unneceſſarily to wound the character of one, with whom he is nearly connected.

One obſervation remains to be made on this matter, which is, that a tutor is not removeable for his poverty alone. A poor man may yet be honeſt; his character may make him very proper for having the care of another; and he may not be liable to the ſmalleſt ſuſpicion on account of his poverty, § 13. *J. l.* 8. *ff. l.* 5. *C. de ſuſp. tut.* But want ſometimes leads into temptation; and his urgent neceſſities might induce the tutor to miſapply the money of his pupil. It may therefore be in ſome caſes reaſonable to oblige even an honeſt tutor either to find caution, *Du.* 12th *Feb.* 1633, *Govan*, and to remove him, in caſe he does not do it, *Fo.* 16th *Feb.* 1705, *Balfours;* or to appoint one to act along with him and to prevent his mal-adminiſtration.

It is hardly worth while to remark, that a tutor cannot be removed after his office is determined; for one cannot loſe or be removed from an office, which he does not hold, *l.* 3. § 6. *l.* 11. *ff. de ſuſp. tut. l.* 1. *C. eod.*

§ 475. Tutory ends 7) With the marriage of a female tutrix: for a married woman cannot, by the Law of Scotland, be a tutrix (§ 410, 419, 427.), ſince ſhe is bound to employ herſelf in managing the domeſtic affairs of her huſband (§ 225, 244.), and may therefore be preſumed to have little time and little attention to beſtow on thoſe of others. Hence a woman, who hath been appointed a tutrix, loſes the office, as ſoon as ſhe marries, *Ba. tutor*, 14th *July* 1557, *L. Largo.* By conſequence, the nomination becomes void, in caſe ſhe is either *ſine qua non*, or an eſſential member of a quorum, or named jointly with the other tutors; and the power of them as well as of her is at an end. 'Tis otherwiſe, in caſe they are named either ſimply, or jointly and ſeverally, (§ 412.).

§ 476. The power of a tutor determines 8) In caſe he is ſentenced for a crime to ſuffer either baniſhment or a capital puniſhment; becauſe one, who has been guilty of a crime which deſerves to be puniſhed with baniſhment or death, may well be *ſuſpected* by the Law, and ought not to be truſted with the care of others; and he cannot take it, in caſe he hath actually been baniſhed, *l.* 14. *p. ff. de tut.* § 1. 4. *I. quib. mod. tut. finit.* § 1, 2. *I. de cap. dem.*

§ 477. The laſt way, in which it determines, is, in caſe the tutor becomes incapable of managing the affairs of his pupil, *v. g.* by ideotiſm, madneſs, deafneſs, dumbneſs, blindneſs, or any other diſeaſe by which he is incapacitated from managing the affairs of others.

In all theſe caſes, the office becomes void, and thoſe who are entitled to it, may either cauſe themſelves to be ſerved tutors of Law, or obtain a gift of tutory-dative.

§ 478. A tutor is not, after the expiration of his office, obliged, for he has not any title, to intermeddle with the affairs of his pupil. His power laſts no longer than his office. He is not therefore bound even to finiſh thoſe things which he had begun, *inchoata perficere.* For tutory determines either at the ſame time with the pupilage of the pupil, or before it; and in both caſes there is a preciſe point, at which the tutor ceaſes both to have right and to be bound to act. In the firſt caſe, in which it is ſuppoſed to be determined by the pupilage of his pupil, he is not bound to continue to manage: for one, who has attained the age of puberty, is by the Law of Scotland allowed and held to be capable to manage his own affairs; and it is dangerous for one, after his office is determined, to interfere officiouſly in the concernments of a minor. In the other, in which

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it is ſuppoſed to determine before the pupilage of the pupil, either the tutor is removed from his office for incapacity, or it expires by the death of his pupil. One, who is removed either for incapacity, or for mal-adminiſtration, or for ſuſpicions which lie againſt him, ought not to continue to act; by being deprived of his office he is forbidden to do it; and it would be abſurd to oblige one who is prohibited to act. In caſe his pupil dies during his pupilage, the tutor is not *ſtrictiſſimo jure* bound to take any more trouble about the affairs of his pupil: for his eſtate immediately devolves to thoſe whom the Law calls to ſucceed to it, and it is both their buſineſs and their intereſt to take care of it. But they may be at a diſtance, and may not hear of the death of their friend; his affairs might go to ruin if nobody looked after them. 'Tis therefore the duty of the tutor to acquaint them, as ſoon as poſſible, of the death of his pupil; and he ought in ſome caſes to continue his good offices in putting the affairs of his pupil at leaſt into a condition, in which they may remain without ſuſtaining damage, till thoſe intereſted in them have time to be acquainted, and to give orders about them. 'Tis true, he cannot be ſaid to be ſtrictly bound to do ſo; but in caſe he does it, he acts a dutiful part, and if it appears that he hath acted *bona fide* and with fidelity, he may well be ſaid to be entitled not only to indemnification but to a reaſonable gratuity for his pains. Beſides, he may, in order to be fully authoriſed and to acquire a legal title to a ſalary, apply to the Court of Seſſion on the emergency, and may be appointed factor or *curator bonorum* by them. Thus, he may prevent all ſuſpicions againſt his intentions; becauſe he muſt find caution for his conduct.

§ 479. A tutor acts for the behoof of his pupil; the benefit of every thing, which he does in the exerciſe of his tutorial office, accrues to his pupil; and he means not to bind himſelf by what he does *tutorio nomine*. Therefore, he is not, after the expiration of his office, either bound or ſuable for deeds done by him *tutorio nomine*, in the exerciſe of it, and in the name of his pupil. All the benefit, all the rights, all the actions ariſing from them, inure to the pupil, and are *ipſo jure* acquired by him. Of courſe, all the burdens, all the obligations, all the actions, which flow from them, muſt *ipſo jure* devolve to him, and muſt lie againſt him. So he is alone bound and ſuable for them; his tutor is no longer liable, *l.* 1. *C. l.* 5. *ff. quando ex facto tut. l.* 15, 26. *C. de admin. tut.*

But there are two which are commonly, tho improperly, called exceptions to this rule. A tutor may bind himſelf perſonally for his pupil; but every one is bound to fulfil the obligations, under which he brings himſelf. Therefore 1) A tutor muſt be, even after the expiration of his office, bound to fulfil thoſe which he granted *proprio nomine*, and may be ſued for this purpoſe, *l.* 15. *C. de admin. tut. l.* 5. *ff. quando ex facto tut.*

Every one is anſwerable for his own fraud, and cannot involve another in the conſequences of it. Fraud therefore creates a perſonal obligation on the fraudulent perſon to repair the loſs, which he hath made another ſuſtain. Therefore 2) A tutor is bound by his own fraud, and his pupil is not anſwerable for it. The obligation he brings voluntarily *delinquendo* upon himſelf, and he muſt remain, even after his office is determined, bound to fulfil it. *Dolus tutoris pupillo non nocet, l.* 3. *ff. quando ex fact. tut. l.* 9. *ff. quæ in fraud. cred. l.* 5. *ff. de tab. exhib. l.* 1. § 1. *ff. de doli mali et met. except. l.* 134. § 1. *ff. d. r. j. l.* 13. § 1. *ff. de act. emp.*

But it would be abſurd to allow a pupil to be benefited by the fraud of his tutor, and not accountable for the profit he makes by it. It ought not to be either hurtful or beneficial to him. *Dolus tutorum puero neque nocere neque prodeſſe debet.* Therefore the Law makes pupils in all caſes liable *in quantum locupletiores facti ſunt*, whether the profit they have made aroſe from their own fraud or that of their tutors, *l.* 5. *p. de auct. et conſen. tut. l.* 21. § 1. *ff. de pecul.*

TITLE VIII.

Of the Obligations which are incumbent on Tutors, and of the actions which lie either to or againſt them, after the Determination of the tutorial Office.

§ 480. EVERY one, who manages the affairs of others, is, therefore a tutor muſt be bound 1) To render an account of his adminiſtration, 2) To reſtore every thing which he has, that belongs to him whoſe affairs he managed (§ 434.), *R. M. l. 2. c. 42. § 12.*

Indeed, he is ſo much bound to do both, that he would not be free from theſe obligations, tho he ſhould be expreſsly declared by the teſtator, the perſon who names him, to be *aneclogiſtus*, unaccountable, or not liable to be called to account. One, who names perſons to be tutors, means them to have the management of the affairs of his children. Therefore he muſt mean that his children ſhould have ſome eſtate, which may be managed. By conſequence he cannot be ſuppoſed to mean, by declaring their tutors to be unaccountable, to make over to them all, which he leaves to be managed by them for the behoof of his children. But all of it would in effect be made over to them, in caſe they were to be *abſolutely unaccountable*, *i. e.* to have power to do with the eſtate of their pupils, and to diſpoſe of it as they pleaſed, without being liable either to be called to account for their adminiſtration, or to reſtore. Indeed one who is declared to be unaccountable, is not, ſtrictly ſpeaking, declared to be free from the obligation of reſtoring. Hence, the Law hath interpreted ſuch a declaration to import, not that a tutor, who is ordained to be unaccountable, ſhall be altogether free from the obligation of accounting, and ſhall have it in his power to reſtore to his pupil as much or as little as he pleaſeth, but that his accounts ſhall not be ſo ſcrupulouſly examined as thoſe of others, and that he ſhall be liable for his fraud alone, *dolus et lata culpa:* for *lata culpa* is equal to fraud. Whereas tutors are commonly liable not only for *dolus* and *lata culpa*, but alſo for *culpa levis*, *l. 5. § 7. ff. de adm. et per. tut. l. 119. ff. de legat. I. l. 9, 20. § 1. de lib. leg. l. 72. § 3. ff. de condit. et dem.*

§ 481. The obligation of accounting is ſo ſtrictly incumbent on them, that no action lies to them, even after the expiration of their office, for debt due to themſelves by their pupil, at leaſt they are not entitled to recover a decree for it, unleſs they either have accounted or are ready to account for their adminiſtration. For they are always preſumed *intus habere*, to be poſſeſſed of effects of their pupil ſufficient for paying debt due to themſelves, till they have accounted, and ſhewn that they have not enough to diſcharge it (§ 446.). They are therefore in all caſes bound to account.

§ 482. That of which they are bound to give an account, is their adminiſtration. Therefore, this obligation muſt begin to be incumbent on them only after the expiration of their office. For one cannot give an account of his adminiſtration, till he has actually adminiſtred, and it is at an end. Beſides, a pupil can do nothing for himſelf (§ 468.); his tutor is held to be in ſome ſort the ſame perſon with him (§ 470.); therefore he cannot be bound to account during his office, for there is not any body to whom he can account, and he cannot do it to himſelf.

But he may be bound to do it during the pupilage of his ward: for it is at the expiration of his office that he begins to be bound to account. But it may happen to determine during that time (§ 473, *ſqq.*), *l. 4. p. l. 7, 8, 9. p. § 1, 2, 3, 4, 5. ff. de tut. et ration. diſtrah.*

§ 483. They are bound to account and to reſtore either 1) To the perſon whoſe affairs they managed; or 2) To ſuch, as ſucceed to his rights, for inſtance, to his heir, *l.* 1. § 17. *ff. de tut. et rat. diſtrah.* for an heir is held to be the ſame perſon with him, to whom he ſucceeds. No matter, whether the perſon, to whom he accounts, be a pupil, a minor, or a major; provided, in caſe he is not come of age, he be properly authoriſed either by other tutors, or if he has none, by one appointed ſpecially for authoriſing him to receive and to paſs the accompts, *d. l.* 9. § 4. *ff. de tut. et rat. diſ.* or 3) To his aſſigns; for every patrimonial right, which one has, may be made over by him to another; or 4) To his creditors; for one's creditors ought to have acceſs to every fund out of which they can recover payment. Therefore they may oblige the tutor to account either by laying on an arreſtment in his hands, and upon this bringing an action in order to get him decreed to make every farthing, which he owes to his pupil, forthcoming to them; or by bringing an action directly in their own name, and that of their debtor, in order to get him obliged to account, and to reſtore to them that for which he is liable to his pupil. 'Tis true that the laſt is not a common method; but it and others may be uſed according to circumſtances.

§ 484. The perſons, who are obliged to account and to reſtore, are the tutors. But every tutor, who accepts, is bound to manage with fidelity. By conſequence, in caſe there are more than one, they are all equally bound to take care of the intereſt of the pupil. Therefore, if they neglect to do it, they may in ſome ſort be ſaid to be delinquents; for they have not done their duty. But all delinquents are bound for their delinquencies *in ſolidum*. Hence, if a pupil has, through the negligence or miſmanagement of one of his tutors, ſuffered any loſs which that tutor is bound to make up, the reſt are bound, in caſe this one proves to be inſolvent, to make it up for him; becauſe it was their buſineſs to have watched over the conduct of their collegue, to have prevented their pupil from ſuffering through his miſmanagement, and, if it was neceſſary, to have got him removed. Hence the Law of Scotland, which takes the fatherleſs under its peculiar protection, hath, in order to render thoſe, who have the care of their affairs, more vigilant about the diſcharge of their duty, made all and each of them accountable, liable and ſuable *in ſolidum* not only for their own conduct, but alſo for that of their co-tutors. So that the pupil may ſingle out any one among them he pleaſes, and call him to account for the adminiſtration of every part of the office; this one is bound to anſwer *in ſolidum;* and decree may be made againſt him for every farthing which the pupil is entitled to recover from all his tutors *tutorio nomine*, whether he ever actually interfered in the management or not: for if he did not, he is culpable and liable for his negligence, becauſe he ought to have done it, *Go.* 3d *June* 1675, *Burnet.*—*N.* 91.—*H.* 985. 'Tis true, in caſe one of them ſhall be obliged to reſtore to his pupil more than is proportionable to his ſhare, he will have action againſt the reſt for a ratable reimburſement from each of them. But he, who is ſued and is called to account, muſt firſt account and reſtore to his pupil, and then ſeek his redreſs from his co-tutors *.

However there is one exception to this rule. For they are each of them liable not *in ſolidum* for the reſt as well as for themſelves, but for themſelves and for their own conduct alone, in caſe they have been named by the father of the pupil, in terms of the act 1696, *c.* 8. by a deed made during his *liege pouſtie*, with this particular proviſo, that they ſhall each of them be liable not *in ſolidum* for others as well as for themſelves, but for themſelves alone.

§ 485.

* Our Law ſeems in this matter to have made a gradual progreſs towards its preſent ſtandard. For a pupil could at firſt ſue his tutors only *pro ratis portionibus*, and was obliged to prove the extent of the intromiſſions of each of them, in caſe he alledged they had intromitted with more than fell to their ſhare, *Ha.* 8th *Jan.* 1612, *Edgar.* Then he was found to be entitled to ſue them *pro ratis*, without proving their intromiſſions, *Ha.* 22d *Feb.* 1612, *Hunter.* And at laſt each of the tutors was found to be liable to account *in ſolidum*, *Du.* 22d *Feb.* 1634, *Davidſon.*

§ 485. Tutors are liable to account *in ſolidum* not only for their own intromiſſions, but alſo for their own omiſſions; nay not only for their own omiſſions, but alſo for the omiſſions as well as the intromiſſions of others their co-tutors. For every tutor brings himſelf, by his acceptance, under an obligation to take care of his pupil and of his affairs. If, therefore, he neglects them, when his pupil had reaſon to depend upon his fidelity, he ought to be liable for his negligence, *i. e.* for what he omits to do as well as for what he actually does.

Being liable for his own omiſſions, he muſt by conſequence be liable for the conduct of his co-tutors, for their omiſſions as well as for their intromiſſions. For, if they have neglected to do any thing which ought to have been done, it was his duty to have taken care to have made up for their neglect, and to have ſeen it done either by himſelf or by another. Conſequently, he muſt be liable for their omiſſions. But if he is liable for their omiſſions, he muſt, *a fortiori*, be liable for their intromiſſions, ſince, as ſoon as he ſaw any thing miſmanaged by them, he ought to have taken care to have corrected their abuſes: and, if he ſuſpected them of being unfaithful to their truſt, he ought to have got them removed. Indeed, it would be but ſilly for a tutor to excuſe the miſmanagement of the affairs of a pupil by ſaying, that he truſted them to the care of another. For he was, as every tutor is, bound to take care of them himſelf, and ought not to have been ſo careleſs as to truſt them entirely to another.

Hence a tutor, who has accepted, is liable *in ſolidum*, tho he ſhould not have intermeddled at all with the adminiſtration of the affairs of his pupil, but have entruſted it entirely to others. Nay, he is not only liable, but even ſuable *in ſolidum*, tho the other tutors alone took the burden of the management: for the Law of Scotland does not give tutors that privilege which they had by the Civil Law, the *beneficium ordinis*, which made it neceſſary to ſue and to do all diligence in order to recover payment from thoſe who had actually adminiſtred, and their heirs, ere action could be commenced againſt thoſe, who had not adminiſtred, *l.* 3. *C. de divid. tut. l.* 3. § 2. *ff. de ad. et per. tut. l.* 1. § 11, 12. *ff. de tut. et rat.* The Law of Scotland, obliging all tutors, who accept, to adminiſter, makes them all equally liable, and gives the pupil an option to ſingle out any one among them he pleaſes, and to ſue him *in ſolidum*, whether he hath or hath not ever intermeddled in the management.

§ 486. A tutor, when called to account for his management, muſt in the firſt place exhibit the inventory, which he made of the eſtate of his pupil, upon his entrance on his office (§ 436.), and ſhew what he hath done with every particular, and after what manner he hath employed every farthing, which it contains. For the very purpoſe, for which it was taken, was to be the foundation of making a charge againſt him (§ 437.). Not that every thing contained in it is held, *præſumptione juris et de jure*, to have belonged to the pupil; it creates no more than a *præſumptio juris* againſt the tutor, and makes it incumbent on him to account for every particular which it contains, or at leaſt to ſhew it did not belong to his pupil.

Next, he muſt give an account of the ſucceſſive profits, additions, and acquiſitions made by his pupil during his tutorſhip; and ſhew how he hath employed the rent of his lands, that of his houſes, the intereſt of his money, or any other thing, which he may have happened to have acquired during it.

But tutors take trouble about the affairs of their pupils; and employ on them that time which they might have turned to their own account. Therefore the Law is not ſo rigorous, as to make them accountable for every the moſt minute trifle which hath come into their hands. Hence it does not oblige them to account for the value of ſervices, which the tenants of their pupil have performed to them, provided he had no uſe to have them performed to him, and they could not oblige the tenants to pay money in place of them, *St.* 11th *Jan.* 1668, *Grant*; for he does not in this caſe ſuſtain any patrimonial loſs, and allows only

only an *innoxia utilitas* to his tutor. For the ſame reaſon, tutors are not accountable for thoſe ſmall fowls, which were due to their pupil, and they may have had occaſion to uſe; ſuch as hens, chickens, *&c.* provided they have not taken too many of them. For a pupil ought not to go rigorouſly to account with his tutors, and ought not to demand money for every thing which they may have uſed, when looking after his affairs. But the tutors ſhould not exceed reaſonable bounds, and are liable in ſo far as they go *extra modum.* Thus, they are not entitled to uſe either all the fowls payable by the tenants to their pupils, or a great many of them, or ſuch as are very valuable; they ſhould uſe no more than a reaſonable quantity, ſuitable to the circumſtances, the eſtate and the occaſions of their pupil, *D.* II. 493. *Fo.* 24th *June* 1680, *Wright.*—*H.* 979.

Tutors ought to give an exact, diſtinct, and particular account of their adminiſtration, and to authenticate every article of it by proper vouchers, that it may thereby be poſſible to examine the truth and the juſtneſs of them, and to know the balance, if there is any which remains in their hands, and is to be reſtored to the pupil, *l.* 82. 111. *ff. de condit. et dem.*

Credit ought to be allowed them for every article and for every diſburſement, which it was their duty, and for the intereſt of their pupil, they ſhould lay out. So, after making allowances for thoſe parts of their management which ought to be approved, and deductions for thoſe which ought not to be approved, and caſting up the balance, for which upon the whole, for it is for the balance that the tutors are accountable, their accounts muſt be cleared.

Tutors, in accounting for the value of grain, are bound to account for the prices which they have actually received, in caſe they were higher than thoſe which are fixed by the Sheriff-deputy, and are called the *fiars.* Theſe are rated annually in every county by a jury of men acquainted with the ſtate of the country; the crop produced by the earth, and the value of corn. Therefore the Law preſumes them to be nearly thoſe which may be expected for grain; and it obliges a tutor, who hath perhaps got lower ones, to charge himſelf with them, unleſs he can ſhew that they were higher than thoſe at which corn was ſold in his neighbourhood, or that his neighbours ſold for lower ones, *Home,* *Feb.* 1682, *Viſcount of Oxenfourd.*—*D.* I. 311. *Fo.* 21ſt *Feb.* 1679, *Viſcount of Oxenfourd.*

But beſides this balance, for which it appears from the ſtate of the accompts exhibited by the tutor himſelf he muſt account, he is alſo accountable for his omiſſions, *i. e.* for every loſs, which has been ſuſtained by his pupil, becauſe he has omitted to do ſomething which he was bound to do. Now, a tutor is bound to be as careful about the affairs of his pupil as a careful man uſes to be about his own. Conſequently, he is bound to make up to him every loſs, which he may have happened to ſuſtain through either his fraud or his negligence, *dolus, culpa lata,* or *culpa levis, l.* 7. *C. arb. tut.* (§ 434.) *. Thus if he has neglected to lay out his money on intereſt, he muſt be liable to pay intereſt for it himſelf (§ 448, 449.). If his farms have been through his negligence either uncultivated or not let, he muſt pay the rent which the pupil ought to have drawn. In ſhort, he muſt make up to his pupil every loſs, which he can prove he has ſuſtained through the negligence of his tutor, either in doing what he ought not to have done, or in omitting to do what he ought not to have omitted.

§ 487. A tutor is bound to reſtore every thing, which, it appears from the accompts, is due to his pupil. Therefore, he cannot be bound to reſtore any thing, till theſe have been examined, cleared and paſſed: for till that is done, it is not certain, whether he is bound to reſtore any thing to his pupil, or, if he is bound, what is the preciſe amount of it. So the balance muſt be fixed, that a full diſcharge may be ready to be granted to the tutor, ere he can be forced to reſtore to his pupil.

§ 488.

* Indeed, he is bound *præſtare dolum et culpam latam* alone, if he is ordained expreſsly to be *unaccountable.* (§ 480.).

§ 488. The action, by which a pupil compels his tutor to account and to reſtore, is called an *action of compt and reckoning*, and is the ſame with the *actio tutelæ directa* of the Roman Law. It may be brought before the Lords of Seſſion, *and before them alone*, by a Summons * iſſued at the ſuit of the pupil, or of thoſe who have ſucceeded to him (§ 483.).

It may be brought not only againſt the tutors themſelves, but alſo againſt their heirs: for an heir is held to be the ſame perſon with him whom he repreſents. So he muſt be, ſince his predeceſſor was, bound to account and to reſtore. But their heirs are more gently dealt with than the tutors themſelves; by the civil Law they were accountable only for the *dolus* and *culpa lata* of their predeceſſor; whereas the tutor himſelf was accountable alſo for his *culpa levis*, *l.* 1. *C. de hered. tut.* For a tutor himſelf might be able to give a very ſatisfactory and a very rational account of many things, the reaſon of which might be entirely unknown to his heir.

§ 489. But the tutors may be inſolvent, and the pupil may not, after having done diligence againſt them and their heirs, be able to recover from them what they are bound to reſtore to him. His remedy in that caſe is to ſue their cautioners, if they have given any.

Cautioners for tutors are ſureties for the faithful diſcharge of an office, (§ 420, 432.). Therefore they have the *beneficium ordinis*; the pupil cannot ſue them, till that office is determined *l.* 4. §4. *ff. rem. pup. ſalv.* and he has ſued the tutors themſelves, for whom they are ſurety; becauſe a cautioner is not obliged to pay debt for which he is caution, till it hath appeared, that the principal debtor is not able to pay it, *R. M. l.* 3. *c.* 1. § 7.—*ſ. ſt. R.* I. *c.* 10. Beſides, before that time it is impoſſible to know, whether the tutors are in arrears. Therefore, the cautioners cannot be liable, in caſe it is owing to the negligence of the pupil himſelf, that he has not recovered what was due to him from his tutors. Thus, if he has delayed to ſue them within due time, and has allowed them to become inſolvent, the cautioners will not be liable: for the pupil might have recovered it; the cautioners are liable only for what he is not able to recover from them; and he can blame for his loſs nothing but his own culpable delay, *l.* 1. *C. de div. tut. l.* 2. *C. de fidej. tut. l.* 1. § 11. *ff. de mag. conven.*

But, if the pupil hath not been negligent, cannot be accuſed of careleſſneſs, has done diligence, and has not been able to recover his own from the tutors or their heirs, for the tutors and their heirs are the ſame perſons, the cautioners become liable to him, and are ſuable in the next place.

But they may have bound themſelves not as cautioners, but as principal debtors, *correi*, jointly and ſeverally along with the tutors. They have not in this caſe the *beneficium ordinis*, and are liable to be ſued as ſoon as thoſe for whom they are ſurety. But they are not themſelves tutors; they have not the management of the eſtate of the pupil, and lie not under any obligation concerning it. By conſequence they are yet in this caſe no more than ſureties, and cannot be ſued till the office of the tutor is determined, and the preciſe ſum, for which they are liable, is aſcertained. But as ſoon as this is done, they may be ſued for it, and compelled to pay; becauſe by binding themſelves as principal debtors, they muſt be held to have renounced the *beneficium ordinis*, and have agreed to be liable to pay as ſoon as the pupil gets the ſum, for which they are bound, aſcertained.

The cautioners of tutors ought, each of them, to be taken bound *in ſolidum* (§ 420, 432.). But they cannot be compelled to grant their bond in other terms than they pleaſe. Therefore they muſt, by the Law of Scotland, be held to be bound according to the preciſe terms of the deed, by which they oblige themſelves. By conſequence, if they have not bound themſelves jointly and ſeverally, they are, each of them, liable not *in ſolidum*, but *pro rata* only; ſo the obligation muſt be divided equally among them; every one of them is liable to his own

* See the tenor of it in DALLAS, p. 372.

ſhare of it alone*; and if the pupil happens, through the inſolvency of any one of them, to be unable to recover from him his proportion of that which is due, he cannot ſue the reſt to make up the loſs.

§ 490. Tutors of Law ought, before a decree of chancery is made and granted in their favour, and tutors-dative, before a grant of the office is given them, to find caution *rem pupilli ſalvam fore* (§ 420, 426.). Therefore, if the pupil is not able, after having done all proper diligence againſt the heirs and the cautioners of the tutors, as well as againſt the tutors themſelves, to recover what is due to him, he may then fly to his laſt refuge, and may, in ſome caſes, ſue the officers who *gave* the tutors, and were bound to cauſe ſufficient caution to be found by them: for it was their duty to ſee them find ſufficient caution. In caſe they either neglect to exact it altogether, or accept of improper cautioners, or do not take them bound jointly and ſeverally, they muſt, for their negligence, be themſelves bound ſubſidiarily to make up to the pupil any loſs, which he may happen to ſuſtain through their neglect. The pupil is unable to take care of his own affairs, and to provide for his own ſecurity; he ought not to be allowed to ſuffer for the fault and for the careleſſneſs of others, eſpecially of thoſe whoſe duty it was to ſee him rendered ſecure, and proper caution found to him. In caſe therefore they neglect their duty, they ought to bear the conſequences of their own negligence, and to ſuffer for it. Beſides, it may eaſily be preſumed, that they meant themſelves to be cautioners, ſince they neglected to exact others, when it was their duty to have exacted them.

Thoſe, who are bound for tutors of Law, ſeem to be the director and the other officers of Chancery. For it is their duty, after the brief, the verdict of the inqueſt, and the proceedings of the Judge upon it have been returned to them, not to give him, who is ſerved, a decree of Chancery nominating him tutor, till he has found caution; and, if they give it him ſooner, they do it at their peril. From hence it is plain, that neither the Judge before whom the brief is ſerved, nor the jury whoſe verdict is given upon it, nor any of the officers of that Judge's court are liable on this account: for it is not their duty to exact it; the province of the Judge is confined within the limits of the brief or order ſent him; after he has made the inquiry directed by it, all, which he is ordered to do, is to return it with his proceedings upon it to the Chancery; and that of the jury is to give their verdict on the evidence brought before them.

Again, thoſe, who are bound for tutors-dative, are the Barons and other officers of Exchequer, to whoſe department the exaction of caution belongs. For they ought not to give a grant of the office of tutor, till he, to whom it is to be granted, hath found caution *rem pupilli ſalvam fore.*

In caſe therefore he, whoſe duty it was, ſhall neglect to exact caution altogether, he muſt be bound to make up to the pupil any loſs, which he may have ſuſtained through the inſolvency of his tutors, and would have been entitled to have recovered from their cautioners, if they had found any; for he is not entitled to recover from the magiſtrates any thing which he would not have been entitled to have recovered from the cautioners themſelves, ſince they are only liable for them. Thus, if the pupil hath neglected to ſue his tutors, while they were ſolvent, and were liable to be ſued, and hath ſuffered through their inſolvency ſupervening, the Magiſtrate will not be bound to make up the loſs; becauſe the pupil has no body to blame but himſelf, *l.* 1. § 12. *ff. de mag. conven. l.* 1. *C. de div. tut.*

The officers of Chancery or of Exchequer muſt alſo be bound, in caſe they accept of improper cautioners, ſuch as are not reſponſible: for they were bound to

* One would conclude from the words of *R. M. l.* 3. *c.* 1. § 10. that cautioners were bound and were each of them liable *in ſolidum* in all caſes, in which it was not expreſsly provided otherwiſe. This doctrine is not agreeable to the principles either of the Civil or of the Scotch Law. It is ſurprizing, that SKENE has not only omitted to take notice of this error, but even fallen into it himſelf.

to exact responsible ones. Consequently, if the cautioners were good responsible men at the time, at which they were accepted of and taken bound, the officers, who accepted of them, will not be liable to indemnify the pupil, in case they shall happen afterwards to become insolvent; for they did their duty, are in no sort culpable, and are not liable for accidents, *l.* 1. § 11. *l.* 6. *ff. de mag. con.*

The cautioners of tutors ought to be taken bound conjunctly and severally. For those, who have not bound themselves in this manner, are liable not *in solidum*, but *pro rata*. Therefore the officers of the Chancery and of the Exchequer must, in case they take them bound in this improper manner, make up to the pupil the loss which he may sustain through the insolvency of any one of them. For he cannot recover it from the rest; since they are, each of them, bound for themselves alone, and are not liable for one another. But the Magistrate, who neglected to take them bound conjunctly and severally, neglected to do his duty, and ought therefore to be liable for every one of them.

§ 491. Not only the cautioners and the Magistrates, but the heirs of both are liable to the pupil, and suable by him in their proper order, *i. e.* the heirs of the cautioners before the Magistrates. They are liable in the same manner with the cautioners or the Magistrates, to whom they succeed: for every obligation descends to the heirs of the original debtor in the same way, in which it was incumbent on him.

§ 492. A pupil, it has been said (§ 434.), is bound to indemnify his tutor of any expence, to which he may be put in the discharge of his duty. Hence the tutor must have some legal way to obtain his indemnification. He may obtain it, either when he is called to account by his pupil, or by a separate action called *actio tutelæ contraria*.

A tutor, when he is called to account, may ask allowance of every thing which he can claim from his pupil, *l.* 1. § 4. *ff. de con. tut.* this being implied in the nature of the action brought against him. For one, who calls another to account for his administration, means to demand no more than remains due after the accompts are fully stated. Therefore he cannot refuse to receive a full and complete state of them, and to give him who is accounting allowance of every thing, which he is entitled to claim on account of his administration.

Or he may obtain his indemnification by commencing a separate action, the *actio tutelæ contraria*, in order either to oblige his pupil to receive and to pass his accompts and to indemnify him, or, if he hath already accompted, to obtain his indemnification alone. For a tutor may, no doubt, force his pupil, provided always he be properly authorised, to receive, to examine, and to pass his accompts. But he cannot force him to indemnify him, unless he either has accounted already, or is at least willing to account for his administration, *l.* 1. § 3. *ff. de cont. tut.*

§ 493. Not only the tutor himself but his heirs may bring this action; for it is *rei persecutoria:* and it lies not only against the pupil himself, but his representatives. Besides, the tutor, in case he is sued by others, for others have a right to call him to account, must be entitled to recover his indemnification from them, as they are not entitled to recover more from him than he owes to his pupil, *l.* 3. § 9. *ff. de cont. tut.*

§ 494. By this action the tutors sue to be indemnified of all losses which they have sustained in the administration of their office. Hence they may demand to be reimbursed of all expences which they have laid out on the affairs of their pupil, *l.* 1. § 4. *eod. l.* 3. *C. de adm. tut. l.* 3. *C. de cont. jud. tut.* such are expences of travelling, of being in taverns, of prosecuting pleas, *&c. l.* 1. § 9. *ff. de tut. et rat. distrah.* provided they have laid them out, for they are bound to manage for the utility of the pupil. They are not entitled to be reimbursed of money which they have laid out foolishly on his affairs, *l.* 3. *p.* § 8. *de con. tut. l.* 9. § 6. *ff. de adm. et per. tut.* But it must be remarked, that it is no matter,

matter, whether the intereſt of the pupil was or was not promoted by the diſburſements; provided the tutor was, in no ſort, culpable in making them, *l.* 3. § 7. *ff. de cont. tut. l.* 10. § 1. *ff. de neg. geſt.* for no body is liable for accidents, *l.* 4. *C. de per. tut.*

But a tutor muſt give a particular account of every article of his expences, and muſt not ſeek to be reimburſed of a certain ſum without ſpecifying particulars, *Di.* 435.—*Fo.* 10th *July* 1688, *Wilſon.* And he is entitled not only to be reimburſed of the principal ſums laid out by him on the affairs of his pupil, but alſo to be allowed intereſt for them, till they either are or ought to have been paid, *l.* 3. § 1, 2, 3, 4, 5, 6. *ff. de cont. tut.* *H.* 974.

He is alſo entitled to demand to be freed from any obligation, under which he hath brought himſelf for his pupil, and from being liable for any thing on his account; provided he obliged himſelf not *donandi animo*, but merely *qua* tutor, for the utility of his pupil, *l.* 1. § *ult. l.* 3. § 1. *l. ult. ff. eod.* In ſhort he ought in no ſort to be allowed to loſe or to be out of pocket by his office.

But he is not entitled to get a ſalary for his pains; for his office is not either a mercenary or lucrative one (§ 403.); and as he ought not to loſe, ſo he ought not to make gain by it, *l.* 58. *p. ff. de adm. et per. tut.*—*Ni. curators, Feb.* 1642, *L. Scotſtarbat.*—*Fo.* 10th *July* 1688, *Wilſon.*

§ 495. Tutors, who have been ſo good as to employ their time and their attention on the affairs of their pupils, ought to be relieved, as ſoon as poſſible, from that anxiety, in which they may naturally be ſuppoſed always to continue, till their accompts are received examined and paſſed. Hence the duration of all actions of compt and reckoning, which pupils may bring againſt their tutors *, in order to make them account for their adminiſtration, is limited 1696, *c.* 9. within ten years from and after either the death, or *the majority of thoſe who were the pupils*; they preſcribe in that time. Therefore, if neither thoſe perſons themſelves who were the pupils, nor their heirs, ſhall *purſue and inſiſt in* them, within the ſpace of ten years from and after that time, the tutors and their ſucceſſors are not liable to be called to account afterwards, and are declared to be as fully acquitted, as if they had actually accounted, reſtored, and got full and ample diſcharges from thoſe, whoſe tutors they were.

The *actio tutelæ directa* being enacted to preſcribe within ſo ſhort a time, it is reaſonable, that the contrary action, which tutors may bring againſt their pupils† in order to get themſelves indemnified, ought, *ex paritate rationis*, and is therefore enacted to *preſcribe in the ſame manner within ten years*. From theſe, which are the words of the act of Parliament, it does not appear to be plain, from what time the preſcription of the contrary action begins to run; whether, like that of the *direct* one, from the death or majority of the pupil, or from the time at which the tutorial office determines. The reaſon of the doubt is, that a tutor has a right, and may, in all reſpects, have it in his power to commence his contrary action immediately upon the determination of his office: whereas the affairs of the pupil may be neglected; and he may happen not to commence his direct one, till he comes of age, and be himſelf able to manage his own affairs. It ſeems, however, that the preſcription of both begins to run from the ſame time, to wit, from the death or majority of the minor; 1) Becauſe it ought to be competent to the tutor to aſk to be indemnified as long as his pupil is entitled to call him to account. A pupil, who brings an action againſt his tutor in order to make him account, confeſſes in ſome ſort, that he has not yet done that which it is his duty to do, indemnified his tutor, *l.* 1. § 4. *ff. de con. tut. et ut. act.* 2) It may be inconvenient for a tutor to bring his contrary action during the minority of him, who was his pupil; becauſe a minor is, if he has been hurt, liable to be reſtored *in integrum*. So he has it in his power to pretend, that he has been

* Or minors againſt their curators.
† Or curators againſt their minors.

been wronged by his tutor, and may, therefore, involve him in a new law-ſuit. 3) A good office ought to be prejudicial to no body. *Officium ſuum nemini debet eſſe damnoſum, l. 7. ff. teſtam. quem. aper. l. 61. § 5. ff. de furt.* Beſides, 4) The contrary action may, in ſome ſort, be compared to an exception: for by it the tutor ſeeks the ſame indemnification, which he would be entitled to demand, if he were ſued by the *actio directa* to account and to reſtore to his pupil. But every exception laſts as long as that action, to which it may be oppoſed, *l. 5. § 6. ff. de doli mali et met. except.* From whence it muſt follow, that the preſcription of the contrary as well as of the direct action of tutory runs from the death or majority of the pupil *.

TITLE IX.

Of Minors and Curators.

§ 496. TUTORY, it has been ſaid (§ 472.), determines at the ſame time with the pupilage of the pupil. Hence minors, as ſoon as they attain the age of puberty, ceaſe to be ſubject to the power of tutors: for theſe have powers over the *perſons* (§ 403.) as well as over the eſtates of their wards. But a ſurpriſing alteration is produced on the minds as well as on the bodies of minors at the time, at which they arrive at puberty. Their bodies become firm and robuſt; they become ſenſible of their ſtrength, and begin to feel violent deſires after the propagation of their kind. Nature is not ſo abſurd, as to intend that a power, which ſhe hath beſtowed on any of her creatures, ſhould not be exerted by them. Of courſe the *perſons* of minors muſt ceaſe to be ſubject to the power of their tutors, as ſoon as they attain the age of puberty.

It would be abſurd, if thoſe who were capable of having children, had not affections to diſpoſe, and diſcretion to qualify them for taking care of their offspring. Hence Nature, who is ever found to be conſiſtent with herſelf, and to act by the moſt unerring wiſdom, produces continually, on the minds of men, changes correſponding to thoſe, which ſhe produces on their bodies. Mankind, as ſoon as they grow able to become parents, acquire a thoughtful turn; forget their childiſh habits; and feeling the ſtrongeſt affection for their children, begin, as ſoon as they have any, to be both diſpoſed and capable of taking care of them. They are therefore ſaid, at that time, to have arrived at the *years of diſcretion.*

It would be abſurd, if thoſe, who are able to have children, and muſt therefore be allowed by Law (§ 171.) to have families, ſhould be held to be incapable of managing their children, their families and their affairs, and ſhould in all caſes be obliged to be governed by others. Hence the Law of Scotland holds all minors paſt pupilage to be capable of taking care, and therefore entruſts them with the management of themſelves and of their own affairs.

§ 497. Minors, therefore, who have not curators, have in all reſpects the ſame powers, which majors have, to manage their own affairs, provided they are not, by ideotiſm or madneſs, deprived of the uſe of reaſon. Every act of adminiſtration, which it is lawful for one who is major, it is lawful for a minor, who has not curators and is of ſane mind, to do; the power of the latter is more circumſcribed and more limited than that of the former, in two reſpects alone. For 1) A major may diſpoſe not only of his moveable but alſo of his heritable eſtate, as well *mortis cauſa* as *inter vivos.* But a minor, tho he has power to make a teſtament, to appoint an executor, to leave legacies, and to diſpoſe of his moveable eſtate both *mortis cauſa* and *inter vivos, St.* 30th *Nov.* 1680, *Stevenſon.*—*Fo.* 13th *Jan.*

* This preſcription, it is declared by the Legiſlature, does not run againſt minors.

Jan. 1697, *Yorſton*, has not however power, and is not allowed by Law to diſpoſe of his heritage *mortis cauſa*, *i. e.* either to make a ſettlement by which others than his heirs at Law may be made to ſucceed to it, or to alter one, if any has been made of it by his predeceſſors, *K.* 70, 71.—*D.* I. 578. 24th *Jan.* 1728, *Hunter*.—*Fo.* 18th *Nov.* 1697, *Yorſton*.—*F.* 24th *Jan.* 1706, *Schaw*.—*D.* I. 578. 29th *Jan.* 1731, *M'Culloch*.—16th *Jan.* 1739, *Waddell*.—*C. F.* 86. (§ 398.).

2) A minor is not allowed to ſtand alone in judgment, and either to ſue or to defend a law-ſuit without a curator, *l.* 2. *C. qui leg. perſon. ſtand. in jud. hab.* § 2. *J. de curat.* for he is not, any more than a pupil, perſonable alone. Therefore, a curator *ad litem* muſt be appointed to him, by the Judge, before whom an action is brought againſt him, ere the cauſe can proceed. It is competent either to the minor himſelf, or to the other perſon who is party to the ſuit, to aſk the Judge to aſſign him one. But the neceſſity of the caſe requires, that a ſummons may be ſerved, every thing, which is extrajudicial, be done, and thoſe forms, which are neceſſary to be obſerved before the cauſe can be called before the Judge, be gone through, before a curator is appointed to him. The power of a curator *ad litem* is confined to the particular cauſe, in which he is appointed to authoriſe the minor. So he is bound to make oath only that he will be faithful in managing it; he has no power to intermeddle with any other of the affairs of the minor. Conſequently, he does not find caution; becauſe his power ceaſes, as ſoon as ſentence is pronounced; for the ſuit is then brought to an end. Therefore, he has not power to intermeddle any farther either by paying or by receiving payment of that which is ordained by the decree to be paid, or by doing that which is ordered by it to be done. All which is poſterior to the decree, and conſequent on it, muſt be done by the minor himſelf.

But excepting theſe two caſes, a minor, who has not curators, has, in every reſpect, the ſame power to manage his own affairs, which a major has, and may do every thing concerning them, which one of full age may do. Thus he may diſpoſe of his heritable as well as his moveable eſtate for onerous cauſes. He may ſell, wadſet, or charge it as he pleaſes; and he may not only bring his eſtate under real burdens, but himſelf under perſonal obligations either by entering into contracts, by making bargains, by borrowing money, or by doing any other obligatory deed.

§ 498. 'Tis true, young people have keen paſſions and little reflection: whence they are apt to be more frequently impelled by the furious violence of the former than guided by the calm dictates of the latter. Beſides, inexperienced in the ways of the world, they are little ſuſpicious of the deſigns of others; are apt to believe every one to be really what he pretends to be; and thus are liable to be cheated and impoſed on by the crafty and the abandoned. They have not had time to learn the high value of an independent life, to know the many advantages attending a plenteous fortune, and to acquire a moderate regard to money. From whence, regardleſs of their intereſt, they are apt to ſquander away, in prodigality and folly, the greateſt eſtates, and to reduce themſelves to the pinching neceſſity of a bit of bread. Liable thus to be ſeduced by their paſſions, and to be bubbled by mankind, they may frequently be injured by their want of experience and by their facility. Hence, we ſhall ſee, the Law hath invented the extraordinary remedy of reſtitution, by which all minors, whether they have curators or be without them, are reſtored *in integrum* againſt every pecuniary loſs, which they have ſuſtained through their own facility. But excepting this privilege, by which minors, who have been hurt by others, are entitled to be reſtored againſt the hurt done them, they are in all reſpects in the ſame ſituation with majors *quoad jus privatum*, with regard to the adminiſtration of their private affairs. They have the ſame rights, the ſame powers, the ſame faculties; may, if they pleaſe, take the management of their eſtates into their own hands; and are not obliged to commit it to the care of curators.

For

For the Law does not *impoſe* curators upon them. It does not however hold them to be abſolutely fit for managing their own affairs, or deprive them of a right which every one, major as well as minor, has to commit the management of his affairs to others, with what powers, under what limitations, after what manner they pleaſe. Hence minors are allowed to chuſe to themſelves curators, and to commit the management of their affairs to theſe.

§ 499. Curatory may be defined to be 'a power of managing the eſtates of 'minors, which is entruſted to thoſe, who are either choſen by the minors 'themſelves, or appointed by their fathers;' and curators may be defined to be 'thoſe, who are entruſted by Law with the power of managing the eſtates 'of minors.' From theſe definitions it follows I. That the power of curators extends not to the perſons, but to the eſtates II. Of minors alone. III. That curators are either choſen by the minors themſelves, or appointed by the father of the minors. IV. That they are *entruſted* by Law with the management of the eſtates of the minors, and are therefore bound to diſcharge their duty with fidelity. V. That their power laſts during the minority of the minors. VI. That their office is not either mercenary or lucrative.

From theſe axioms it will be eaſy to deduce every thing, relating to the appointment of curators, to their powers, and to the determination of their office.

TITLE X.

Of the Appointment of Curators.

§ 500. MINORS, having the management of their own affairs, may commit it to whom they pleaſe. Therefore, they have power to elect their own curators (§ 499, *ax.* 3.). But, tho they are allowed to chuſe whom they pleaſe, that are capable of the office, they muſt however make their election after that manner, and according to thoſe forms, which are appointed by Law, 1555, *c.* 35. *C.* 20th *Feb.* 1577. For the Law is as careful of them as we have ſhewn it is of pupils.

Hence a minor, who wants curators, muſt raiſe a ſummons *, and cauſe it to be ſerved upon two of the moſt *honeſt* and *famous* † of his kindred, both on the ſide of his father and on that of his mother, *St.* 23d *July* 1674, *Wallace*, either perſonally, or at their dwelling-houſes by giving to their wives or ſervants, or by affixing to the gates copies of it; as alſo upon all others having intereſt in the matter, generally at the market-croſs of the head-borough of the ſhire, within which he has his lands or goods; ſummoning them to appear before a certain Judge, againſt a particular day, which muſt be at leaſt 9 days after the day of ſerving the ſummons upon them, to hear and ſee curators choſen by the minor, given by the Judge, and find caution *de fideli adminiſtratione*.

The Judge, before whom a curator ought to be elected, ought regularly to be the Judge-ordinary, within whoſe juriſdiction the minor has his reſidence, *i. e.* either the Sheriff of the ſhire, or the Magiſtrate of the borough, within which the minor lives. Not that the Lords of Seſſion are not competent to the election; they are competent to every thing, to which any inferior Judge is competent, unleſs his juriſdiction is expreſsly declared to be privative of that of the Court of Seſſion. But minors uſe, becauſe it is moſt convenient for them, to make their election before their Judge-ordinary.

Thoſe

* See the ſtyle of it in DALLAS, *p.* 271.

† For it is not neceſſary, that they be two of his neareſt of kin, 1555, *c.* 35.

Thoſe of the kin of the minor, who are ſummoned to be preſent at the election, muſt be perſons living within the juriſdiction of that judge, before whom they are ſummoned to appear. Therefore, if they live without his territory, the election muſt be void, becauſe the ſummons is ſo, *Home*, *Jan.* 1685, *Burnet*, whether they were ſummoned by virtue of a warrant iſſued by the Judge-ordinary himſelf, or of letters of ſupplement iſſued by the Lords of Seſſion. For the juriſdiction of every Judge is confined within his own territory. Conſequently, if they were ſummoned upon the warrant of the Judge-ordinary himſelf, the ſummons muſt be void; becauſe no Judge has power either to cauſe a ſummons to be executed without his territory, or to order one, who lives without it, to be ſummoned to appear before him. If they were ſummoned by virtue of letters of ſupplement, the ſummons muſt alſo be void; becauſe nobody can be ſummoned to appear before a judge, within whoſe territory he does not live, and who has therefore no juriſdiction over him: for the defects of a juriſdiction, which neither has nor can have exiſtence, cannot be ſupplied.

From hence it follows, that, in caſe they do not live within the territory of any one of his ordinary Judges, he muſt chuſe his curators before the Lords of Seſſion; becauſe it is competent to ſummon theſe relations of the minor to appear before them alone *.

The election muſt be made by the minor himſelf: for it is optional to him, whether he will or will not ſubject the management of his affairs to curators. Conſequently, he may chuſe any perſons he pleaſes; provided they are not either naturally or legally incapable of doing the duties of their office (§ 410, 419, 427.)

He may chuſe them after what manner, in what terms, and with what powers he pleaſes. Thus, he may chuſe either one perſon, or more than one; he may chuſe one of them to be curator *ſine quo non*, may appoint a certain number of thoſe he chuſes to be a quorum, may commit the adminiſtration to them all jointly, or may commit it to them jointly and ſeverally; he may chuſe them either *pure*, *ſub conditione*, *ex die*, or *in diem*. This follows from the power, which he has of either chuſing or not chuſing them at all: for, as nobody can force him to do it, neither can any body impoſe on him the terms of his election; it muſt be taken as he pleaſes himſelf to make it.

But the power, which he has of electing curators, ariſes from that, which he has to manage his own affairs. They muſt therefore be elected by him, after his pupilage is at an end, and he can properly be ſaid to be minor; becauſe the Law does not entruſt him with the power of managing his own affairs, till he has attained the age of puberty. Of courſe, an election made during his pupilage, no matter whether with or without the authority of his tutors, is *ipſo jure* void, *Sp. tutor*, 26th *Nov.* 1624, *Ramſay*.—20th *Dec.* 1634, *Campbell*. But it muſt be remarked, that it is the *Election* alone, which it is neceſſary ſhould be made by him after the determination of his pupilage. All the ſteps, which it is neceſſary to make before it, may be made during his pupilage. Thus the ſummons, which, it has been ſaid, is previous to the election, may be raiſed by his tutors, and ſerved in his and their name upon thoſe, who ought to be preſent at the election. Indeed, both the reaſon of the thing and the words of the act of Parliament, 1555, *c.* 35. make it neceſſary, that the day, to which the ſummons is executed, be, in *all* caſes, at leaſt 9 days after the Minor ſhall have attained the age of puberty. For it is not only a lawful, but a very dutiful act of adminiſtration, for a tutor to do a thing, which may promote the utility of his pupil, and to take care, that he be provided with ſome perſons, by whoſe advice he may manage his affairs, *l.* 5. § 5. *ff. de adm. et per. tut.*

On the day, to which the ſummons was executed, the minor exhibits to the Judge a deed containing a liſt of thoſe whom he chuſes to be his curators, and the

* A difficulty can ſeldom occur on this head; for thoſe, who are cited by the minor, it is not neceſſary ſhould be his neareſt of kin; 'tis ſufficient, if they are related to him, and are perſons of an honeſt character.

the terms on which he elects them. On which, those who are elected, and are willing to accept, having signed an acceptance of the office, and found caution *de fideli administratione*, the Judge interposes his authority to the election; decree is passed; and an act of curatory is extracted, the act being no more than an extract of this decree.

§ 501. It was said (§ 498.), that it is optional to minors either to chuse curators, or to take the administration of their affairs into their own hands alone. However, Law imposes curators on them in two cases. For 1) as has been remarked (§ 365, 366.), it gives a father power to appoint not only tutors but curators to his children, and to appoint them under this proviso, that they shall, each of them, be liable neither *in solidum* for their colleagues as well as for themselves, nor for their omissions as well as for their intromissions, but for themselves and for their own intromissions alone. Therefore they cannot, in case he exerts this power, and appoints curators to them, either take the management of their affairs on themselves alone, and exclude those whom he has appointed to be their curators, or reject his nomination, and elect others instead of those named by him, *D.* II. 478. *Feb.* 1731, *Pitcairn.* But this power the father must exert after that form, which is prescribed by Law. Therefore, he cannot make his nomination of curators, by a deed made on death-bed; he must do it by one made during his *liege poustie*, 1696, *c.* 8. 2) Minors who happen to be fatuous or furious, or are, by ideotism or madness, deprived of the use of reason, are subjected to curators, nay to curators who have tutorial powers, because the minors are, like other ideots or mad-men, utterly incapable of managing their own affairs. Therefore, they must be subjected to the power of tutors in the same way, as others who are deprived of the use of reason.

§ 502. From what has been said it is plain, that curators are either nominate or elective; that the Law of Scotland knows not either curators of Law or curators-dative*; that therefore there are no persons, who are entitled to be served curators of Law; and that the king has not power to give curators to minors, who have none. For a minor, who wants them, is not obliged, and cannot be forced, either to elect or to receive any.

§ 503. Curatory is like tutory; it is not a public and a civil office (§ 417, 429.), which may be imposed upon one, whether he is or is not willing to accept of it. Every one therefore, who is either appointed by the father of a minor, or chosen by the minor himself to be his curator, either may or may not accept of the office as he pleases. Therefore, he can be liable only for what he does after the time of his acceptance.

One is held to have accepted of the office of curator, in case, after he knows that he is either appointed or chosen curator, he intermeddles with the affairs of the minor, and does any act of administration regarding them; provided he does not protest, that he does it without an intention to accept: for if he makes a protest to that purpose, he cannot be held to have accepted. A formal acceptance, therefore, is not necessary.

'Tis true, curators elected by a minor ought regularly to sign an acceptance, and to find caution *de fideli administratione et rem adolescentis salvam fore*, ere the Judge, before whom the election is made, interpose his authority to it; they may omit to do so; and they will notwithstanding be held to have accepted, *si pro curatoribus gerant*, in case they exercise the curatorial office, provided they knew they were elected to it.

§ 504. Curators are not obliged to accept; they are, however, if they have once accepted, bound like tutors by their acceptance to continue in the office; for they cannot afterwards renounce it at pleasure. Not only the curators cannot renounce, but the minor cannot exclude them from the office by making a

* Except in the case of fatuous or furious persons, who have tutors or curators of Law, as we shall see afterwards, whether they be minor or major.

new election of others in their place. For thoſe, whom he has once choſen, muſt continue to be his curators, till either he becomes major, or they be judicially removed from the office. A minor has no ſecond option, *unleſs* he has *expreſsly* reſerved it to himſelf in his firſt election, *v. g.* by chuſing his curators either conditionally, from a day, or to a day; in caſe he elects them *purè*, he cannot make a ſecond choice, *Du.* 20th *Nov.* 1627, *Adam.* Therefore, tho both the minor and the curator ſhould want to be free of one another, and ſhould for this purpoſe obtain a *colluſive* decree to be pronounced, ordaining the curators to renounce, they will, notwithſtanding, continue to be bound to manage, and will therefore be liable after the pronunciation of the decree in the ſame way, in which they were liable before it, *St.* 21ſt *July* 1664, *Scot.* For a curator is liable to be removed for mal-adminiſtration alone. Therefore, if he has not been guilty of mal-adminiſtration, and has been cauſeleſsly removed, his removal is void.

§ 505. Curators are bound by their acceptance to manage the affairs of their minors; but they ought not to ſuffer any loſs by their adminiſtration; a good office ought to be hurtful to nobody. Hence, curatory is, like tutory, as it were a contract entered into by the curator and the minor, and inferring obligations on each of them (§ 434.). On the one hand, the curator is bound by his acceptance to manage with fidelity the affairs of his minor, to render an account of his adminiſtration, and to reſtore every thing he may have that belongs to him. On the other hand, the minor gives his curator a commiſſion to manage his affairs, is bound to concur with him in every lawful deed of his adminiſtration, and is obliged to indemnify him of any expence to which he may be put in the diſcharge of his duty.

§ 506. Curators elected by the minor, it has been ſaid, are, like tutors of Law and tutors-dative (§ 432.), bound to find caution *rem minoris ſalvam fore.* Conſequently, the Judge, before whom the minor makes his election, is culpable, in caſe he either interpoſes his authority before caution is found, or accepts of improper cautioners, or takes them improperly bound; he muſt, therefore, repair to the minor the loſſes, which he may ſuffer through any of theſe cauſes.

But curators named by the father of the minor are not bound to find caution; for the Law repoſes the greateſt confidence in his nominees (§ 432.).

TITLE XI.

Of the Powers, Duties, and Obligations of Curators.

§ 507. THE perſons of minors are wholly exempted from the power of their curators (§ 496, 499, *ax.* 1.), becauſe they have attained the age of puberty, and have arrived at the years of diſcretion. Conſequently, they can diſpoſe of them as they pleaſe; they can live where they pleaſe; they can marry, if they pleaſe. Their curators have no right to intermeddle in any thing concerning their perſons alone, *Di.* 316. their power is confined to the management of the eſtates of their minors. Hence it is ſaid, *Tutor datur perſonæ, curator rei.* 'Tis this which makes the principal difference between tutory and curatory. For the duties, the obligations, the powers, and the rights of curators, are almoſt in every thing relating to the adminiſtration of the eſtates of their minors, the ſame with thoſe which tutors have over the eſtates of their pupils. It will therefore be needleſs to go into the detail, ſince every thing almoſt, which has been ſaid of tutors, may *mutatis mutandis* be affirmed of curators alſo.

§ 508. Thus I. Curators as well as tutors are bound, before they enter on the adminiſtration of their office, to make and to authenticate an inventory of *all* the

the particulars, of which the eſtate of the minor conſiſts; and they are bound to do it after the ſame manner and under the ſame certification with tutors, 1672, c. 2. Therefore *every thing*, which has been ſaid of tutors and of tutorial inventories (§ 436, 437, 438.), may be affirmed and repeated, *mutatis mutandis*, of curators and of curatorial inventories.

But the ſame perſons, who have been one's tutors, may be named (§ 366.), and may continue to be his curators. In this caſe, the office as well as the officers continue to be the ſame; their power is not interrupted; it is only diminiſhed. 'Tis not neceſſary therefore for the curators to make new inventories; for they are not liable to be called to account till the majority of their wards. 'Tis otherwiſe in caſe their office is not continued, but interrupted, tho for the ſhorteſt time.

II. Curators are alſo bound to manage both the moveable and the heritable eſtates, and to take care both of the extra-judicial and of the judicial affairs of the minors (§ 442.). Their powers, obligations, and rights, are the ſame with thoſe of tutors. Thus, they are bound 1) To diſpoſe of the moveables of the minor, if his utility requires this to be done (§ 443.); 2) To take care of his heritable eſtate, to let his houſes and his lands to tenants, and to take care that they do not lie idle (§ 444.); and 3) To do every thing, which, it has been ſaid, tutors are bound to do with regard to both.

III. They are alſo, like tutors, bound 1) To pay debts juſtly due by the minor, either to others or to themſelves; 2) To pay them voluntarily, if it is clear that they are due; and 3) To make up to him any loſs which he ſuſtains thro their negligence or delay in paying (§ 446.).

IV. They are alſo bound 1) To receive payment of debts due to the minors; 2) To exact it, provided it is for his intereſt, that payment of them be exacted; 3) To lay out his monies on intereſt within the ſame time, within which tutors are bound to lay out thoſe of their pupils. Indeed, the obligations of curators, with regard to the ſuing for payment of debts due to their minors and the loan of their money, are preciſely the ſame with thoſe of tutors (§ 448, *ſqq.*). They differ in one thing only, which is, that curators are not, like tutors (§ 449.), bound to accumulate into one principal ſum the whole intereſts which become, at ſucceſſive times during their office, due to the minor for money bearing intereſt, and to have the accumulated ſum lent out as a principal on intereſt either at or before the expiration of their office, *Home*, *Nov.* 1686, *Inglis.*—*Fo.* 10th *July* 1688, *Wilſon.*

V. Curators are bound to watch over the debtors of their minors; to do diligence againſt them as ſoon as they ſuſpect they are turning inſolvent; and to repair any loſs which the minor ſuſtains through their negligence (§ 450.).

VI. Beſides, they ought to proſecute the doubtful claims of the minors either in a judicial or in an extra-judicial manner; for they have the ſame powers, which tutors have, to tranſact and to ſubmit (§ 451.).

VII. They are bound to watch over the conduct of one another, and to take care that ſuch, as appear to be unfit for continuing in the office, be removed (§ 453.).

§ 509. As curators are bound to do moſt of the things, which tutors are bound to do, they are in like manner prohibited to do moſt of thoſe, which tutors are prohibited to do. Thus, 1) They cannot intervert the money of the minor to their own uſe, without being liable to pay intereſt for it (§ 454.); 2) They cannot be *auctores in rem ſuam* (§ 454.); 3) They cannot acquire any right affecting his eſtate, without being held, *præſumptione juris et de jure*, to have meant to acquire it for the behoof of the minor (§ 455.); 4) They cannot make gratuitous alienations of his property (§ 456.); 5) They cannot borrow money in his name, except on the moſt neceſſary occaſions (§ 456, 457.); 6) They cannot aſſign debts due to him, except to ſuch as pay them (§ 458.).

But

But curators are not, like tutors, prohibited to ſell, or rather to conſent to the ſale of his heritable eſtate: for heritage belonging to a minor may be ſold without the leave and authority of the court of Seſſion. 'Tis true, in caſe he has curators, he muſt do it with their conſent, *Du.* 2d *Feb.* 1630, *Hamilton.*—*A. minor*, 21ſt *July* 1631, *Earl Kinghorn.*—*St.* 13th *Dec.* 1666, *Thomſon.*—*Fo.* 6th *Dec.* 1699, *Creditors of Clark*; otherwiſe the ſale is, like every other deed done by him without it, *ipſo jure* void, *C. Jan.* 1584, *Robertſon.*—*M.* 17th *March* 1561, *Kincaid.* But if he has none, the ſale ſubſiſts; for a minor, who has not curators, may do every thing which one of full age may do (§ 496, 497.). So he may ſell his heritage *ſine decreto*, *S.* 4th *March* 1543, *Glentoirs.*—*M.* 6th *March* 1561, *Grundiſtone.*—17th *March* 1561, *Kincaid.*

But minors are entitled to be reſtored againſt deeds which are hurtful to them; and people uſe not to be fond of having unneceſſary dealings with them. Therefore tho the heritage of a minor may be alienated without the leave of the Court of Seſſion, either by himſelf alone, if he has not curators, or by him with their conſent, if he has any; it is however competent, *D.* I. 580. 17th *Feb.* 1738, *Campbell.*—10th *Aug.* 1757, *Maitland of Eccles v. his neareſt of kin*, and is always adviſable to have the ſale authoriſed by a decree of the Lords. For purchaſers will thereby be invited to offer, and will not be afraid to buy, as a minor cannot be eaſily reſtored againſt a ſale authoriſed by them.

§ 510. A minor can alienate his heritage with conſent of his curators; but he cannot, as has been remarked (§ 497.), make a ſettlement of it, and make it deſcend to others than thoſe, whom the Law calls to ſucceed to it. Therefore every deed, by which he either alters a ſettlement made of it by his predeceſſors, or ſettles it on others than his heirs at Law, or attempts to limit their powers over it, is *ipſo jure* void; whether he do it with or without the conſent of his curators. For their office is conferred on them, that they may preſerve and may take care of his eſtate.

§ 511. Curators are bound to manage the judicial as well as the extra-judicial affairs of their minors after the ſame manner, as tutors are bound to manage thoſe of their pupils (§ 442.). So that every thing, which has been ſaid of tutors (§ 450, 451, 462, 463.), may be affirmed, *mutatis mutandis*, of curators, with regard to judicial matters. They muſt either employ ſolicitors, counſel, and others neceſſary for managing them, or take care of them themſelves.

§ 512. Every one, who has attained the age of puberty, is allowed to have the diſpoſal of his perſon, and is preſumed to have diſcretion (§ 496, 507.). Therefore the concurrence of the minor is neceſſary to every thing concerning the management of his affairs. But his curators have the care and the management of his eſtate; therefore their concurrence is neceſſary alſo. Of courſe, every act of adminiſtration concerning it ought *regularly* to be done *by the minor*, with the conſent of his curators; he cannot do any thing without them, nor they without him. Thus bonds, bills, conveyances, charters, leaſes, diſcharges, *&c.* ought to be both granted and ſigned by them both. But many things admit not of delay, are of ſmall importance, and uſe not to be done in a formal manner; ſuch are thoſe which uſe to be done in conſequence of verbal orders; it would be abſurd to require the concurrence of the minor, and of a quorum of his curators to the ordering of theſe; they may be allowed to be done either by the minor or by any one of his curators (§ 467.).

Therefore every thing done by the minor alone, without the conſent of his curators, is *ipſo jure* void; be it alienation, obligation, contract, or what it will, *Ha.* 21ſt *March* 1622, *Seton.*—*Du.* 19th *Dec.* 1632, *Maxwell.* But there is one exception to this rule; for a minor may make a teſtament, and diſpoſe of his moveable eſtate *mortis cauſa*, without their conſent, knowledge, or concurrence, *St.* 30th *Nov.* 1680, *Stevenſon.*—*Fo.* 13th *Jan.* 1697, *Torſton.* In the ſame manner, every thing, done by the curators alone, is alſo void. Thus, as a diſcharge,

granted

granted by the minor alone without the consent of his curators, frees not the debtor; so neither does one granted by the curators alone, *Ha.* 26th *June* 1610, *Forrester.* —*St.* 9th *Jan.* 1675, *M'Intosh.*—*D.* II. 487. *Dec.* 1725, *Earl of Bute.*

But payment can be made, goods can be delivered to one of them alone; it cannot be made to them both. Whether therefore shall it be made to the minor or to his curators? He might misemploy the money; therefore payment ought not to be made, goods ought not to be delivered to him. 'Tis true in case he intermeddles either with his money or with his goods without the consent of his curators, they are not liable to account for that with which he intermeddles; because they cannot hinder him from doing it. But those, who pay to him, are not bound, cannot be compelled, and ought not to do it. Therefore, they are not released from their obligations on making payment to him; because they ought to have delivered the money to his curators alone, and a discharge granted by a minor in these circumstances is void, in so far as he, who makes the payment, does not prove the minor to have been *locupletior factus*, *F.* 5th *Dec.* 1707, *Cunningham.*

It has been said, that things done either by the minor alone, or by the curators alone, are *ipso jure* void; but this is true only *quoad* the minor; for if he is willing to hold them to be valid, the other party is bound, and must stand to them, because the contract is complete on his part (§ 468.).

Besides, minors are in all cases bound both by their own deeds, and by those of their curators, *in quantum locupletiores facti* (§ 457, 468.), *Ha.* 24th *July* 1605, *M'Adam.*—*St.* 24th *Feb.* 1672, *Corsar.*—*Du.* 11th *Dec.* 1629, *Gordon.*—*D.* I. 576. *Fo.* 9th *Jan.* 1678, *Hamilton.*—*Du.* 5th *Feb.* 1631, *Inglis.*—22d *March* 1634, *Rynd.*—23d *March* 1639, *Stewart.*—22d *June* 1627, *Drummond.*

Since every thing ought to be done by him with the consent of his curators, 'tis plain, that it must always be with the consent of those, whose consent is necessary to every act of administration. Thus, if one of them is curator *sine quo non*, nothing can be done without his consent, *&c.* (§ 467.).

§ 513. The lawful tutorial deeds of tutors are obligatory on their pupils (§ 470.): *a fortiori* a minor must be obliged by such deeds, as have been done by himself with consent of his curators, and is suable in consequence of them. Being himself obliged to others, he must reciprocally have others obliged to him, and must therefore have a right to sue them (§ 471.).

TITLE XII.

Of the Determination of Curatory.

§ 514. CURATORY, as it resembles tutory in many other respects, is like it in the ways by which it determines: for it determines 1) By the majority; 2) By the death of the minor; 3) By the death of the curator*; 4) By his removal on account either of malignant suspicions, or of incapacity†; 5) By the marriage of a curatrix; 6) By the existence of a condition; 7) By the arrival of a day.

* It has been adjudged that curatory does not, like tutory, expire upon the death of a *sine quo non*, or for the want of a quorum of the curators elected, so as to make a second election necessary. For the minor may allow those, who remain and are capable, to continue to act. In this case others cannot refuse to deal with them, or object want of power to them. A second election, therefore, is not necessary. *St.* 4th *Jan.* 1666, *Fairfouls.* At the same time it must be confessed that the principles maintained in this judgment are not entirely agreeable to Law, and that it is in all cases *safest* for the minor to make a new election in a formal manner.

† Curators are liable to be removed at the suit not only of co-curators, but also of the minor himself or of his relations.

But there are two ways, in which curatory may, but tutory cannot expire. For 8) The minor muſt himſelf concur to every act of adminiſtration; he may be froward and obſtinate, and may not be willing to concur with his curators. They ought therefore in this caſe to be releaſed from their office, and from the obligations which it implies; and may for this purpoſe bring an action againſt their minor, in order to have them looſed from one another, by a decree of the Court of Seſſion. 9) A huſband is the curator of his wife (§ 211.): therefore as ſoon as a woman, who is not of full age and has curators, marries, the power of her other curators ceaſes, and devolves by Law to her huſband. But a man may marry before he comes of age (§ 170.). Therefore his curators, if he has any, muſt conſent to every deed which he does as curator of his wife, as well as to every deed relating to his own affairs. If he has none, he muſt, notwithſtanding his nonage, authoriſe her juſt as if he was of age; for he has in this caſe full power to manage his affairs.

§ 515. Curators, after their office is at an end, are liable to account and to reſtore to the minor, in the ſame manner, in which tutors are liable to their pupils; ſo they are ſuable by them *actione curatelæ directa*. And the minors are liable to them in the ſame manner, in which pupils are liable to their tutors; ſo they are ſuable *actione curatelæ contraria*.

§ 516. Actions of *compt and reckoning* between minors and their curators, the contrary as well as the direct one, preſcribe in ten years from the death or majority of the minor, 1696, *c.* 9.

TITLE XIII.

Of Pro-tutors and Procurators.

§ 517. SUCH are the duties, the obligations, the powers, and the rights of thoſe who are called in a formal manner, and are therefore legally entitled to exerciſe every part of the tutorial or curatorial office. ‘ Thoſe, who take it on ‘ themſelves, without being called in a legal way, to intermeddle at their own ‘ hand, with the affairs either of pupils or of minors, to manage them and to ‘ act as tutors and curators’, are called *pro-tutors* and *procurators*.

Theſe intermeddle of their own accord with the affairs of the minors and act as tutors and curators. Therefore the Law brings them under the ſame obligations, binds them to the ſame diligence, and makes them accountable in the ſame manner with ſuch as are conſtituted in a legal way, and are properly entitled to exerciſe the tutorial and curatorial office, *Aſ.* 24th *June* 1665*. For it preſumes that they are willing to do every thing, which, if they had been appointed in a legal way tutors and curators, they would have been bound to have done. Beſides, it is culpable in one to intermeddle with matters, which do not concern him, *l.* 36. *d. r. j.* for it may be well ſuſpected, that he means to turn his adminiſtration to his own profit. And ſuch, as ſee the affairs of pupils or of minors managed by thoſe pro-tutors and procurators, are led to reſt ſecure, that they are not neglected, but managed with care. For theſe reaſons the Law of Scotland hath copied after the example of that of the Romans, and made pro-tutors and procurators liable, accountable, and ſuable, for their omiſſions as well as for their intromiſſions; in ſhort, in every reſpect, in the ſame way in which tutors and curators are liable, accountable, and ſuable, *Aſ.* 24th *June* 1665.—*St.* 18th *Nov.* 1671, *Caſs.*—*Home* *Jan.* 1686, *Thoirs.*

§ 518. But pro-tutors and procurators preſume, at their own hands, when they have no legal title, to act as tutors and curators (§ 517.). Therefore, they have not

* It was not ſo before the act of Sederunt, *St.* 10th *June* 1665, *Swinton.*

not any of the *active* powers of theſe, *i. e.* they cannot *force* any body to deal with them, either about the extra-judicial or about the judicial affairs of their minors: ſo they cannot force any body either to pay them debts due to the minors, or to defend themſelves againſt actions brought by them in their name. For Law gives theſe active powers to thoſe alone, whom itſelf veſts and entruſts with the office. Every body therefore may refuſe, ſince one cannot be forced to deal with them about the affairs of the minors.

Since no body can be forced to deal with them, 'tis plain that every one, who does deal with them, does it at his peril; for he does it voluntarily. He is not looſed, by virtue of his dealings with them, from the obligations with which he was bound to the minor. Tho therefore he ſhould have performed every thing, which he was bound to perform, he will, notwithſtanding, continue to be obliged to the minor in the ſame way, as if he had not fulfilled his obligation. He will however be looſed, and his obligation will be extinguiſhed in ſo far as that, which he performed to the pro-tutors and procurators, is *in rem minoris verſum*.

If the obligations of thoſe, who deal with pro-tutors and procurators, are not extinguiſhed by performance made to them; *a fortiori*, thoſe, with whom they contract in the name of minors, muſt be bound to the minors in the ſame way, as if they had contracted either with the minors themſelves, or with lawful tutors or curators. For the contract is perfect on their part; they were willing to enter into it; and it cannot alter the caſe, or make them be held not to have conſented, that thoſe, who contracted with them, were not legally authoriſed to do it. It was their buſineſs to know, whether theſe had power to do it.

But the minors in whoſe name the agreement was made, are not reciprocally bound to them. 'Tis true in caſe they chuſe to ſtand to the contract, they muſt fulfil the obligations under which it brings them: for every body who claims the benefit of a contract, muſt fulfil his part of it; that is a condition implied in every contract. But they may either ſtand to it or be off, as they pleaſe.

§ 519. Thoſe, who have fulfilled an obligation to pro-tutors or procurators, are not looſed from it, and may be forced to fulfil it again, in caſe that, which they have done, has not been *in rem minoris verſum*. But the pro-tutors and the procurators are in this caſe bound to indemnify them, if they are forced to perform twice. for the pro-tutors and the procurators bound themſelves by accepting of payment from them, and muſt of courſe be held to have promiſed to employ it to the profit of the minor. Therefore if they have employed it to the profit not of the minor, but of themſelves, they muſt be bound, becauſe they are *locupletiores facti*. If they have not employed it to his profit or to their own, but have miſpent it, they are bound *ex delicto*.

But it is poſſible, that they may not have been culpable; they may have been hindered by accident, *caſu*, from employing it to the profit of the minor; and it would be hard in this caſe to make them liable to thoſe who paid: for no body is bound by accidents. Indeed if the pro-tutors or procurators were *in dolo* from the beginning; if they circumvented the perſon bound to the minor, and made him believe they were lawful tutors or curators; or if they forced him to fulfil the obligation; they will, at common Law, be bound *ex delicto* to repair his loſs; for he has a right to be reſtored againſt that, which he was either induced by fraud or forced by violence to do, *l. 7. ff. quod falſo tut. auct.*

§ 520. Pro-tutors and procurators manage the affairs of others; they muſt therefore be liable to account and to reſtore as well as tutors and curators. Hence they are liable to be ſued by their pupils or minors *actione protutelæ* or *procuratelæ directa*. I ſay by the *pupils*: For the *actio protutelæ* differs from the *actio tutelæ* only in this one reſpect, that it may be brought as well during as after the pupilage of the minor, provided the pupil is properly authoriſed by other tutors.

But

But a good office ought to be hurtful to nobody; pro-tutors and procurators may have had the moſt upright intentions, and may have managed with fidelity; they muſt therefore be entitled to be *indemnified* by the minors. For this purpoſe Law gives them the *actio protutelæ* or *procuratelæ contraria*, which differs not from the *actio tutelæ* or *curatelæ contraria*. It cannot be commenced, till the pro-tutors or procurators have quitted the management, and have ceaſed to *be bound* to adminiſter.

TITLE XIV.

Of Factors appointed by the Court of Seſſion to manage the Eſtates of Pupils.

§ 521. THE Lords of Seſſion, who have a ſupreme juriſdiction and Prætorian Powers, are entitled to watch over the good of their country, to invent remedies ſuitable to every emergency, and to apply them on neceſſary occaſions. Agreeably to this power, they uſe to appoint factors to manage the eſtates of ſuch as are either by abſence, or by any other temporary incapacity, diſabled from taking care of their own affairs, and have not any to look after them. Among others, for whoſe good the Lords provide, are ſuch pupils as have not tutors; for pupils who have tutors ſtand not in need of the aſſiſtance of factors *. But if they have none, the Lords uſe, on ſummary petitions preſented in their behalf, to appoint factors to manage their eſtates. Theſe petitions may be exhibited in name of any body; becauſe any body may do a good office to another, and the Lords may do with them as they ſee proper. But to prevent improper perſons from being appointed, the relations of the pupils ought to be acquainted that the applications are to be made. So the petitions either ought to be intimated to them after the ſame manner with other incidental petitions, that they may thereby have it in their power to hinder an order from being made purſuant to the prayer of them: or they ought to be ordered to be ſerved upon ſome of the relations of the pupils; and a reaſonable time ought to be allowed theſe to conſider, whether they ought to oppoſe or to agree to the granting the requeſt of the petitioners: or a deed may be exhibited along with the petition, ſignifying their conſent to the appointment of thoſe in whoſe favour application is made. For they ought always to have an opportunity of being heard upon the utility of the nomination.

But pupils may have no relations, to whom the petitions can be notified; and the Court muſt provide for their ſecurity in the beſt way it can, by enquiring into the circumſtances of the caſe, and the fitneſs of the perſons who want to be appointed factors.

In caſe, after having enquired into theſe, the Court thinks proper to appoint them to be factors, they make an order or decree to that effect.

§ 522. The duties, the obligations and the powers of factors, appointed by the Lords to manage the eſtates of pupils, are deſcribed in *Aſ.* 13th *Feb.* 1730. They regard either 1) The immoveables, 2) The moveables, or 3) The debts of the pupils; for of theſe eſtates conſiſt.

But a factor, before he enters upon the exerciſe of his office, is firſt of all bound to find caution *de fideli adminiſtratione*. Both he and his cautioners ought to bind themſelves conjunctly and ſeverally, *n.* 11. *d. aſ.* Therefore, he ought both to find caution, and to have himſelf and his cautioners bound in this manner, ere he ought to be granted an extract of the decree by which he was appointed factor. Conſequently, if the clerk sgive him an extract of it before this be

* For the ſame reaſon, the Lords cannot appoint factors to manage the eſtates of minors; becauſe they are capable of managing their own affairs.

be done, they are culpable, and muſt therefore be bound to the minor in the ſame manner, in which the cautioners would have been.

§ 523. After he is, by having found caution, and by getting an extract of the decree appointing him factor, properly veſted with the office, he is bound to enter upon the actual exerciſe of it. Therefore 1) He muſt, within ſix months after he has extracted the act by which he is appointed factor, make an exact ſtate of the rents of the immoveable and rentable eſtate of the pupil; containing a diſtinct account of the rent, which each particular part of it pays. This ſtate muſt be put into the hands of the clerk to the act appointing him factor, to be kept by him, that it may be inſpected and peruſed *gratis* by all, who have intereſt to inſpect and to peruſe it; and that a charge may be made out againſt the factor from it, *n.* 2.

But his eſtate may be improved; diſcoveries may be made on it; and the rent may happen afterwards either to be increaſed or to be diminiſhed. In this caſe he muſt put into the hands of the ſame clerk an account of the alteration, within three months after it happens, *n.* 3.

It is important to hinder the pupil from being defrauded, to know the true ſtate of his affairs; the ſtate of the rent, made by the factor, may be found to be deficient, and he may omit to give account of the ſucceſſive additions made to it. Therefore it is provided that he ſhall in theſe caſes be liable to double the deficiency or omiſſion, *n.* 3.

§ 524. He is impowered 2) to grant leaſes of the immoveable parts of the eſtate to laſt as long as it continues to be under the inſpection of the Court of Seſſion, and for a year longer, *n.* 8. He is *bound* therefore to let the immoveable eſtate of the pupil; for he has accepted of an office, which gives him power to do ſo, *l.* 8. § 1. *ff. de reb. auct. jud. poſſid.* But he cannot let it for a rent lower than that at which it was rented, when he entered on his factorſhip, without obſerving the ſolemnities appointed by Law to be obſerved in all caſes of this kind, *n.* 3. (§ 444.).

From hence it follows, that he muſt be entitled to ſue *actions of removing* againſt thoſe, who tenant the eſtate: for he is bound to manage with fidelity; he has power to grant leaſes; and cannot be himſelf *ſeiſed.* Therefore he muſt in this caſe *ex neceſſitate* have the ſame title with him whoſe eſtate he is managing.

But he cannot alienate the immoveables of the pupil. Indeed no factor, no procurator can alienate immoveables without a ſpecial commiſſion to do it, *l.* 63. *ff. de procuratoribus.*

§ 525. A factor is bound within ſix months, from the time at which he cauſes to be extracted the act of factorſhip, to make an inventory containing an exact account and deſcription of *all* the moveables (§ 436.), ſuch as cattle, corn, hay, houſhold-furniture, *&c.* that belong to the eſtate of the pupil, and to put it into the hands of the ſame perſon with whom the inventory of immoveables was depoſited, *n.* 6.

§ 526. Theſe moveables he is bound and has power to manage according to prudence; he may either ſell them, or diſpoſe of them in any way, which is moſt for the intereſt of the pupil and of his eſtate; provided always he do it according to the rules of Law, and manage according to the dictates of prudence, *n.* 6.

Hence alterations may be made in the ſtate of the moveables of the pupil; and the factor is bound to put into the hands of the clerk, within three months from the time at which they happen, an account of them, of the cauſes of them, and of the value got for thoſe moveables of which he hath diſpoſed.

And in caſe either the principal inventory is defective, or he omits to give exact accounts of the ſucceſſive alterations of the moveables, he is declared to be liable to double the deficiencies or omiſſions, *n.* 6.

§ 527. He is bound 3) within the ſame time and under the ſame certification, to make and to depoſite, in the hands of the ſame clerk, an inventory of all the bonds, bills, notes, or obligations, granted either for money or for goods, which

belong to the pupil; which inventory ought to expreſs particularly 1) the names both of the creditors and of the debtors, 2) the ſums of money, or quantity of goods for which the obligations are granted, 3) the rate of intereſt, if they are made to bear it, 4) the time of payment of the principal, as well as 5) that from which the intereſt runs, and 6) that from which it appears to remain unpaid, 7) of the conveyances of the obligations.

And becauſe alterations muſt frequently happen in the ſituation of the particulars contained in this inventory, he is bound, within the ſame time and under the ſame certification, to depoſite with the ſame clerk accounts of theſe ſucceſſive alterations, *n.* 5.

§ 528. He is bound to *manage* theſe obligations, *n.* 6. Conſequently, he is bound, and is impowered to make, to receive, to exact, and to ſue for performance of them. So that diſcharges granted on payment made either to him or by him, free both himſelf, and thoſe who pay to him.

§ 529. But it may ſometimes be neceſſary to make titles to moveables by confirmation. He is therefore impowered, and muſt by conſequence be bound to confirm them in his own name, as executor-dative, and as factor appointed by the Court of Seſſion on the eſtate of the pupil, for the uſe and behoof of all having intereſt in them. Commiſſaries are bound to confirm him, unleſs ſome other, who has a preferable title, ſues to be confirmed.

The factor is bound, within three months from the date of the confirmation, to put into the hands of the ſame clerk a juſt and full copy both of the confirmed teſtament, and of all the ekes which he may afterwards make to it. This if he neglects to do, he is declared to be liable to ſuch a mulct, as the Lords of Seſſion ſhall pleaſe to impoſe upon him, *n.* 7.

§ 530. I ſaid (§ 528.) that he may pay debts due by the pupil. But this muſt not be underſtood, as if he had an arbitrary power of paying to whom he pleaſes; for in this matter he is bound to obey the will of the Lords of Seſſion, can do nothing without their permiſſion, and is expreſsly hindered from applying the money, which comes into his hands, to the payment of any other perſons, at any other times, than thoſe appointed by the Lords themſelves either in the original act of factorſhip, or otherwiſe, *n.* 9.

§ 531. A factor is, like all who manage the affairs of others, bound to render an account of his management, and to reſtore. For this purpoſe, he is ordained, once every year, to depoſite with the ſame clerk a ſcheme of his accounts, containing a particular ſtate both of his charge and of his diſcharge, that all concerned may have acceſs to ſee, to examine, and to provide themſelves with means of checking it. This if he neglects to do, he is liable to ſuch a mulct as ſhall be impoſed on him by the Court of Seſſion, and ſhall not be leſs than the half of the yearly ſalary allowed him, *n.* 4.

§ 532. He is liable to pay intereſt for all the money which he either hath, or might by diligence have recovered, from and after a year from that time, at which the money became due, or might have been recovered. For it is his duty to lend it out as ſoon as poſſible. The Law therefore impoſes no hardſhip on him, when it holds him obliged to have it lent out within a year after he might have had it in his poſſeſſion, *n.* 1.

§ 533. His office is not like that of tutors or of curators; for he is entitled to get a ſalary allowed him for his pains, proportionable to the extent of the eſtate, and to the trouble which he has in managing it, *n.* 4.

§ 534. A factor is bound to diligence, eſpecially as his office is mercenary. Conſequently, if he neglects to do any thing which he is ſpecially ordained by the *Aſ.* to do, he is liable not only to the certifications given him for each particular omiſſion of his duty, but alſo to be removed from his office, *n.* 11. 'Tis true, he may be removed for any other good cauſe as well as for theſe*.

TITLE

* This act of Sederunt is remarkable, and deſerves to be particularly conſidered, becauſe it is declared, *n.* 12. that it ſhall extend, and ſhall regulate the conduct not only of ſuch as are appointed factors on the eſtates of pupils,

TITLE XV.

Of the Privilege, minor non tenetur placitare ſuper hereditate paterna.

§ 535. ALL actions, it has been ſaid (§ 462.), which may be brought againſt perſons of age, may be brought againſt minors. But there is one exception to this rule. For heritage is valuable, and it is fructiferous; with the fruits which it yields, minors may be maintained. If, therefore, it were allowed to be evicted from them during their minority, they might happen to ſtarve, in caſe they had no other fund of ſubſiſtence. Beſides, people uſe not to be ſo anxious about the property of others, as about their own; minors are young, and unacquainted with buſineſs. Hence the Law, tho it entruſts the management of their affairs to their tutors and curators, does not oblige them to go into ſuits, by which their heritage may be evicted from them. *Minor*, the Law ſays, *non tenetur placitare de hereditate paterna. R. M. l. 2. c. 42. § 8.—l. 3. c. 32. § 2, 15, 17. —ſt. W. c. 39.—Fa. II. 56.* For I. thoſe, who are privileged, are minors. II. The privilege relates to their heritage alone. III. It conſiſts in this, that they are not obliged during their minority to enter into ſuits by which their heritage may be *evicted* from them.

It will be eaſy, upon an attentive examination of theſe maxims, to ſhew 1) The perſons, who have the privilege; 2) The things, to which it extends; 3) The caſes, in which it has place.

536. The perſons, who have the privilege, are *minors* (§ 535, *ax.* 1.); that is, *all* below the age of twenty one years. For they have it, whether they be above or below pupilage; whether they have or have not guardians.

But *all* minors have it not: for it extends to *heritage* alone (§ 535, *ax.* 2.). Therefore it is neceſſary, in order to entitle a minor to plead it, that he have acquired *heritage;* that is, that he be heir of his predeceſſor, have ſucceeded to his inheritance, and have made an univerſal title to it by ſervice. For one, who acquires it not by a ſervice, but by a deed made in his favour by his predeceſſor, has not the privilege. The reaſon is, he cannot ſay, either that he is heir, or that he has acquired *heritage*, *M.* 28th *June* 1551, *L. Angus.—Go.* 8th *July* 1676, *Zeaman.* But nobody can be ſaid to be proprietor of any thing, before he is veſted, by proper titles, with the property of it. Therefore a minor, ere he can be allowed to avail himſelf of the privilege, muſt be ſerved heir in ſpecial to his predeceſſor, and muſt by ſeiſin have apprehended formal poſſeſſion of his heritage; otherwiſe he cannot ſay it is *his own*, *R. M. l.* 3. *c.* 32. § 1, 2, 3.—*N.* 66.

But the privilege belongs to minors alone; therefore it is not pleadable by perſons of full age, *R. M. l.* 3. *c.* 32. § 2, 3, 19. 20. even tho their intereſt be intimately connected with that of the minors *. 'Tis true, nothing done in the action ſued againſt the former, can be hurtful to the minor, or affect his intereſt in any ſort, *Du.* 25th *Nov.* 1624, *Hamilton.*—23d *June* 1625, *Pringle.*—14th *July* 1626, *Stuart.*—*St.* 15th *July* 1665, *Borthwick.*

But it is pleadable by minors not only againſt ſuch as are of age, but alſo againſt minors †; becauſe the defender, whoſe right is impeached, and is attempted to be annulled, is *in damno vitando*, and is therefore more favourable than the purſuer, who is *in lucro captando*. However, there is one exception to this rule; for the privilege is not pleadable againſt one, who is ſuing to be reſtored *ex capite minorennitatis et*

pils, and of perſons who either through abſence, or through a temporary incapacity, are diſabled from taking care of their own affairs, and have nobody to look after them, but alſo of all factors, whom the Lords ſhall appoint, except of ſuch as are regulated by *Aſ.* precedent to this one of *June* 1730.

* It ſeems to have been otherwiſe in antient times, *ſ. ſt. R.* I. *c.* 17.

† It ſeems to have been otherwiſe in antient times, *R. M. l.* 3. *c.* 31.

et læſionis, againſt deeds which were done by him during his minority, and by which he has been hurt, *Ha.* 17th *Jan.* 1619, *Roſyth.*—*St.* 18th *June* 1680, *Lyel.* becauſe the privilege of reſtitution *ex capite minorennitatis et læſionis* is as favourable as that, which frees minors from the neceſſity of entering into law-ſuits concerning their heritage.

§ 537. All privileges are odious; becauſe they are introduced in favour of particular perſons, and are not enjoyed by the reſt of the world. Hence they are ſtrictly interpreted. Heritage therefore is, on this occaſion, uſed in its moſt limited ſenſe, and is oppoſed 1) To that, which is called *Conqueſt*. For the privilege extends not to every thing, which is heritable, or devolves by ſucceſſion to *heirs*; it extends to thoſe heritable things alone which are *heritage* in the perſon of the minor, that is, which belonged to his predeceſſor, and have devolved by *inheritance* to him, *R. M. l.* 3. *c.* 32. § 3, 4. For that can alone be properly called *his heritage*, which deſcends by *inheritance* to him. It extends not to conqueſt; that is, to ſuch heritable things, as have not by ſucceſſion devolved from his predeceſſor to him, but been acquired *titulo ſingulari* by himſelf. For the privilege is given him, in order to maintain him in poſſeſſion of that, which was peaceably poſſeſſed by his parent. The Law preſumes, that one, who has delayed to impeach the right of the minor's predeceſſor, and commences his ſuit againſt the minor himſelf, is conſcious of the badneſs of his cauſe, and means to take advantage of the nonage of his adverſary. But it cannot preſume ſo in caſe of acquiſitions made by the minor himſelf. For theſe were never veſted in the perſon of his predeceſſor. Therefore, the privilege extends not to them.

But extending to the heritage of the minor, it muſt extend to that, which was *conqueſt* in the perſon of his predeceſſor; that is, to ſuch heritable things, as were acquired *titulo ſingulari* by his predeceſſor, and have devolved by ſucceſſion to him. For they become *heritage* as ſoon as the minor ſucceeds to them, or acquires them by inheritance. Conqueſt continues to be conqueſt only as long as it continues to be the property of him, by whom it was at firſt acquired; and ceaſes to be conqueſt as ſoon as it devolves by ſucceſſion to his heir, *N.* 66.

§ 538. Parents are thought to be bound by nature to leave their eſtates to their children. They have brought them into being; they have the ſtrongeſt affection for them; and they uſually allow them more liberty in diſpoſing of their property, than others who have no relation to them. Hence children, upon ſucceeding to the eſtates of their parents, are ſaid to be *their own heirs*, § 2. *J. de hered. qualit. et differ. l.* 7. *p. ff. de bon. damnat.* and that, which devolves to them, is ſtrictly called *their own heritage*. For it was, in ſome ſort, *their own*, before the ſucceſſion opened to them by the death of their parents. The Law therefore limits this privilege of minors to that, which can alone be properly called *their own heritage*, that is, heritage which has immediately devolved to them from one of their aſcendents. For it extends not to that, which devolves to them immediately from their collaterals, for inſtance, their brothers, their uncles, or their couſins. Hence the Law ſays, *Minor non tenetur placitare ſuper hereditate* paterna, *ſt. W. c.* 39.—*R. M. l.* 3. *c.* 32. § 3. But the natural obligation of leaving their eſtates to their children lies as well on mothers as on fathers. Therefore, the Law does not diſtinguiſh, for it can ſee no reaſon for diſtinguiſhing, between heritage which deſcends from parents of the maternal, and that which deſcends from thoſe of the paternal line. Minors have the privilege in the one as well as in the other caſe.

§ 539. *Heir* is a feudal term; and *heritage* is ſomething feudal. Hence, the privilege extends to ſuch heritage alone, as is ſtrictly and *ſua natura* feudal; that is, to ſuch as may be *formally ſeiſed*, and is not complete without it. Of courſe, it extends to land, to houſes, to immoveables, and to all the parts, appendants, and acceſſories of theſe. But it extends not to tacks, to bonds containing clauſes excluding executors, or to ſuch heritable things as are not properly feudal and cannot

cannot be formally ſeiſed. For the minor cannot, in theſe caſes, ſay *ſe eſſe in tenemento*, *R. M. l.* 3. *c.* 32. § 3.

§ 540. But it is not enough, that the heritage be *capable* of being *ſeiſed:* In order to entitle a minor to plead his privilege, it is neceſſary that his parent was actually *ſeiſed* of it, *R. M. l.* 2. *c.* 32. § 3.—*St.* 31ſt *Jan.* 1665, *Kello.*—27th *Nov.* 1678, *Guthrie.*—*Fa.* II. 83. 'Tis true, it may ſometimes happen, that the parent may, after having done all which he can do in order to recover ſeiſin, be, notwithſtanding, unable to effectuate his purpoſe. But it would be hard, in this caſe, to forfeit his young heir of his privilege; this would be to puniſh him for an accident, to make him ſuffer, becauſe his father happened to die, before he had completed his diligence in order to obtain ſeiſin. Therefore the Law allows him to plead it in all caſes, in which his parent has done either all which he could do in order to get ſeiſin, or that which is held to be equivalent to it, *N.* 66. provided the author of his parent was ſeiſed, *Du.* 23d *June* 1625, *Pringle.*

In caſe both the minor and his parent were ſeiſed, it matters not, whether the *author* of the parent was or was not ſeiſed. The privilege is pleadable, ſuppoſe he ſhould have never been infeft. For the ſeiſin of the parent, and the ſervice and ſeiſin of the minor entitle him to ſay, that his heritage is *hereditas paterna.* It was, by complete and proper titles, veſted in his parent, and it is alſo fully veſted in himſelf. Indeed, if he were excluded from it for this reaſon, it might happen to be of little value to him. For he might thereby be involved in a ſuit both about his own right and about that of his parent. Thus, the intention of the Law would be counteracted. For the Law preſumes *præſumptione juris et de jure*, that both the minor himſelf has, and his parent had a good right, in caſe they are properly ſeiſed of their heritage. Therefore, it does not lay his heir under the neceſſity of entering into a diſpute about it, till he comes of age, *St.* 18th *Jan.* 1667, *Chapman.*

§ 541. The minor, in order to entitle him to plead the privilege, muſt be able to call the heritage *his own* (§ 538.). Therefore it is neceſſary that his parent hath not only been ſeiſed of it, but ſeiſed of it at the time of his death: otherwiſe it is impoſſible for the minor to ſay, that it has devolved to him by inheritance, *R. M. l.* 3. *c.* 32. § 3, 5, 7, 8, 11, 12, 14, 17.

Nay, he muſt not only have been ſeiſed of it at the time of his death, but ſeiſed of it *as of fee, ut de feodo;* that is, he muſt have been ſeiſed of it as his property, as that which belonged to himſelf, and which he was *ex facie* entitled to hold as long as he pleaſed. For we ſhall ſee, that the privilege extends to ſuch actions alone, as tend to *evict* his property from him, *R. M. l.* 2. *c.* 42. § 8, 9, 10.—*l.* 3. *c.* 32. § 5, 7, 8, 10, 11, 12, 13, 14.

§ 542. But the privilege is, in ſome ſort, given him, becauſe the Law ſuſpects that one, who would engage a minor in a ſuit about his heritage, is conſcious of the badneſs of his cauſe, and has therefore choſen the time of the minority of his adverſary for commencing his action. In all caſes therefore in which there is no room for making this ſuſpicion, it is plain that the minor cannot be entitled to plead his privilege. From hence it follows, that it is not pleadable by him, unleſs his parent was in peaceable poſſeſſion of his heritage at the time of his death. It is not pleadable, in caſe action was commenced about it againſt the minor's predeceſſor. The time of commencing the ſuit ſhews, that he, who commences it, has no intention to take advantage of the nonage of his adverſary. Beſides, by commencing it he had already, before the heritage devolved to the minor, acquired a right to get it brought to a concluſion, and to get it transferred *in ſtatu quo* againſt the heir of his original opponent, *C.* 16th *Nov.* 1574, *Dumfermline.*—*Go.* 8th *July* 1676, *Zeaman.*—*R. M. l.* 3. *c.* 32. § 5, 7, 8, 11, 12, 14, 17.

§ 543. The privilege conſiſts in this, 'That a minor is not obliged to enter 'into ſuits, by which his heritage may be *evicted* from him (§ 535. *ax.* 3.).'

Therefore it extends to ſuch actions alone, as tend to *evict* it from him. A thing is ſaid properly to be *evicted*, when it is found to belong to one, and is therefore adjudged to be his property, *becauſe* he has a *better* right to it than the perſon, from whom it is recovered.

Therefore the privilege extends to ſuch actions alone, as deny the right of the minor and of his predeceſſor, or at leaſt affirm that of him, who brings them to be better. It extends not to thoſe, in which it is ſo far from being denied, that it is acknowledged the minor and his predeceſſor had a right to the property of the heritage. For he is not, in that caſe, engaged in a diſpute about his right to it, *R. M. l.* 3. *c.* 32. § 5, 7, 8, 9, 10, 11, 12, 15, 16, 17.

By conſequence, it is not pleadable 1) Againſt actions, which ariſe either from feudal caſualties or from feudal delinquencies, even tho they ſhould be brought by the minor's ſuperior, in order to deprive him of his heritage, *R. M. l.* 3. *c.* 32. § 5. *ſqq.* For the ſuperior denies not the right of the minor; he owns that he is his vaſſal, and has a right to his eſtate. But he ſays, that ſomething has been done either by the minor himſelf or by his predeceſſor, which entitles him to the property of the fief. Thus, if the predeceſſor of the minor has forfeited his right either by having neglected to pay his feu-duty, or by any other feudal delinquency, the ſuperior, to whom the fief is forfeited, has a right to commence, and cannot be hindered from ſuing every action which it may be neceſſary for him to bring, in order to effectuate his right, and to recover poſſeſſion of the fief, *Ha.* 22d *Feb.* 1609, *Hepburn.*—25th *June* 1613, *L. Madertie.*—*Ho. minor*, 19th *Nov.* 1624, *L. Inchaffrey.*—*Du.* 20th *Feb.* 1633, *Lennox.*—*St.* 28th *Jan.* 1681, *Dun.*

For the ſame reaſon, 2) It extends not to ſuch actions, as deſcend from obligations incumbent on the predeceſſor of the minor, even tho the conſequence of them ſhould be to deprive him of his heritage. For he, who brings them, denies not the *right* either of the minor or of his predeceſſor; but contends, that he is obliged, and muſt therefore fulfil his obligation. For every one, be he of age, or be he minor, is bound to fulfil his obligations.

Hence 3) It cannot be pleaded by a ſuperior, tho he is minor, againſt his vaſſal who is entitled, and wants to relieve his lands out of his hands, *R. M. l.* 2. *c.* 42. § 8, 9, 10. *l.* 3. *c.* 32. § 5, 8, 10, 13. For every ſuperior is bound by the nature of the thing, and is uſually bound by an expreſs obligation, to give his vaſſal poſſeſſion of his fief.

For the ſame reaſon, 4) It cannot be pleaded againſt a *reverſer*, who wants to redeem his lands from him, from whom he is entitled to redeem them, *Ha.* *Feb.* 1593, *Forbous.* For every one, who has a redeemable right, is *bound* to ſurrender it to him, who is entitled to redeem it; and he, who has a right to redeem cannot be hindered from doing it by the minority of him, from whom he is to redeem it.

For the ſame reaſon, it cannot be pleaded 5) Againſt a relict, who want to be kenned and ſerved to her terce. For ſhe does not controvert, indeed ſhe owns, for her own plea depends upon the right of the minor's predeceſſor, *R. M. l.* 2. *c.* 16. § 66. Beſides, if it were pleadable againſt a relict, ſhe would be neceſſitated to wait till the heir of her huſband ſhould come of age, and might ſtarve in the mean time, *Q. A. c.* 99.

It cannot be pleaded 6) Againſt one, who ſues for performance of an obligation, by which the predeceſſor of the minor was effectually bound to convey his heritage, or of a deed, by which he has actually made it over to another, *C. May* 1582, *L. Ormiſton.*—*Sp. minor*, *July* 1583, *Hamilton.*—*N* 51—*F.* 25th *July* 1710, *M'Kenzie.* For one, who ſues for performance of ſuch a deed, owns the validity of the right of the predeceſſor of the minor.

Nor is it pleadable 7) Againſt actions ariſing from the moveable obligations of the predeceſſor of the minor, *v. g.* for debt, and brought in order to make theſe effectual, *R. M. l.* 3. *c.* 32. § 16. 17th *June* 1562, *Pitſligo* reported by Sk. *not.*

not. ad d. § 16. for every one, to whom another owes a debt, or is bound by an obligation, may ſue for payment of the debt, or performance of the obligation either from the original debtor, or from his heir. Beſides, he does not deny the right of the minor. The heir therefore is obliged to fulfil the obligation, which was incumbent on his predeceſſor; and he, to whom he has been obliged, is entitled to effectuate performance by attaching either the heritable or the moveable eſtate of his debtor. Therefore he cannot be hindered from effectuating performance of the obligation by adjudging the heritage of the minor, tho the effect of an adjudication is, no doubt, to deprive the minor of his heritage.

Nor can the privilege be pleaded 8) Againſt actions, that ariſe from the fraud of the predeceſſor; for fraud ought not to be allowed to be profitable either to the fraudulent perſon himſelf or to his heir. This is the doctrine, which is inculcated by the bulk of the writers on the Law of Scotland, and is agreeable to a ſeries of judgments of the Court of Seſſion, *S.* 1ſt *March* 1546, *Queen's Advocate.*—12th *Feb.* 1548, *L. Seton.*—*C. July* 1581, *Scot.*—*Ha.* 7th *Jan.* 1593, *L. Drumquhaſil. March* 1610, *Lord Sanquhar.*—*F.* 27th *Dec.* 1711, *Crawfurd. Ha.* 5th *Feb.* 1607, *Lord Elphinſton.*—*Fo.* 21ſt *Nov.* 1694, *Davidſon.* But it may be doubted, whether the doctrine both of the lawyers and of the reports is not directly contrary to the intention of the Law and of the privilege. For this privilege is granted to minors, in order to hinder them from being involved in intricate law-ſuits about their heritage, from being obliged to defend the validity of the right of their predeceſſor, and from running the riſk of being diſpoſſeſſed of it, when they have perhaps a good title to it. But if they were obliged to defend an action brought againſt them on account of the fraud of their predeceſſor, they would be obliged to enter into a law-ſuit about their heritage, and to defend the validity of his right, and might, perhaps, be deprived of the poſſeſſion of it, through the ignorance, ſtupidity and negligence of their curators or tutors. Conſequently, the privilege muſt be pleadable againſt actions of this kind as well as againſt all others, in which the validity of the right of the minor is impeached, is attempted to be ſet aſide, and muſt therefore be defended, *H.* 716.

It is not pleadable 9) Againſt actions ariſing from deeds done by the minor himſelf, *R. M. l.* 3. *c.* 32. § 16.

Since it is pleadable againſt ſuch actions alone, as tend to evict from the minor the property of his heritage, 'tis plain, that it cannot extend 10) To actions commenced in order to get the boundaries of his lands and of thoſe of his neighbours ſettled, *Di.* 64. * or 11) To actions of proving the tenor of charters, ſeiſins, or deeds of any ſort; becauſe, tho the tenor of a deed be proved, it alters not the right of the minor, *Du.* 15th *Feb.* 1628, Mr. *Jedburgh.*

It defends not 12) Againſt making a production of writs either in actions of exhibition, *C. July* 1582, *Fleming.*—*Fo.* 1ſt *Feb.* 1710, *Crawford,* or 13) In actions of ſimple reduction, *Sp. reduction,* 12th *March* 1628, *Balmanno,* or 14) In thoſe of reduction and improbation, *Go.* 8th *Jan.* 1670, *Wilkie.*—*St.* 27th *Nov.* 1678, *Guthrie.* For the privilege remains entire, after the writs have been produced; the minor may plead it, in caſe he finds, that they are going to be employed, in order to evict his heritage from him; it would be to defraud the Law, to oblige the minor, after he has produced them, to go into a ſuit, by which it might be evicted.

§ 544 Since, then, *minor non tenetur placitare de hereditate paterna,* 'tis plain, that every action, commenced againſt a minor, muſt ſtop, as ſoon as he pleads his privilege, and ſhews, that the conſequence of it will be to oblige him to enter into a plea, by which his heritage may happen to be evicted, *R. M. l.* 3. *c.* 32. § 2, 3, 14, 15, 17. Conſequently, the minor will be obliged to defend, unleſs he proves his privilege. Therefore, he muſt produce as many of his titles as are neceſſary

* It ſeems to have been otherwiſe in antient times, *ſt. D.* II. *c.* 20. § 9.

neceſſary for proving, that the heritable thing, which may be evicted from him, is heritage, to which he has immediately ſucceeded as heir to ſome one of his forefathers, *St.* 31ſt *Jan.* 1665, *Kello.*

TITLE XVI.

Of the Reſtitution of ſuch, as have been hurt during their Minority.

§ 545. CURATORY, it has been ſaid (§ 514.), ends, as ſoon as the perſon ſubject to it becomes *major*. One is ſaid to be major, 'who has at-'tained that age, at which all men are preſumed to be able, and therefore 'acquire full power to manage their own affairs, without the aſſiſtance or inter-'vention of others.' This age is fixed by the *common Law* of Scotland to be that of twenty-one years complete, *R. M. l.* 2. *c.* 41. § 1, 2. *et ibi not.* SKENE.—*c.* 68. § 2. *Q. A. c.* 38. § 1. *c.* 91. § 2.—*ſ. ſt. R.* I. *c.* 6. § 1. 1555, *c.* 35.—1564, *c.* 87.—1587, *c.* 22, 112, 114.—1681, *c.* 19, *&c.* As ſoon therefore as one attains the age of twenty-one years complete, he is reckoned to be a complete, perfect, and full-grown man, and acquires the ſame powers and the ſame rights to manage and to diſpoſe of his own affairs, which any citizen has at any time of his life. Hence this age is by Law called *ætas legitima, ſ. ſt. R.* I. *c.* 6. *plena, R. M. l.* 2. *c.* 41. § 1, 2.— *c.* 68. § 2.—*Q. A. c.* 91. § 2. *perfecta;* SK. *N. ad d. c.* 68.—*ſt. W. c.* 39. *lawful, perfect,* or *full* age, 1555, *c.* 35.—1564, *c.* 87.—1587, *c.* 22, 112, 114.—1681, *c.* 19.

But one is not reckoned of age, till the firſt twenty-one years of his life are entirely paſt; they muſt be complete; no part of them muſt remain to run, time being in this matter held to flow *de momento in momentum.* Therefore one is not ſaid to be major, till the ſame hour of the ſame day of the ſame month, in which he was born, is come, *l.* 3. § 3. *l.* 45. *p. de minor.* Thus one, who was born on the firſt day of January 1750 at 11 o'clock at night, will not be major, till eleven o'clock at night of the firſt of January 1771. For the day is not, in this caſe, held to be done as ſoon as it begins; the nature of things and the truth of the matter are regarded; and time is, in this caſe, held by Law to flow one inſtant after another, ſince it flows *really* after this manner. Conſequently, a day is not held to be one indiviſible point of time; ſo it cannot be held either to be ended, when it is only begun, or to be paſt before it is ſo. Not that the Law goes ſo ſtrictly to work, as to count even minutes of time; ſuch minute particles of it are diſregarded, becauſe it is not uſual to attend to them, and it would be difficult to mark them with preciſion in real life. Hence it ſeems not to deſcend lower than to hours.

§ 546. Since one is not held to be major, till he has attained the age of twenty-one years *complete*, it muſt follow that the intercalary day, which is inſerted in every leap-year, muſt be held to be the ſame with that which immediately preceded it: ſo that theſe two days muſt be taken for one, *l.* 3. § 3. *ff. de minor.* Thus one who happens to be born on a twenty-eighth day of February, if the year, on which he comes of age, happens not to be a leap-year, ſo that the February of that year has only twenty-eight days, will be major on the twenty-eighth day of February. Thus it happened to MONTAIGNE; he tells us, that he was born on the laſt day of February 1533; but neither this year 1533, nor the 1554 happened to be leap-years; ſo he became major on the 28th of February 1554. But if the year, on which he became major, had happened to be leap-year, which would have been the caſe, if he had been born in 1531, ſo that the February of that year had had twenty nine days; he would have been major, not in the 28th, but in the 29th day

day of February of that year. In the ſame manner, one, who happens to be born on the 29th day of February of a leap-year, will be major twenty-one years afterwards either on the 28th of February, if the year, on which he happens to come of age, is not a leap-year, or on the twenty-ninth, if it happens to be one. The reaſon is, that the twenty-one computed years would not really be twenty-one true years, and would not be complete, unleſs the intercalary day were counted after this manner; becauſe an intercalary day is inſerted in leap-years, in order to correct the vulgar computation, and to make it keep pace with the courſe of the Sun *.

§ 547. 'Tis fullneſs of years, which alone makes one become major according to the principles of the Law of Scotland; by conſequence one cannot become ſo ſooner than the time determined by Law allows him to be held to be major, unleſs he obtains from the *Legiſlature* a ſpecial diſpenſation with the general diſpoſition of the Law; for the Legiſlature alone has power to diſpenſe with the public Law, and to make one be held to be major, before he attains that age, at which, according to the common Law, one becomes ſo. One, who diſpenſes with the general Law of the Land in favour of any particular perſon, exerts in reality a power of repealing it; but no other than the ſupreme legiſlative authority has power to repeal Laws, ſince it alone has power to enact them. (§ 90.). Conſequently, the King has no power to grant one a *venia ætatis*, a licence to be held to be major before the ordinary time, at which the common Law enacts men to be reputed major; for the King is not alone veſted with the legiſlative authority in this iſland (§ 89.), and has not power to diſpenſe with the Law. Every licence, therefore, either granted by him, or obtained in any other way than by act of Parliament, both is and ought to be held and to be adjudged to be *ipſo jure* null and void.

§ 548. Since one cannot become major otherwiſe than by attaining the age of twenty-one years, it is plain, that no addition of dignity, no change of ſtate, no alteration of circumſtances can make one become major ſooner. Marriage, therefore, does not make one become major, and acquire full power to manage his own affairs ſooner than he would have done, in caſe he had remained a batchelor. Hence one, who is ſubject to curators either appointed to him by his father or choſen by himſelf, is not by marriage looſed from their care, but remains after it ſubject to them in the ſame way, in which he was before.

§ 549. Every country muſt be governed by its own laws (§ 93.); and the Law of Scotland hath made the age of twenty-one years complete the time of majority. Therefore, every one, be he native or foreigner, live he within or without Scotland, muſt, in Scotland, be held to be major as ſoon as and only as ſoon as he hath attained that age. So that all things, whether they be moveable or immoveable, which are ſituated in Scotland, muſt be deemed to be the property of minors, if they belong to perſons who would, by the Law of Scotland, be deemed to be minors, *i. e.* to perſons under the age of twenty-one years; and to be the property of majors, if they belong to perſons who would, by the Law of Scotland, be held to be majors, *i. e.* to perſons who have attained the age of twenty-one years. No matter, whether they be natives or foreigners; whether they would, by the Law of that country where they live, be held to be of age or to be minors. Thus one who is held in that country where he reſides, to be major, as ſoon as he attains the age of 18 years, can not be held by the Judges of the Law in Scotland to be major, till he attains the age of twenty-one. So that, if he happens to have property or buſineſs in Scotland, he will not, before he is 21, be allowed to exert any powers concerning the management of it, which the Law does not allow minors to exert; even tho he ſhould have paſt the age of 18 years, at which he is held to be major in his own country. For inſtance, if he has an action at Law or any judicial matter to manage, he will

* Voet was, certainly, no mathematician; or he would never have ſaid that the time of minority was, as it were, augmented by the addition of the intercalary day, *tit. ff. de min.* § 1. for he ſeems to have thought, that minority, in the caſe of leap-years, laſted for twenty-one years *and one day*, and quotes a Law of the *Corpus*, *l. 2. ff. de div tem. præſ.* to prove his opinion. See the long note inſerted above in pages 120, 121, 122.

not be allowed to manage it without a curator *ad litem;* becauſe the Law of Scotland allows no judicial affair to be managed by a minor without a curator *ad litem.* In the ſame manner, one, who is not held in his own country to be major, till he has attained the age of 25 years, will, notwithſtanding, be held in Scotland to be major, as ſoon as he attains that of twenty-one, and will at that age be allowed to exert every power and to do every thing, which he would be allowed to do, if he had attained the age of twenty five years.

§ 550. People uſe to be more careful about their own affairs than about thoſe of others. Hence thoſe, whoſe affairs are entruſted to the care of others, may happen to ſuffer by the negligence of their curators. This may happen, in a ſpecial manner, to minors, who can hardly be ſuppoſed to be capable of managing their own affairs with diſcretion. Therefore the Law of Scotland, tho it allows all minors, who have attained the age of puberty, to take the management of their own affairs on themſelves alone (§ 497.), is not however altogether unmindful of the heat and of the facility of youth, but preſumes it to be poſſible, they may have ſuffered through both, and therefore grants them the privilege of reſtitution (§ 498.). In virtue of which they are entitled, if it is neceſſary for them, to be reſtored againſt every thing, which they have done during their minority, and by which they have been hurt, 1493, *c.* 51.—1540, *c.* 72. One is ſaid to be reſtored againſt a thing which he has done, ‘ when his affairs are, as much ‘ as they can be, put into the ſame preciſe ſituation in which they would have been, ‘ in caſe it had never been done.’ So that the privilege of reſtitution *ex capite minorennitatis et læſionis* may be defined to be ‘ a right, which every one has to be reſto- ‘ red againſt every lawful deed that is not *ipſo jure* void, which he did during his ‘ minority, and by which he was leſed.’ From which definition it is plain, I. That *all* perſons are entitled II. To be reſtored againſt III. Every IV. Lawful deed, V. That is not *ipſo jure* void, VI. Which either they did themſelves, or thoſe who managed their affairs did VII. During their minority, and VIII. By which they were leſed; IX. That the reaſon of the reſtitution of minors is their facility, and their want of diſcretion. An attentive conſideration of theſe axioms will eaſily ſhew us, 1) The perſons, who are entitled to be reſtored *ex capite minorennitatis et læſionis;* 2) The deeds againſt which, 3) The perſons againſt whom, 4) The time within which they are entitled to be reſtored; 5) The effects of reſtitution.

§ 551. The perſons, who are entitled to be reſtored, are ſuch as have been hurt by deeds done by them during their minority, *i. e.* before they were major, or attained the age of twenty-one years complete, *ſt. W. c.* 29. I ſay *complete*, for in this matter time is, as it has been remarked, held to flow *de momento in momentum.* Conſequently, the perſons, who ſue for reſtitution, muſt prove, that they were minor at the time they did the deed, againſt which they want to be reſtored, *R. M. l.* 3. *c.* 32. § 19, 20. For it is a general rule, *Affirmanti, non neganti, incumbit probatio.*

The benefit of reſtitution extends to all minors: for they are all liable to be hurt by their facility. Therefore it is no matter, whether they are men or women; whether they had or had not attained the age of puberty; whether they were or were not married; whether they had or had not tutors or curators at the time, at which they did the deed. For regard is had not to the condition, but to the age of the perſon, who ſeeks to be reſtored.

Since the privilege of reſtitution belongs to the minors themſelves, it muſt be deſcendible 1) To their repreſentatives, *i. e.* to their heirs. For theſe are held to be the ſame perſons with thoſe, whom they repreſent, *l.* 18. § *ult. ff. de min.*—*Du.* 7th *March* 1637, *Vernock.*—*Go.* 14th *July* 1669.—*Fo.* 15th *Dec.* 1698, *Straiton.*

For the ſame reaſon it muſt go 2) To their voluntary aſſigns, that is, thoſe to whom the right of ſuing it and of reaping the benefit of it is ſpecially made over by the minors themſelves, for every patrimonial right, which one has, may be

be made over by him to another; or thoſe to whom is made over a right to that, to which the reſtitution neceſſarily relates; for the right of reſtitution is, in that caſe, an acceſſory, and, as it were, a part of the principal thing, which is conveyed.

It goes 3) To the creditors of the minor: for every right, which one has, and which may be beneficial to his creditors, is attachable by them. Therefore, 4) It goes to his legal aſſigns, that is, thoſe who have recovered an adjudication either of all the eſtate of the minor, or of this particular faculty, *arg. Du.* 7th *March* 1623, *Bargeny.*—23d *Feb.* 1628, *Dunbar.*—2d *Feb.* 1630, *Hamilton.*—*A. minor*, 26th *June* 1628, *Leſlie.*—*St.* 16th *Feb.* 1669, *Balmerino.* But it cannot be held to be tranſmitted to ſingular ſucceſſors, either onerous or gratuitous, by implication, that is, unleſs it either is ſpecially made over to them, or is a neceſſary concomitant of that, which is made over to them. For ſingular ſucceſſors acquire right to no more than that particular thing, which is made over to them.

§ 552. They are entitled to be reſtored againſt all deeds, which have been done by them during their minority, and by which they have been leſed (§ 550.). Therefore, they are entitled to be reſtored 1) Againſt ſuch as they have done with the concurrence of their tutors or curators, as well as 2) Thoſe which they have done without it; 3) Againſt judicial as well as 4) Extra-judicial affairs, *ſt. W. c.* 29. againſt 5) Unilateral as well as 6) Bilateral deeds; in ſhort, againſt every thing, by which they have been leſed, *l.* 7. *p.* 1, 4. *ff. de min.*

§ 553. Entitled to be reſtored againſt extra-judicial deeds of all ſorts, they muſt be entitled to be reſtored 1) Againſt all contracts, into which they have entered; 2) Againſt all alienations made by them, either for onerous, for rational, or for gratuitous cauſes; 3) Againſt obligations, under which they have either expreſsly or tacitly brought themſelves; 4) Againſt all other extra-judicial deeds, by which they have been hurt.

Conſequently, they are entitled to be reſtored 5) Againſt ſales either of their heritable or of their moveable eſtate, if the price which they have received is too low; 6) Againſt purchaſes made by them of things belonging to others, if they have paid too much for them. So that the goods bought muſt be reſtored to the ſeller, and the price to the buyer. 'Tis true, equity may ſeem to require not that the goods and the price be mutually returned, but that the inequality of the latter be corrected; for this being done, one cannot be ſaid to be leſed. It may therefore be thought to be optional to the party, from whom the minor bought, or to whom he ſold, either to annul the bargain altogether, or to make up the loſs the minor has ſuſtained. This doctrine ſeems to be agreeable to principles, and to be confirmed by *l.* 12. § 1. *ff. de jure dot.* But it is contradictory to ſeveral texts of the Civil Law, as well as to the *common* opinion of Lawyers, *l.* 24. § 4. *l.* 27. § 1. *ff. de minor.* For Law regards not with a favourable eye thoſe, who it ſees have circumvented minors in bargains made with them; and hath therefore made it optional *to the minors* either to have the bargains annulled altogether, and the goods and the price mutually reſtored, or to get reparation of the loſs they have ſuſtained; for it is optional to them which they will aſk, *l.* 19. *ff. d. r. j.*

They may alſo be reſtored againſt 7) Location-conduction; they may have let out to others things belonging to themſelves, or have taken leaſes of thoſe belonging to others on bad terms; and muſt therefore be entitled to get the leaſes annulled *in futurum.* For the nature of things does not admit of reſtitution of the paſt. A houſe which has been inhabited, or land that has been cultivated, cannot be *in præteritum* not inhabited, or not cultivated. 'Tis true, the rent, if it has been unequal, may be reduced to equality by forcing the party, who has the advantage of the bargain, to give allowance of as much, as will make it a juſt one. But this can hardly be done, unleſs the rent is very unequal, and if they have no curators; for every little inequality is not regarded: and if they have curators,

rators, they cannot be entitled to be reimburſed either by their tenants, or by their landlords; reparation of the damage, which they have ſuſtained, ſince it is entirely different from reſtitution, they ought to ſeek from their curators, and from them alone; except their tenants or landlords were *in dolo;* that is, induced them by *fraud* either to grant or to take the leaſes on theſe terms: for they are, in this caſe, entitled by the common Law not only to be free of the bargain for the time to come, but to get reimburſement of the loſs which they *have* ſuſtained by the inequality of it, thoſe with whom they dealt being unable to ſay, that the great profits they *have* made are *bona fide percepti.*

But it is not on account of the inequality alone of the rent, that they are entitled to be reſtored againſt location-conduction; they may be reſtored alſo, in caſe it is hurtful to them on other accounts, *v. g.* if they have granted a long leaſe of the meſſuage of the family, of the gardens belonging to it, and of the ground included in its policy, even tho the rent ſhould be equal; becauſe it is ſilly in one to let out the ſeat of his family and the land included in the policy around it.

They may be reſtored 8) Againſt mandates either given or undertaken by them; provided theſe are hurtful to them, *l.* 23, 24. *p. ff. de minor.*

They may alſo be reſtored 9) Againſt contracts of copartnery. For one, who enters into partnerſhip with a minor, may be preſumed to know that he is liable to be reſtored againſt it. But it ſeems not, that the privilege can in this caſe be very beneficial to him. For all, which it can avail him, is to be free from the contract for the time to come. But one may, without uſing this remedy, leave the company of his partner when he pleaſes; and he may obtain reparation of the damage he has ſuſtained by the action *pro ſocio.* Beſides, his minority will not avail him againſt his partner, or entitle him to any claim which he would not otherwiſe have been entitled to make againſt him. For being allowed to enter into partnerſhip, he cannot plead any benefit from his nonage, becauſe people would not in that caſe go into company with him; and he cannot be reſtored againſt any thing done by him in the way of his buſineſs, *v. g.* againſt ſales of his wares, becauſe people would not in that caſe chuſe to deal with him.

They may be reſtored 10) Againſt loans either given by others to them, or by them to others. For they may be leſed in this as eaſily as in any other way. Hence it is that the Law preſumes, in all caſes, loans made to minors to have been prejudicial to their intereſt; and makes it incumbent on the lender to prove, that his loan was not hurtful to the minor, that he was not leſed by it, or that the thing which was lent was truly and really employed to his profit. At leaſt, this is true as to loans of money: for it is the price and the purchaſer of all things; and minors, who want to borrow it, may well be preſumed to have none but bad uſes to make of it. Therefore thoſe, who are ſo wicked as to lend it them, ought to be allowed to loſe it, unleſs *they* prove, that it was really turned to a good uſe by the minors.

It being dangerous to truſt money in the hands of minors, they muſt of courſe be entitled to be reſtored 11) Againſt payment made either to or by themſelves. If it is made to themſelves, leſion is preſumed by Law; and thoſe who make it muſt prove, that the money was employed to the utility of the minors: otherwiſe theſe will be entitled to get a ſecond payment (§ 452, 468.). But payment made not to the minor himſelf but to his tutors or curators is preſumed *præſumptione juris et de jure,* to have been turned by them to his utility. So he cannot in this caſe be entitled to be reſtored; becauſe no body would pay to tutors or curators, or deal with them, if payment made to them and *formal* diſcharges granted by them did not looſe thoſe, who paid, from their obligations (§ 452.).

Minors may be reſtored not only againſt payments made to them, but alſo 12) Againſt thoſe made by them. In caſe that, which they have paid, was truly due by them, they will be looſed and diſcharged of their obligation. If it was not due, they may be reſtored by ſuing for reſtitution of the *ipſa corpora* paid (§ 144.) *condictione indebiti, condictione ſine cauſa, &c.*

Minors

Minors may alſo be reſtored againſt 13) Submiſſions and 14) Tranſactions, as well as againſt agreements of other ſorts (§ 451.); for they are liable to be hurt by theſe as well as by other contracts.

Entitled to be reſtored againſt others, they may be reſtored againſt marriage-contracts, that is, thoſe by which the pecuniary intereſts of the ſpouſes are determined: for they may be leſed by theſe as well as by others; one may, *in æſtu amoris*, be induced to do many things, which he would not otherwiſe have done, and which may be hurtful to him, *Du.* 4th *July* 1632, *Davidſon.*—*St.* 22d *Nov.* 1664, *M'Gill.*—*Go.* 23d *Feb.* 1669, *Gordon.*—*F.* 27th *July* 1708, *Byres.*—25th *July* 1710, *Chalmers.*—*B.* 5. But we ſhall ſee, that one cannot be reſtored againſt marriage itſelf.

One may be reſtored againſt alienations made for onerous, *a fortiori* he may againſt thoſe made for gratuitous cauſes; becauſe theſe involve leſion in their very nature. Therefore he may be reſtored againſt donations, promiſes, and offers.

Minors may be reſtored againſt all deeds, by which they are either expreſsly or tacitly brought under obligations. Conſequently, they may be reſtored againſt the acquiſition of an inheritance; for they become liable by acquiring it to all the debts due by the perſon to whom they ſucceed, and included in his eſtate. But more debts may be due by him than the eſtate, which he has left, is able to pay; thus the inheritance may be hurtful; and a minor, if he has entered upon it either by ſervice, by confirmation or otherwiſe, muſt be entitled to be reſtored againſt his entrance, *l.* 11. § 5. *ff. de minor.*

If a minor is entitled to be reſtored againſt the acquiſition of an inheritance, *a fortiori* he muſt be entitled to be reſtored againſt a renunciation of it, whether he has made it at the ſuit of creditors, after the ſucceſſion opened to him by the death of the perſon to whom he was entitled to ſucceed; or at the requeſt of that perſon himſelf, to whom he might have ſucceeded: for he may hurt himſelf by the renunciation. Hence a girl who hath renounced her right to her legitim, is entitled to be reſtored againſt it; whether ſhe has done it by a marriage-contract on the receipt of a portion, or by any other deed; for a child has a natural right to a legitim, and cannot be deprived of it againſt her will. But ſhe may out of facility be induced to renounce, and muſt therefore be entitled to be reſtored. 'Tis true, in caſe ſhe ſues to be reſtored againſt her renunciation, ſhe muſt not only do it *intra quadriennium utile*, but muſt reſtore either to her father, if he is alive, or to his repreſentatives, if he is dead, any mutual conſideration given her for her renunciation. From whence it is plain, that this queſtion can ſeldom happen to be debated; becauſe few people chuſe to provoke their fathers by ſeeking reſtitution againſt deeds to which they conſented voluntarily.

In ſhort, without going into a more particular detail, it may be affirmed, that minors are entitled to be reſtored againſt all deeds which they have done, and by which they have been leſed.

§ 554. They are entitled to be reſtored againſt judicial as well as againſt extra-judicial deeds; for they may be hurt by deeds of the one as well as by thoſe of the other ſort, *l.* 7. § 4. *ff. de min.*—*ſt. W. c.* 29.

From hence it is plain, that they are entitled to be reſtored againſt decrees pronounced againſt them *in abſence*. One may be ſummoned to appear before a court, and may diſregard the ſummons; in this caſe it is uſual for the Judge, without hearing the matter, to pronounce a decree in favour of him at whoſe ſuit the action is brought, preciſely agreeable to the terms of his libel; becauſe the Law preſumes, that one, who has been formally ſummoned, and has notwithſtanding neglected to appear, is conſcious that his cauſe is bad, and that, tho he ſhould iſt himſelf before the Judge, decree would be recovered againſt him. Beſides, by pronouncing decree againſt him it puniſhes his contempt of the authority of the Law, and lays him under the neceſſity of iſting himſelf at ſome time either

before that court which made the decree againſt him, or before ſome other. But the affairs of minors may be neglected; their guardians may not appear to defend them; they may thereby be hurt; and muſt therefore, on account of their minority alone, be entitled to be reſtored againſt decrees pronounced againſt them in their abſence, and that, without being liable to reimburſe thoſe in whoſe favour the decrees were made, of the coſts laid out on obtaining them.

But it is not againſt decrees in abſence alone, that minors are entitled to be reſtored; they are alſo entitled to be reſtored againſt ſuch as are made againſt them *in foro contradictorio*, when they have appeared, and have pleaded defences before the Judge. It muſt however be remarked, that the privilege extends in this caſe to *omiſſions* alone; that is, they are entitled to be reſtored againſt leſion which they have ſuſtained through omiſſions alone made either in point of fact, or in point of Law by themſelves, or by thoſe who manage their affairs, *St.* 15th *June* 1680, *Gordon.*—*Fo.* 20th *Dec.* 1699, *Logie.*—*St.* 9th *Feb.* 1672, *Cockburn.* Thus, if any fact material to the cauſe has been omitted to be ſtated to the court; if any argument has been omitted to be urged; or any allegation has been omitted to be made, which might have been made in behalf of a minor, he is entitled to be reſtored againſt leſion, which he may have ſuffered through the omiſſion, *l.* 36. *ff. de min.*—*Di.* 64.—*Ho. minor*, 27th *Nov.* 1624, *Forreſter.*—*Du.* 1ſt *Dec.* 1638, *Stewart.*—*Fo.* 14th *Jan.* 1697, *Alexander.*—*H.* 709. If the time, within which an appeal muſt be taken, has been allowed to paſs, and the ſentence of an inferior Judge has thereby become final, he will be reſtored, that he may be allowed to bring his appeal, and to have the cauſe tried before the ſuperior Court, *l.* 7. § 11. *ff. de minor.*

But minors are not entitled to be reſtored againſt decrees, in caſe all the allegations, which could have been made for them, have actually been laid before the Judge, and have been repelled by him; they muſt have ſomething new to ſay ere they can be reſtored, and they muſt reſt their cauſe on it alone. They cannot be allowed to urge in their favour any allegation which has already been laid before him: for he has already given his judgment upon it, and *res judicata pro veritate accipitur*, *l.* 207. *ff. de reg. jur.* The Law preſumes, that the opinion and deciſion of a Judge concerning a point, which has been urged before him, is juſt and right; and that, tho the matter was to be tried over again, the ſentence would not be altered. Were it otherwiſe, law-ſuits would be endleſs. *Singulis controverſiis ſingulas actiones, unumque judicati finem ſufficere, probabili ratione placuit; ne aliter modus litium multiplicatus ſummam atque inexplicabilem faciat difficultatem: maxime ſi diverſa pronunciarentur*, *l.* 6. *ff. de excep. rei jud.*—*R. M. l.* 1. *c.* 13. § 3.—*Q. A. c.* 82.—*D.* I. 584. *Fo.* 7th *Jan.* 1698, *Counteſs of Kincardine.*—14th *Jan.* 1732, *Anderſon.* Hence it is ſaid that minors are entitled to be reſtored againſt *competent and omitted*, but not againſt *proponed and repelled*, that is, againſt ſuch allegations as might, but have been omitted to be made for them; but not againſt ſuch, as having been actually made, have been repelled by the Judge.

§ 555. But minors are in no caſe entitled to be reſtored, unleſs they have been *leſed* by the deed, againſt which they ſue for reſtitution (§ 550. *ax.* 8.), *i. e.* they muſt have ſuffered ſome pecuniary loſs either by loſing that which they had, by bringing themſelves under perſonal obligations, or by impoſing real burdens on their eſtates, *arg. ſt. W. c.* 29. *l.* 44, 45. *p. ff. de minor.*

Conſequently, they cannot be reſtored againſt marriage: for marriage involves not any pecuniary loſs. Beſides, minors who have attained the age of puberty, have the ſame power which others have to diſpoſe of their perſons (§ 496.), and are therefore allowed to marry (§ 171, 507.).

For the ſame reaſon they are not entitled to be reſtored againſt the omitting to commence criminal proſecutions, *l.* 37. *p. ff. de min.* They may be entitled to proſecute a criminal, and might have made money by the proſecution, for inſtance by getting a ſhare of the fine impoſed on him, or by getting a reward for diſcovering the delinquent; they will not however be entitled to be reſtored againſt the

the omiſſion. For loſs of this kind can hardly be ſaid to be patrimonial, ſince one's eſtate is not diminiſhed by it. Beſides, there is really nobody againſt whom they can be reſtored. For the criminal either has or has not been proſecuted. In caſe he has, they cannot be reſtored againſt him; for having been once proſecuted for his crime, he cannot be proſecuted for it again, no matter whether he hath been condemned or acquitted. By being condemned he hath already ſuffered the puniſhment which he hath deſerved, and hath given ſatisfaction to the Law which he hath tranſgreſſed. By being acquitted he hath acquired a right to be held for ever to be innocent of the crime charged upon him, *Q. A. c.* 82. As little can they be reſtored againſt the proſecutor either public or private; for he had a right to bring the proſecution, elſe he would not have been admitted to inſiſt in it; but if he had a right, it was lawful to uſe it; and if he has uſed it, the criminal cannot be proſecuted a-new. In caſe he has not been proſecuted, they need not the benefit of reſtitution, in order to be entitled to ſue him; for they may ſue him ſtill, provided preſcription has not run in his favour, and become a bar to the proſecution. Beſides, one is in no caſe bound to make up any other than thoſe loſſes which minors have ſuſtained in dealings with him. But they have not, in ſuch omiſſions, dealings with any body. So they cannot be ſaid to be leſed by any other than themſelves.

§ 556. Minors being entitled to be reſtored againſt thoſe deeds alone, by which they are leſed, it muſt therefore be incumbent on them to prove, that they have been leſed, *l.* 5. *p. C. de in int. reſt.* for leſion is not inferred from minority alone: *Nec enim utique, qui minor eſt, ſtatim et circumſcriptum ſe docuit, l.* 9. § 4. *ff. de jurejur.* The proof, which they muſt bring, muſt vary according to circumſtances. In ſome caſes leſion is preſumed, becauſe the very nature of the thing implies it. Conſequently, in theſe minors are freed from the neceſſity of bringing poſitive proof that they have been leſed; it is incumbent on the party, againſt whom they ſue to be reſtored, to prove, that they have not been ſo; and the minors muſt be held to have been leſed, and muſt be reſtored, unleſs it is proved by the other party, that they have ſuſtained no loſs. Thus if a minor has given a gift to any one, leſion is preſumed from the nature of the thing, ſince it is implied in the very idea of a donation (§ 456.). In the ſame manner, if he has bound himſelf cautioner for one, he is held to be hurt. As ſoon therefore as it is made appear to the Judge, that a minor has done a deed of this kind, he enquires no farther, but immediately reſtores him againſt it. Again, leſion is preſumed in loans of money given to minors: for no minor, no tutor, no curator has power to borrow money (§ 457.). Conſequently, thoſe, who lend it them, are obliged to prove, that it was employed to their utility; otherwiſe they are not obliged to pay, *l.* 1, 2. *C. ſi adv. cred.* In the ſame manner, if payment is in any caſe made to the minor himſelf, he is preſumed to be leſed, *i. e.* to have thrown away the money in a uſeleſs unprofitable way. So he will be reſtored, without being obliged to repay it, unleſs the payer proves it was employed to his utility (§ 468.). 'Tis otherwiſe, in caſe payment is made to the tutors or curators: for diſcharges granted by tutors, or by a minor with the conſent of his curators, on payment made to them, looſe thoſe who pay from their obligations ſo effectually, that the minor is not entitled to be reſtored, even tho the money ſhould be miſpent, miſemployed, or ſquandered by the tutors or curators (§ 452.).

§ 557. But the deeds, by which he has been leſed, muſt have been *lawful* ones, that is, deeds which it was lawful for him to do. For he is not entitled to be reſtored againſt ſuch as it was unlawful for him to do; becauſe one ought not to be allowed to make breaches in the Law. Conſequently, he is not reſtored either againſt his delinquencies, or againſt loſſes which he ſuſtains on account of them. Thus one cannot be reſtored againſt a pecuniary mulct impoſed on him for a crime committed by him, *l.* 9. § 2. *l.* 37. § 1. *ff. de minor.* Minority may *extenuate* the guilt, but it is not an *excuſe* for the commiſſion of any crime, which a minor

a minor is capable of committing. *Malorum mores infirmitas animi non excuſat, l.* 1, 2. *C. ſi adver. delict. l.* 7. *C. de pœnis.* For the ſame reaſon, a minor is not entitled to be reſtored againſt his fraud, *dolus*, or any loſſes which he happens to ſuffer by it. For one, who is *in dolo*, cannot be ſaid to be hurt by his *facility*, the reaſon for which he is entitled to the privilege of reſtitution; he is ſufficiently attentive to his own intereſt, and ſhews himſelf capable of over-reaching others. Beſides, every fraud is a delinquency, *l.* 9. § 2. *ff. de minor.* Hence one is not entitled to be reſtored, who has fraudulently and deceitfully affirmed himſelf to be of age, in order to accompliſh his end, *l.* 2, 3. *C. ſi minor ſe maj.* For his malice ſupplies the defect of his years; *malitia ſupplet ætatem, Du. ult. Feb.* 1637, *Weemyſs.* But the perſon, with whom he dealt, may have been not ignorant of the fraud; he may have known him to be really minor, and that which he ſaid to be falſe; the minor may have affirmed himſelf to be of age not fraudulently, with a wicked intention of cheating him with whom he dealt, but ignorantly, with an honeſt belief of his own majority; in theſe caſes he is not barred from the benefit of reſtitution, *l.* 1, 4. *C. ſi minor ſe maj.* For in the firſt the perſon, with whom he dealt, was *in dolo;* he ought not to have dealt with one whom he *knew* to be under age; and the fraud of the minor is leſs culpable and more excuſable than his. Conſequently, not the minor, but the other, ought to be the ſufferer. In the ſecond, the minor is as much hurt and as little culpable, as if had not affirmed himſelf to be of age; and muſt therefore be reſtored, ſince the loſs, which he ſuſtained, aroſe from his facility in believing himſelf to be ſo.

§ 558. Minors are reſtored againſt ſuch deeds alone, as are *ſummo jure* valid, *l.* 16. *p. ff. de min.* For they need not be reſtored againſt ſuch as are *ipſo jure* void, ſince a deed, which is *ipſo jure* void, produces no effects; the minor is *ipſo jure* ſafe againſt it, and may get it ſet aſide at any time before he loſes his right by the negative preſcription, *l.* 16. § 1. *ff. de minor.* And it matters not, whether it be done by the minor himſelf, by his tutors or curators, or by others. Thus land belonging to a pupil cannot be ſold without the allowance and decree of the Court of Seſſion (§ 459.); the minor therefore does not in this caſe ſtand in need of reſtitution, for the ſale is *ipſo jure* void. So the pupil may claim his land at any time he pleaſes, before the purchaſer has ſecured his right by continued poſſeſſion during the years of preſcription, *C.* 24th *Jan.* 1577, *Bruce.* In the ſame manner, if either himſelf, or his tutors have borrowed money for his behoof, and granted an obligatory deed for it, the loan is *ipſo jure* void. He needs not therefore ſue to be reſtored againſt his obligation within his *quadriennium utile*, but is entitled to get it ſet aſide, and declared to be null at any time within the years of preſcription. Only he will be obliged in ſo far as the money was employed to his utility, *in quantum in rem ejus verſa.*

On the ſame principle it may be affirmed, that minors either cannot or need not be reſtored againſt preſcription. For it either is or is not determined by Law, that preſcription runs againſt them. In thoſe caſes, in which Law has ſaid that it runs againſt them as well as againſt others, they cannot and are not entitled to be reſtored againſt it. Hence minors cannot be reſtored againſt thoſe ſhort terms of preſcription which run againſt them, becauſe it is not expreſsly enacted that they ſhall not do ſo: for the years of minority are prohibited to be deducted from theſe; and the preſcription continues to run, notwithſtanding the minority of thoſe againſt whom it is running. But in thoſe, in which it is determined by Law, that it ſhall not run againſt minors, *i. e.* that it ſhall ceaſe to run during the minority of thoſe againſt whom it is running, or rather would run if they were of age, or that the years of minority ſhall be deducted, the minors ſtand not in need of reſtitution; for they are ſafe *ipſo jure.* Hence they are not, *i. e.* they ſtand not in need to be reſtored either againſt the long preſcription of 40 years, whether it be negative, 1617, *c.* 12.—*D.* II. 122. 23d *Feb.* 1714, *Earl of Marchmont*, or poſitive, *C. F.* 118. or againſt any of thoſe

ſhort

ſhort preſcriptions which run not againſt minors, becauſe it is expreſsly declared that they ſhall not run againſt them *. But if it runs not againſt them, they are protected by the ordinary ſyſtem of the Law, and ſtand not in need of the extraordinary remedy of reſtitution.

§ 559. Reſtitution lies againſt ſuch deeds alone, as have been done during minority. Therefore, nobody can be reſtored *ex capite minorennitatis et læſionis* againſt any deed done by him, after he has come of age. For one who is of age is preſumed to have perfect diſcretion, and to be capable of managing his own affairs.

From hence it follows, that one is not entitled to be reſtored againſt thoſe deeds, which have been done by him during his minority, but have been homologated by him after he came of age, *l.* 2. 1. *C. ſi major factus ratum habuerit*, *l.* 3. § 1. *ff. de minor.* *G.* 72.—*D.* I. 377. *Jan.* 1729, *Linton of Pendrick* †. For a deed done by a minor acquires, by being homologated by him after his majority, the ſame validity and the ſame force, which it would have had in caſe it had been done by him after his majority; and may be feigned, held, and ſuppoſed to have been done by him at that very point of time, at which it is homologated.

§ 560. The privilege of reſtitution is granted to minors, becauſe they are preſumed to have a certain facility, which renders them unfit for managing their own affairs, and makes them liable to be impoſed on. Hence it muſt follow, that they are not entitled to be reſtored in any caſe, in which the Law preſumes them to want this facility, and to be fit for managing their affairs. But the Law preſumes in all caſes, in which minors exerciſe any buſineſs, trade, or employment, that they are qualified for exerciſing it, and are able to manage the things relating to it. Conſequently, they are not entitled to be reſtored againſt loſſes ſuſtained by them in dealings which they have had in the way of their buſineſs, *St.* 20th *June* 1676, *Galbraith.*—*D.* I. 585. 14th *July* 1732, *Grieve.*—5th *July* 1732, *Craig.* Thus a minor, who has become tradeſman, merchant, phyſician, or Lawyer, cannot be reſtored againſt any thing, which he does in the way of his profeſſion. The reaſon is plain; dealers of every kind are liable to meet with loſſes, but they have alſo a chance to make profits; and having the advantage of the latter, they ought to run the riſk of the former. Beſides, it is really for the advantage of the minors themſelves, that they be in this caſe excluded from the privilege; becauſe nobody would chuſe to deal with them, if they were liable to be reſtored. Thus they would be effectually deprived of the very chance of making any of thoſe profits, which they make by their buſineſs.

But it is againſt thoſe dealings alone, which they have had in the way of their buſineſs, that they are not entitled to be reſtored. For minors, who carry on trade or have employments, are not thereby excluded from being reſtored againſt things, done by them otherwiſe than in the way of their buſineſs. The reaſon is; the preſumption of the Law ceaſes in this caſe, and a minor is not the leſs a minor becauſe he exerciſes an employment, and is not leſs liable to be impoſed on in other matters, than if he did not exerciſe it, *St.* 24th *Feb.* 1672, *Corſer.*—*Fo.* 11th *Nov.* 1697, *Henderſon.*—*F.* 17th *Jan.* 1711, *Dundas.*—*D.* I. 585. *July* 1724, *Wat.*—15th *Jan.* 1731, *Campbell.*

§ 561. The facility of minors is the reaſon, for which they have the privilege of reſtitution; they cannot therefore be entitled to be reſtored againſt thoſe accidental loſſes, which they ſuſtain either by the common courſe of Law, or by chance. For one, who is hurt by the common courſe of the Law, cannot ſay that he is leſed by his minority and facility, *l. ult. C. de in int. reſt. min. l.* 116.

* Every ſhort preſcription runs againſt minors, unleſs it is expreſsly declared that it ſhall not do ſo.

† One is ſaid to homologate a deed, 'when he ratifies it by doing ſomething, from which it appears, that he 'wills and holds it to be valid.' Conſequently, one may homologate a deed either expreſsly or tacitly; expreſsly, by declaring expreſsly, by ſome formal deed, his ratification of it; tacitly, by doing ſomething, from which it neceſſarily follows, that he holds and wants it to be held to be valid. See *D.* I. *homologation.*

§ 1. *ff. d. r. j.* and is not, on account of nonage, either more or leſs liable to ſuch loſſes than others. Thus a minor, who has ſucceeded to the inheritance of another, is bound, notwithſtanding his minority, to fulfil every obligation which lay on his predeceſſor, tho it aroſe from a bargain againſt which the minor would have been reſtored, in caſe it had been made with himſelf. He muſt take the eſtate as he finds it, and cannot have a right to ſue for reſtitution, as his predeceſſor had none: for he cannot have a right which was not *in bonis* of him to whoſe eſtate he hath ſucceeded, *l.* 7. *C. de reſt. milit.* In the ſame manner, he is not entitled to be reſtored againſt *accidental* loſſes. Thus, Cattle which he hath bought may happen to die, his houſes to be burned, his ſhips to be wrecked, or his goods to be loſt at ſea; he is not however entitled to be reſtored againſt theſe misfortunes, *l.* 11. § 4, 5. *ff. de minor.* For nature has made all human things liable to accidents, and hath exempted nobody from them. Every one therefore ought to bear thoſe which befall himſelf and his goods. Beſides, there is not any body, againſt whom the minor can be reſtored: for nobody can be ſingled out among the whole of mankind, that the minor may be reſtored againſt him, ſince it is much more reaſonable, that one, who has the property and the uſe of a thing, ſhould bear the loſs of it, than any other, *Ho. minor, July* 1614, *Edgar.*

§ 562. In antient times minors were not reſtored againſt deeds, which they had ratified on oath, and which they had ſworn never to impeach. But the Legiſlature, conſidering that they might be induced by the ſame facility, which led them to do the deeds themſelves, to ratify them on oath, and to ſwear that they would never impeach them, prohibited, 1681, *c.* 19. ſuch oaths to be exacted; declared the exactors of them infamous, and the deeds ratified by them to be void and null; and made it competent not only to the minors themſelves, but to any perſon related to them, to get them declared to be ſo, by way either of action, of exception, or of replication. So that minors may now be reſtored againſt deeds which they have, as well as againſt thoſe which they have not ratified on oath; againſt thoſe which they have, as well as againſt thoſe which they have not ſworn never to call in queſtion.

§ 563. Minors may be reſtored againſt all thoſe, with whom they have had dealings, without regard to their rank, ſex, or age. But compared with one another, they are *in pari caſu*; therefore one minor is not entitled to be reſtored againſt another, unleſs he who ſues to be reſtored is *in damno vitando*, while the other, againſt whom reſtitution is ſought, is *in lucro captando.* In that caſe he, who is *in damno vitando*, is entitled to be reſtored againſt the other *in quantum* he is *locupletior.* Thus, ſuppoſe one minor to lend another *L.* 100, and the whole ſum to be *in rem verſum*, employed to the utility of the borrower; in this caſe, the lender is entitled to recover the whole ſum from the other, becauſe every one is bound *in quantum locupletior factus eſt.* Suppoſe *L.* 50 of the *L.* 100 are ſquandered away idly, and the other *L.* 50 employed to the profit of him to whom the money was lent; reſtitution will be granted for L. 50 only, and the borrower is compellable to pay *L.* 50; becauſe he is in ſo far *locupletior factus.* Suppoſe again he, who borrows it, has miſpent it all; the lender will not be entitled to recover one farthing of his money, and reſtitution will be denied to him againſt the borrower, for the borrower and the lender are *in pari caſu;* neither of them is a farthing richer. 'Tis true, the lender is poorer; but the other minor ought not to be bound to make up his loſs, ſince a minor is, in a caſe of this ſort, bound only *in quantum* he is *locupletior factus;* and the borrower is as much entitled to be reſtored or to be freed from the obligation under which he brought himſelf by accepting of the loan, as the lender is to demand payment. Therefore *in pari cauſa melior eſt conditio poſſidentis, l.* 11. § 6. *l.* 34. *p. ff. de minor.*

Minors are reſtored againſt thoſe, with whom they have had dealings. But they may alſo be reſtored againſt others; for thoſe, in dealing with whom they have been hurt, may alienate that which they have acquired; and it may be

be neceſſary for the minors to be reſtored againſt thoſe in whoſe favour the alienation is made; otherwiſe their privilege might not avail them. But theſe may have acquired *bona fide* and for valuable conſiderations. The Law therefore diſtinguiſhes thoſe rights, on which ſeiſin has followed, from thoſe which are perſonal and on which it has not been taken. In caſe ſeiſin has been taken on a deed, the right of him in whoſe favour it is made becomes real, and nothing can affect thoſe who ſucceed to it *titulo ſingulari* and for a valuable conſideration, which appears not either from the deeds themſelves or from the public records to be a charge upon it. Therefore the privilege of reſtitution is not pleadable againſt onerous ſingular ſucceſſors to deeds, on which ſeiſin had been taken before the conveyance made in their favour; becauſe they were not bound to enquire into perſonal charges on that which they were going to acquire, they were entitled to rely on the faith of the public regiſters, and had nothing to do with any thing, which did not appear from theſe to affect it. But they may have *known* otherwiſe that that, which they were going to purchaſe, had been originally purchaſed from a minor, and that he was entitled to be reſtored againſt the alienation: in this caſe, they purchaſe *mala fide*, with their eyes open, and knowing their hazard; they cannot therefore avail themſelves of the circumſtances in which they purchaſed, of the value given by them, or of the purpoſes for which the regiſtries are intended; and the minors muſt be entitled to be reſtored againſt them. But thoſe who purchaſe rights, which are perſonal and on which ſeiſin has not been taken, cannot plead the faith of the regiſtries in their favour; they are not entitled to ſay that no charge, which appears not from theſe, can be effectual againſt them; they are bound, becauſe the regiſters relate not to perſonal deeds, to enquire into every thing concerning them; and every exception, which is good againſt the original purchaſer, is good againſt his even onerous aſſigns. Hence minors are entitled to be reſtored againſt even onerous ſingular ſucceſſors to rights, which are perſonal or on which ſeiſin has not been taken *. *A fortiori* they are in all caſes entitled to be reſtored againſt thoſe who acquire by gift, without a valuable conſideration, or, as they are called, gratuitous ſingular ſucceſſors, *l.* 13. § 1. *ff. de min.*—*D.* II. 70. 25th *Jan.* 1728, *Gourlay*.

§ 564. Law endeavours, as much as it can, to relieve men from anxiety concerning their property. Therefore it allows minors no more than a certain limited time, for ſuing for reſtitution. This is the ſpace of 4 years from their majority. So that they have full four years after they come of age, *i. e.* till they attain the age of 25 years complete, *arg.* 1587, *c.* 31. to look about them, to attend to the ſtate of their affairs, to diſcover thoſe deeds which have been hurtful to them, and to deliberate with themſelves whether they ſhould or ſhould not ſue to be reſtored againſt them. This ſpace of time uſes to be called *quadriennium utile*, becauſe it is ſo uſeful to minors, and ſo promotive of their intereſt. For, if they let it paſs away, and do not ſeek reſtitution within it, they are wholly excluded from ſeeking it afterwards, *l. ult. C. de tempor. in integ. reſt.*

§ 565. Minors may ſue for reſtitution, for they may be reſtored, by way of exception, as well as by way of action.

An exception, in a juridical ſenſe, is 'a defence pleaded by one againſt whom 'an action is brought, in order to hinder decree from being recovered againſt 'him;' and one is reſtored by exception, 'when, without bringing an acti-'on of reduction in order to obtain reſtitution, he obtains it by being aſſoilzied 'from one brought againſt himſelf, or by getting that, by which he has been 'hurt, declared to be ineffectual againſt him.' Hence, in order to entitle minors to be reſtored by exception it is neceſſary 1) That an action be brought againſt them, in order to compel them to fulfil that againſt which they are entitled to be reſtored; otherwiſe they cannot have an opportunity of pleading their minority by way of exception, this being a defence pleaded in bar to an action.

The

* See *D.* II. *p.* 63, 64. *ſqq.*

The Law hath limited the exerciſe of that right, which people have to be reſtored on account of their minority, to their *quadriennium utile*. Therefore, 2) An action muſt be brought againſt them within this *quadriennium*; for as ſoon as it paſſes, they loſe the right of ſuing for reſtitution, and cannot therefore be allowed to plead minority and leſion; otherwiſe the time defined to them by Law for obtaining reſtitution would be prolonged beyond its proper limits.

A written deed made with all the ſolemnities required by Law is complete *ab omni parte*, and is *ſummo jure* good. Therefore one cannot ſay to another, who is founding upon it, that it is void; nullity cannot be *excepted* againſt it; every thing is looſed in the ſame manner in which it is tied; the deed being conſtituted by writ, cannot be ſet aſide otherwiſe than by ſuing out a formal writ or bringing an action in order to get it annulled. Hence in order to entitle minors to be reſtored by way of exception, it is neceſſary 3) That that, againſt which they are ſuing for reſtitution, be a contract, bargain, tranſaction or obligation merely verbal; for tranſactions finiſhed without writ appear not immediately to be *ſummo jure* valid; both parties are on the ſame foot; neither of them is in a better condition than the other; and matters are yet in ſome reſpects imperfect. Beſides, writ not having been uſed to complete them, they may be annulled by an exception pleaded *viva voce*, without cauſing a formal writ to be iſſued in order to get them annulled, *l.* 35. *ff. d. r. j.* Therefore minors may be reſtored againſt theſe by pleading minority and leſion by way of exception. But they cannot be reſtored in this manner againſt formal written deeds granted by them; againſt theſe they can be reſtored by way of action alone, that is, by bringing an action in order to get them ſet aſide. 'Tis true, in caſe they are ſued upon deeds granted by them, they may plead their minority againſt them; but he, at whoſe ſuit the action is brought, is entitled to deny that they can plead it by exception, and may thereby hinder it from availing them in this manner. Form requires, that they commence an action of reduction, ere they can be allowed to object nullity to them; and this action they may *repeat*, as the expreſſion is, that is, after the ſummons on which it proceeds is iſſued, they may produce and found upon it in the ſuit brought againſt themſelves. For it is not preciſely neceſſary that all the formalities obſerved in introducing other actions into Court be uſed in this caſe; their adverſary has already brought the matter into Court; he has ſhewed his willingneſs to enter into a litigation concerning it; and all which is requiſite is to ſatisfy the formality of the Law. Hence, the action may be repeated, before the ſummons is ſerved; before the *inducie legales* are run; before it is called by the clerk; without being given out to be ſeen and returned; without being called before the Judge; and without being remitted by him to the other action brought againſt the minors. 'Tis enough, that it be thrown incidentally into it: for mutual actions are thereby brought concerning the diſputed deed. At the ſame time forms, which are neceſſary for promoting the equal diſtribution of juſtice and for preventing ſurprize, ought not raſhly to be departed from; and every one, who wiſhes to act in a ſure unexceptionable manner, will ſeldom chuſe to omit the obſervance of the ſmalleſt punctilio which is neceſſary to render him abſolutely ſafe. Abundance of Law, it is commonly ſaid, can never break Law; and it is prudent and adviſable to proceed in every cauſe in the moſt formal manner.

But the proper and the moſt effectual way, in which minors can be reſtored, is by way of action; that is, by bringing before the Court of Seſſion an action of reduction in order to get that, againſt which they want to be reſtored, ſet aſide, containing alſo, if it be neceſſary, a concluſion for getting reſtitution made to them of that which they are entitled to recover, and the loſs which they have a right to get repaired, decreed to be made up to them. In this manner they may be reſtored againſt every loſs ſuſtained by them; againſt tranſactions made without writ as well as againſt the moſt formal deeds.

From

From what has been ſaid it follows, that one may be reſtored by way of ſuſpenſion in all the ſame caſes, in which he may by exception; and converſly, that one cannot be reſtored by way of ſuſpenſion in any caſe, in which he cannot by way of exception. For a ſuſpenſion is no more than one formal way of pleading defences; it contains a number of exceptions pleadable by the ſuſpender, in order to ſhew that execution ought not to be allowed to be done againſt him; it is not an action of reduction brought in order to get a deed ſet aſide; it rather ſuppoſes the deed to be good, and an action or charge to be brought upon it againſt the ſuſpender; and it is intended merely for ſuſpending execution of a decree which either is or may be recovered againſt him.

§ 566. The privilege of reſtitution expires with the *quadriennium utile*. But it may be preſerved by taking proper ſteps in order to retain it.

Hence minors retain it even after the expiration of their *quadriennium*, in caſe they plead it before the Judge by way of exception before that period is over, provided it be pleadable in this manner; for by pleading it they exerciſe their privilege, and acquire a right to plead it in the action brought againſt them at any time that he who ſues it chuſes to proceed in his cauſe. A defender is not bound to take any ſteps in order to bring an action brought againſt himſelf to an end; and he cannot loſe his right to uſe any defence, which he has made, by the delays of the purſuer.

But the privilege is in this caſe retained in that individual action alone, in which the defence is pleaded; it may be uſed at any time in it, and muſt be available at the laſt as much as it could have been at the firſt moment; and may be the foundation of a decree abſolvitory in favour of him who pleads it. But farther than this it does not go; it does not give him a right to plead it on any other occaſion or in any other manner, to bring an action of reduction after his *quadriennium*, and after he has pleaded it, in order to get his negotiation ſet aſide; or to plead it by way of exception in any other cauſe.

Hence the pleading it by way of exception cannot avail him, unleſs the privilege was pleadable in this manner (§ 565.). 'Tis true, he may plead it in the ſame action afterwards; but the pleading of it cannot be of any uſe, becauſe it was not originally of any, and he, who has pleaded it, can blame himſelf alone for having allowed his *quadriennium* to paſs without having ſued for reſtitution in the proper formal manner, *Du.* 16th *Nov.* 1630, *Murray*.

But the effectual manner of preſerving the privilege is by bringing an action of reduction before the Court of Seſſion. In this caſe the perſon, who is entitled to ſue it, takes a proper *document* on his right, and thereby prevents it from being loſt by preſcription. But in order to retain it, a ſummons of reduction muſt be ſerved upon him, againſt whom it is iſſued; for a writ, which is not ſerved upon him and is not thereby duly notified to him, has no effect againſt him. Hence a revocation, either general or particular, made by one of deeds hurtful to him, has no effect either in fortifying or in preſerving his right: for revocation is a private latent act, is not a legal ſtep neceſſary to be taken in order to obtain reſtitution, and is not a proper notification of his intention to ſue for it, *Fo.* 28th *Dec.* 1697, *Marquis of Montroſe*. But a ſummons of reduction is another matter; it preſerves the privilege even after the *quadriennium*, provided it be ſerved before this uſeful period expires, *N.* 11.—*Home*, *March* 1682, *Arbuthnot*. For the privilege expires, in caſe the ſummons is not ſerved before the expiration of the *quadriennium utile*, *St.* 25th *Jan.* 1672, *Ramſay*. But the rights of mankind ought not to be allowed to remain long in a precarious incertain ſtate; their minds ought not to be kept in ſuſpence; ſome time ought to be defined, after which they may repoſe themſelves in ſecurity. Hence all thoſe, who take legal ſteps in order preſerve their right and to interrupt preſcription, ought to proſecute their intentions within a limited time; and the Law 1669, *c.* 10. hath declared, *that all citations that ſhall be made uſe of for interruptions, whether in real or perſonal rights, be renewed every ſeven years; otherwiſe*

to preſcribe. Therefore the mere ſervice of a ſummons preſerves the privilege for no more than ſeven years from the time of ſerving it; and the privilege is loſt, in caſe a new ſummons is not ſerved within theſe ſeven years, as much as if it had never been competent. It is not preſerved longer either by being called by the clerk within year and day in order to get the *partibus* marked on it, becauſe that is no *document* taken againſt him in whoſe favour preſcription is running; or by being *given out*, *ſeen*, and *returned*, becauſe returns are made without much attention, and frequently without proper authority from thoſe for whom they are made. Beſides, they make not the ſuit become an action, which may be awakened upon falling aſleep, *Da.* 15. In ſhort the mere ſervice of the ſummons preſerves the right for ſeven years as well alone, as along with all the other ſteps taken before the actual obtaining of an interlocutor in the cauſe from the Judge. But the pronunciation of one interlocutory judgment by the Judge, before whom it is called, preſerves it for no leſs than 40 years; for it makes it become a cauſe which may be wakened, in caſe it is allowed to fall aſleep, at any time within 40 years from the date of the laſt interlocutory judgment pronounced in it, *Da.* 58. This effect hath even an interlocutor *making aviſandum*, as we ſpeak, *with the cauſe*, that is, one by which the Judge determines to take the cauſe into conſideration, and to give judgment in it. Much more therefore muſt an interlocutory, making decree in abſence againſt the defender, have this effect; or one by which any other ſtep is taken in the cauſe.

§ 567. The privilege of reſtitution, it has been ſaid (§ 550. *ax.* 7.), belongs to ſuch as have been minor, and laſts during their *quadriennium utile.* Being patrimonial it is not perſonal to themſelves, but deſcends to their heirs; for their heirs ſucceed to them, are held to be the ſame perſons with them, and acquire every pecuniary right which is found *in bonis* of thoſe whoſe eſtates they inherit, *l.* 18. § 5. *ff. de minor.* Conſequently among others acquired by them is that, by which they are entitled to ſue for reſtitution *in integrum*, and reduction of deeds done by their predeceſſors during their minority to their hurt, *Du.* 7th *March* 1637, *Vernock.*—*Go.* 14th *July* 1669, *Forbes.*—*Fo.* 15th *Dec.* 1698, *Straiton.*

But they muſt exerciſe it within the time determined by Law; for the minors themſelves are, much more ought their heirs to be allowed no more than a certain limited time for impetrating reſtitution. They ſucceed to a right which another had; therefore they muſt take it in all caſes in the ſame condition, in which he left it; and the time allowed them for obtaining reſtitution muſt be the ſame with that which remained to him. The length of it therefore muſt vary according to circumſtances; for the heir, the ſucceſſor, is either minor or of age, and ſucceeds either to a minor or to one of age. If one minor ſucceeds to another, the time allowed the ſucceſſor for obtaining reſtitution is regulated by his own age alone; regard is not had to the minor to whom he has ſucceeded; ſo that he has a complete *quadriennium* after his own majority to aſk reſtitution *ex perſonâ deceſſoris.* The reaſon is, becauſe his predeceſſor having died minor, left him *in bonis* a full *quadriennium utile;* but he may himſelf neglect to ſue for reſtitution within 4 years from the death of his predeceſſor, may thereby be hurt, and muſt be *ex propria perſona* entitled to be reſtored againſt the loſs ſuſtained through the neglect. Therefore the *quadriennium* muſt in this caſe be computed from his own majority, *Du.* 14th *March* 1628, *M'Math.* A minor, who ſucceeds to a perſon of age, has the privilege of reſtitution only in caſe his predeceſſor died before the expiration of his *quadriennium utile:* for if he died after it, and neglected to preſerve his privilege by ſuing for reſtitution before his death, his heir cannot be entitled to ſue for it; ſince he cannot have a right, which his predeceſſor had loſt, or had ceaſed to have, and which was not *in bonis* of him. But if he died before the expiration of his *quadriennium utile*, his heir muſt be entitled to reſtitution *ex perſonâ* of his deceaſed predeceſſor, becauſe he found the privilege *in bonis* of him; and he muſt be allowed as much time as remained to run of his *quadriennium*, to his predeceſſor at the time of his death, or would have remained to him, in caſe he had lived to the end of the four years. Thus if the

perſon

perſon originally entitled to reſtitution happens to die at the age of 22½ years, his ſucceſſor will have 2½ years allowed him to ſeek reſtitution *ex perſona defuncti*; for ſo much of the *quadriennium* remained to run to his predeceſſor. But the time allowed him for ſeeking reſtitution begins in this caſe, as it has been ſaid it does in the former one, to run from that, at which the heir comes of age; becauſe he may omit to ſue for reſtitution during his minority, and muſt therefore be entitled to be reſtored *ex propria perſona* againſt the loſs ſuſtained by the omiſſion: *hoc enim ipſo deceptus videtur, quod, cum poſſet reſtitui intra tempus ſtatutum ex perſona defuncti, hoc non fecit*, *Du.* 14th *March* 1628, *M'Math.*—*l.* 19. *ff. de minor.*

But the heir may be of age, and may ſucceed either to a minor or to one of age like himſelf. In caſe he ſucceeds to a minor, he has a full *quadriennium* allowed him from the death of the minor, to whom he ſucceeds; becauſe the right muſt devolve to him, ſuch as it was in the perſon of his predeceſſor; the privilege he found in this condition *in bonis* of him. In caſe he ſucceeds to a perſon of age, who died before the expiration of his *quadriennium*, *i. e.* before he attained the age of twenty-five years, he has as much time allowed him, after the ſucceſſion opens to him, as remained of the *quadriennium* to run at the death of his predeceſſor; becauſe thus much was *in bonis* of him. And the time allowed to the heir is in both caſes computed from the death of his predeceſſor, or the time at which the ſucceſſion opens, becauſe the right may be immediately uſed by him; for the heir is *ex hypotheſi* of age, and is entitled to no privilege *ex propria perſona*, *l.* 5. *C. de temporibus in integrum reſtitutionis*; ſo the *quadriennium* ought to continue to run its courſe after the death of the minor as it did before it, *arg.* 1621, *c.* 6.

§ 568. The effects of reſtitution will be plain from the definition, which was given of it above (§ 550.). For one is ſaid to be reſtored againſt a thing which he has done, 'when his affairs are, as much as they can be, put into the ſame 'preciſe ſituation at which they were at the inſtant before he did this thing, 'and they would have been at the time of his being reſtored, in caſe it had ne-'ver been done,' *l.* 24. § 4. *l.* 27. § 2. *ff. de min.*

Firſt, Therefore that, by which the minor has been hurt, muſt be ſet aſide, and it muſt be declared to be void and ineffectual againſt him *for the time to come*. Thus an alienation, againſt which he is reſtored, muſt be declared to be void; and all the deeds made in order to complete the right of him, in whoſe favour it is made, muſt be ſet aſide. A deed, againſt which he is reſtored, muſt be declared to be void, and muſt be ſet aſide. A bond granted by him muſt be adjudged to be not binding upon him; it muſt be found that he is not bound to fulfil it; and it muſt on that account be avoided. In the ſame manner a bargain which he has made, a contract into which he has entered, an obligation under which he hath brought himſelf, muſt be annulled, and muſt be adjudged not to be obligatory on him.

Secondly, He muſt recover poſſeſſion of the principal thing which he has loſt. Thus, a corporeal thing which he has alienated, whether it be moveable or immoveable, muſt be reſtored to him upon his being reſtored againſt the alienation; money, which he is entitled to recover, muſt be paid him; and other *corpora* muſt, in caſe they are themſelves extant, be delivered to him. But they may be deſtroyed, and full value muſt be given for them.

Thirdly, The way muſt be cleared for his recovering them and poſſeſſion, and the proper orders or decrees muſt be made for this purpoſe, in order to put it in his power to recover them by legal diligence. Otherwiſe he could not make his right effectual. Theſe are all neceſſary conſequences of reſtitution, and of ſetting aſide that againſt which he is reſtored.

The material article which conſtitutes the eſſence of a ſummons of reduction, concludes, That that againſt which one ſues to be reſtored ſhall be *reduced*; actions of reduction are intended merely for getting deeds or tranſactions ſet aſide: therefore they reſpect the future time alone, and cannot properly be effectual *quoad præterita*.

præterita. But that, which the minor has alienated and which he is entitled to recover, may be ſomething which yields fruits either natural or civil; theſe he would have reaped in caſe he had retained the poſſeſſion of his property; and being entitled to get his affairs *reduced* into the ſame ſtate in which they would have been if that againſt which he is reſtored had never been done, he muſt be entitled to obtain reſtitution *cum omni cauſa.* Therefore, *fourthly*, He muſt recover the fruits yielded by his property during its abſence from him: for this purpoſe an article muſt be thrown into his ſummons, concluding for getting account rendered to him of theſe, and decree made for reſtoring them; and the Judge muſt give judgment for him in terms of this concluſion, *l.* 35. *ff. de verb. ſign. l.* 24. § 4. *l.* 27. § 2. *ff. de min. Du.* 25th *Jan.* 1631, *Houſton.*

But we ſhall ſee below, that one is in no caſe bound to account for fruits *bona fide percepti;* and his claim for thoſe which *have* been reaped muſt be limited to the time, at which he whom he is ſuing began to be *in mala fide, St.* 16th *Feb.* 1666, *Earl of Winton.*

§ 569. One who ſues for reſtitution, aſks no more than that his affairs be brought into the ſame ſituation, in which they were at the inſtant before he did the deed againſt which he wants to be reſtored, and in which they would have been in caſe it had never been done (§ 568.). Therefore, reſtitution muſt in all caſes be reciprocal; *reſtitutio autem ita facienda eſt, ut unuſquiſque in integrum jus ſuum recipiat;* the affairs of the perſon againſt whom it is impetrated, as well as of him who impetrates it, muſt be brought into the ſituation in which they were at that time, *l.* 24. § 4. *ff. de minor.* for if they were not, thoſe of the minor would be ſo far from being reſtored to the ſame condition, that they would be put into a much better one, than that in which they were at it. Therefore a minor is not entitled to obtain reſtitution, unleſs he is himſelf willing to make it to thoſe, againſt whom he ſues for it: *C.* 26th *June* 1576, *M'William.*—*F.* 1ſt *Dec.* 1708, *Creditors of Rothemay.*

Conſequently a minor, upon being reſtored againſt a purchaſe made by himſelf, muſt not only reſtore the thing purchaſed by him, but alſo account for the fruits yielded by it; and on being reſtored againſt a ſale, he muſt reſtore not only the price, but alſo the intereſt of it.

But the natural fruits of a fructiferous ſubſtance may be compenſated with thoſe civil ones produced by money, *i. e.* with the intereſt of it: hence they ought, in all caſes in which it is poſſible for them, to be compenſated together; and the value of the balance be paid to that party, to whom it is found to be due, *l.* 40. § 1. *ff. de min.*

Reſtitution ought to be ſo equal, that the expences of profitable meliorations ought to be repaid by the party to whom the meliorated thing is to be reſtored; otherwiſe the reſtitution would be iniquitous. For he to whom the thing was to be reſtored would be in a better, whereas he by whom it was to be reſtored would be in a worſe condition than he was at the time of doing the deed, againſt which reſtitution is granted, *l.* 39. § 1. *ff. de minor.*

But minors are apt to miſpend their money, and to miſmanage their affairs. Law hath therefore favoured them, hath in ſome caſes derogated from the mutual equality of reſtitution, and obliges them to reſtore no more than either was or is preſumed to have been employed to their utility, *quantum in rem verſum,* or *locupletiores facti ſunt.* Every thing, which has been truly employed to their utility, it is evident they ought to reſtore, or the equivalent of it. But there are ſome caſes, as it has been obſerved (§ 556.), in which leſion is preſumed, *v. g.* in loans of money made to a minor, whether payment of it be made to himſelf, to his tutors, or to his curators. In theſe the Law not only relieves him from the neceſſity of proving, but puts it on the other party to prove, that it was employed to the utility of the minor; and reſtitution will be awarded againſt him of no more than is proved to have been *in rem ejus verſum.* But there are others, in which the minor is bound to make reſtitution of the whole mutual conſideration given him for doing the deed, againſt which he is reſtored; becauſe

becauſe Law preſumes it to have been all employed to his utility. 'Tis ſo, in caſe the deed, againſt which reſtitution is obtained, was legal and was executed legally, that is, was done not only by ſuch as had power to do it, but after the formal manner preſcribed by Law. Thus a minor, who has ſold part of his landed eſtate, has made conveyances of it, received payment of the price, and granted an acquittance of it with conſent of his curators after that formal manner appointed by Law; may, if he has been hurt by the ſale, be reſtored againſt it. But if the price was paid to his curators, he muſt make reſtitution of every farthing of it, ere he can himſelf be reſtored; no matter whether it was or was not employed to his utility: for the Law enquires not in this caſe into that; becauſe the buyer is in no ſort culpable, and omitted nothing of all which the Law made incumbent on him. He made his bargain fairly with thoſe who were empowered to bargain with him, and he paid the price to thoſe to whom the Law allowed him and he could have been compelled to pay it. The whole price therefore muſt be repaid to him, ere the minor can be reſtored againſt the ſale. If it was not employed to his utility, he muſt ſeek reparation of his damage from his curators who have miſemployed it; and can ſeek it from them alone. In the ſame manner, if a purchaſe was made for him, he muſt reſtore not only the thing he bought, but alſo all the fruits it yielded during his poſſeſſion, *F.* 1ſt *Dec.* 1708, *Creditors of Rothemay*. But ſuppoſe the buyer to have paid the price not to the curators, but to the minor himſelf, here he did what he ought not to have done (§ 452, 468, 512.). Therefore he is not entitled to have reſtitution of more of the price made to him, than he proves was employed to the utility of the minor, *Di.* 61. For Law preſumes the minor to have thrown the money away, and to have been thereby leſed. So it obliges him neither to prove nor to reſtore any thing, but lays the burden of the proof wholly on the other party.

§ 570. Minors are alone entitled to be reſtored *in integrum*. Therefore reſtitution granted to them can be profitable to themſelves alone; no others can reap benefit from it, unleſs their intereſt is inſeparably connected with that of the minor, and cannot be divided from it. For in this caſe *neceſſity* makes it impoſſible to hinder the reſtitution of the minor from being beneficial to thoſe, whoſe intereſt is inſeparable from his.

Reſtitution granted to a minor being beneficial to himſelf alone, it cannot be profitable to cautioners, or others, who have either expreſsly or tacitly become ſurety for him. Thus, if one lends money to a minor, and takes cautioners bound either jointly and ſeverally with him or for him, the obligation of the minor may be ſet aſide, but the cautioners will notwithſtanding remain bound: for a creditor, who has been ſo cautious as to exact ſureties from a minor, ought not to ſuffer by his caution.

Reſtitution is not in Scotland, as it was among the Romans, held to be an extraordinary remedy; it is an ordinary one. Minors therefore may have immediate recourſe to it in all caſes, in which they are hurt; whether they are or are not able to recover reparation of their loſs by other means. For it is not their *ultimum remedium;* minority and leſion are ordinary reaſons of reduction, which, if they are verified, muſt be available to get hurtful deeds ſet aſide, *Du.* 7th *March* 1637, *Vernock.*—1ſt *Dec.* 1638, *Stewart.*—*St.* 2d *July* 1667, *Lord Blantyre.*

It may be remarked, that actions brought in order to obtain reſtitution *ex capite minorennitatis et læſionis*, can be brought before the Lords of Seſſion alone. For the reſtoration of minors is a matter of high juriſdiction, and is competent to thoſe judges alone, who have a *nobile officium* and a prætorian power. Beſides, it is uſually ſued and given by way of reduction.

§ 571. The perſons, who are reſtored *ex capite minorennitatis*, are minors who have during their minority done deeds hurtful to them. Therefore, the privilege of reſtitution is not competent to the church, to the poor, to corporations, to hoſpitals, or to any communities; becauſe, if it belonged to them, it would

have no end. Thus it would in ſome ſort hinder the whole world from having dealings with them, ſince nobody would chuſe to have dealings with thoſe, who were perpetually liable to be reſtored; and it would make the affairs of mankind remain ever on an uncertain footing.

TITLE XVII.

Of Ideots, mad Men, dumb Men and deaf Men.

§ 572. EVERY one acquires, as ſoon as he comes of age, the abſolute diſpoſal of his own affairs; becauſe he is preſumed to be capable of managing them, without the aſſiſtance or intervention of others (§ 545.). But every preſumption muſt yield to the truth; and one who is incapable ought not to be allowed to have the ſole and abſolute diſpoſal of them.

One may be incapacitated either by nature, or by Law, from managing his own affairs; by nature, when he is not of ſound mind, and has not the uſe of reaſon; by Law, 1) When he is interdicted; 2) When he is inhibited.

§ 573. Thoſe, who are incapacitated by nature from managing their own affairs, becauſe they are not of ſound mind, and have not the uſe of reaſon, are called *Ideots* and *mad men.*

It would not be eaſy to give a definition which would mark their condition with more preciſion. Almoſt every creature poſſeſſed of the human form, hath *ſomething* of the faculties of his kind; ſome enjoy more, others leſs vigour of mind; a remarkable gradation takes place among the individuals of the ſpecies; and thoſe, whoſe powers are ſo feeble or ſo little uſeful to them that they may be ſaid to be totally *deprived of reaſon,* fall under the denomination, of which we are treating in this Title.

Ideots and mad men agree in this, that they are both of them deprived of the uſe of reaſon. But they differ in ſeveral reſpects; and it would not be difficult to throw out a variety of curious facts concerning them. The following characteriſtics are remarkable.

Ideots are ſuch as are ſlow, ſtupid, inattentive, and undiſcerning; they have few ideas; and ſeem to be almoſt entirely deprived of thoſe mental powers, which are peculiar to rational creatures. Whereas mad-men want not either ideas, or the ordinary faculties of the human mind, but are deprived, by an over-heated or diſturbed imagination, of the right and ſober uſe of them.

The mind is connected with the body; the powers of the one may, in ſome ſort, be ſaid to be dependent on the conſtitution of the other; and the texture of the material has been thought by ſome to determine the energy of the intelligent part of man. DAMIEN is reported to have affirmed, that he would not have attempted to murder his King, if he had been blooded the day, on which he made the attempt. The writers on phyſiognomy, I mean that extenſive kind of it which conſiders the harmony and the connexions obſervable between the œconomy of animal bodies and the diſpoſitions of their minds, have ſaid much on this matter; and their theories are ſomething confirmed by the very looks of perſons deprived of the uſe of reaſon. I will not ſay, that the ſkulls of ideots are thicker than thoſe of other men; or that the brains of mad-men are diſordered, or diſpoſed in a way peculiar to themſelves: for experience ſeems not to have eſtabliſhed the truth of this obſervation. But thus much is certain, that their external appearance is different from that of others. Ideots are remarkable for a dull, ſtupid, inattentive look; mad-men for a briſk, lively, and ſpirited one. Hence it is common to ſay, 'Such a one has an ideotical or mad look.' The former ſeem hardly to have ſpirits to creep along; 'tis with difficulty that they drag their limbs after

after one another; and every ſtep they take marks the imbecillity of their minds. But the mien of mad men is bold and majeſtic and full of energy; they move with eaſe and with ſpirit; and, as SOLOMON expreſſeth it, they ſpeak with their feet *.

The feebleneſs, with which ideots diſtinguiſh every exertion of their powers, extends itſelf even to the government of their tongues; they have not acquired the free uſe of theſe, and are thereby in ſome ſort deprived of the powers of ſpeech. Hence they are ſometimes called *fatuous* perſons. But mad men labour not under this defect †.

'Tis ſeldom that one can continue in an uninterrupted flow of high ſpirits; the force of nature is in human kind eaſily exhauſted; and fits of high ſpirits are uſually, in mad men, followed by others of melancholy ſilence and deſpair. Thus they are liable to remarkable changes; and a ſtate of elevation and one of depreſſion alternately ſucceed one another, ſometimes periodically, ſometimes in an irregular manner. But ideots uſually remain in one and the ſame uniform ſtate of childiſhneſs and ſtupidity; and are not ſubject to changes in their condition.

By theſe and other characteriſtics mad men and ideots are diſtinguiſhed. They are incapacitated from managing their own affairs, becauſe they are not of ſane mind, have not the uſe of reaſon, know not what they do, are ignorant of their own utility, have no will of their own, and are liable to be cheated by every one who can be ſo profligate as to think of impoſing on them. But the Law does not abandon them to the mercy of the world; it takes them under its own protection, and provides for them perſons to take care of them. Theſe are their own neareſt relations.

For ſuch as are related by blood may be preſumed to have the ſincereſt affection for one another, and to be moſt diſpoſed to take care of one another. Beſides, it is more the duty of ſuch as are connected by the ties of nature, than of others, to take care of one another when in diſtreſs (§ 418.). Hence Law calls *their neareſt agnates* to the guardianſhip of ideots and mad men, 1585, *c.* 18. ‡.

§ 574. But that theſe may be entitled to the tutorſhip of their furious or fatuous relations, 1) It is neceſſary that they be males; for women cannot be tutors of Law (§ 419.). 2) They muſt be the neareſt males, who are related to the ideots or mad men on the ſide of their fathers; for relations *ex parte patris* are alone called *agnates*. But it is not neceſſary, that they be males, who connect their propinquity to the ideots or mad men by males alone; for all relations *ex parte patris* are, in the Law of Scotland, called agnates, whether they connect their propinquity by males or by females, *F.* 23d *Feb.* 1710, *Moncrief.* 3) They muſt be of lawful age, *i. e.* of that age, of which Law requires them to be, and which, according to the opinion of thoſe who have written on the Law of Scotland, is that of 25 years. But one may be allowed to doubt of the truth of this poſition; the common arguments, brought to prove it, appear to be inconcluſive. 'Tis true, the act of parliament 1585, *c.* 18. refers to the diſpoſition of the *common* or *civil* Law. But it is no leſs true, that the reference is made to determine the relation, not the age, of that perſon, who ſhall be lawful tutor of fatuous or furious perſons; not a word is ſaid of the age. Beſides, the argument, brought from the Roman Law, ſeems to prove not only that it is not neceſſary to have attained

* PROV. *c.* vi. *v.* 13. See a curious diſſertation written by HEINNECCIUS *de inceſſu animi indice.*

† Ideots are ſometimes called *naturals*, and *natural fools*; becauſe ideotiſm is uſually natural, it is born with one, and ſeldom ſupervenes after one is come of age. Mad men are ſometimes called *furious* perſons, becauſe they are uſually furious in reality.

‡ In antient times the king had the care of the *eſtates* of fatuous perſons, enjoyed the profits of them, and was bound only to provide the unhappy proprietors with *neceſſaries*, *R. M. l.* 2. *c.* 46. But the cuſtody of furious ones belonged to their relations, *ſ. ſt. R.* I. *c.* 24. § 1, 5.

attained the age of 25 years, but that it is ſufficient for one to have attained that of 21, in order to be capable of holding the office. The reaſon, for which the age of 25 years was defined by the Roman Law, is, becauſe all perſons under it were, by the Romans, held to be minor, and were ſubjected to the care of others. But they reckoned it, for it is in itſelf abſurd, that one, who is himſelf under the tuition of others, and is not entruſted with the power of managing his own affairs, ſhould have the care and management of the affairs of others (§ 410.). By conſequence that age, at which one is held in any country to be of age, may well be thought to make him capable of being a tutor of Law in it, unleſs he is, by expreſs ſtatute, incapacitated from holding the office. Thus in Scotland one, who has attained the age of 21 years, muſt be held to be capable of being tutor of Law either of an ideot or of a mad man, becauſe every one, who has attained that age, is held by the Law of Scotland (§ 545.) to be major, and to be capable of the moſt important truſts. For Law holds every major to be, the young as well as the old, equally perfect men, and to be equally worthy of its confidence, unleſs it has, in any caſe, ſaid otherwiſe expreſsly. By conſequence, one, who has attained the age of 21, muſt be as capable of having the guardianſhip of an ideot, as one who has attained that of 25 years; for the one ſeems not to be prohibited any more than the other. 'Tis true, the act of parliament 1474, *c.* 51. makes the age of 25 years neceſſary for rendering one capable of being a tutor of Law. But this act, it is evident, relates to pupils alone, and cannot be extended to ideots or mad men. Indeed, if it is true, as moſt of the writers on the Law of Scotland have ſaid, that the age of 25 years is in all caſes neceſſary to make one capable of being a tutor of Law, the only ſolid argument, which can be brought for the opinion, is that drawn from the words, or from the extenſion of this act 1474, *c.* 51. by which it is enacted, that a *lawful tutor* ſhall be of the age of 25 years. 4) He muſt not lie under any other either legal or natural diſability, by which he is incapacitated to take care of the affairs of others (§ 410, 419, 427.).

§ 575. But the neareſt agnate is not *ipſo jure* entitled to take upon himſelf the care of his unfortunate friend, and the management of his affairs. He may be himſelf incapable of managing them (§ 574.); and ought therefore to be found in a legal and formal manner to be capable, before he be allowed to intermeddle with them (§ 420.). Beſides, every one, who is of age, is *preſumed* to be able to manage his own affairs (§ 545.). Therefore, he muſt be proved to be incapable of managing them, ere it can be lawful for any one to take the management of them upon him; and the Law hath preſcribed a way, in which this ſhall be done.

Firſt; A brief muſt be iſſued from the chancery, and ſhould be preſented to the Judge-ordinary, within whoſe territory the fatuous or furious perſon reſides, that it may be ſerved before him. 'Tis true, it may be ſerved by any judge who has power to impannel a jury; for its direction is, as is uſual in all briefs, left blank. But it is proper to ſerve it before the Judge within whoſe territory the unhappy perſon reſides, becauſe the condition of every one is beſt known to thoſe, who live in his neighbourhood, and have thereby acceſs to ſee and to hear about him. But extraordinary caſes ſometimes happen; the brief may be directed either to the macers or to other commiſſioners ſpecially nominated by the Court of Seſſion; and aſſeſſors may be appointed to theſe.

This brief is called the brief of *idiotry*, if the perſon, to whom it relates, is an ideot; and the brief of *furioſity*, if he is a *furious* one. The tenor of it muſt therefore be varied according to theſe circumſtances. In the caſe of ideotiſm it is as follows: ‘ Vicecomiti et balivis ſuis de ſalutem. Mandamus vobis ‘ et præcipimus, quatenus per probos et fideles homines patriæ, per quos rei veri- ‘ tas melius ſciri poterit, magno ſacramento interveniente, diligentem et fidelem ‘ inquiſitionem fieri faciatis, ſi B. ſit incompos mentis, *fatuus et naturaliter idiota,* ‘ *ſic quod timetur de alienatione tam terrarum ſuarum, quam aliarum rerum mobilium* ‘ *et*

'*et immobilium? et quamdiu ſuſtinuit iſtam fatuitatem?* Et ſi ſit, quis ſit tunc 'propinquior conſanguineus dicto B.? Et ſi ille propinquior ſit ſuæ rei providus, 'et potens cavere idoneè de adminiſtratione rei alienæ? Et ſi ſit legitimæ ætatis? 'Et quod per dictam inquiſitionem diligenter factam, eſſe inveneritis, ſub ſigil-'lis veſtris et ſigillis eorum qui dictæ inquiſitioni intererunt faciendæ, ad capellam 'noſtram mittatis, et hoc breve.' In the caſe of madneſs, in place of thoſe words diſtinguiſhed by Italic characters, theſe are ſubſtituted, prodigus et furioſus, viz. 'quod neque tempus neque modum expenſarum habet, ſed bona et poſſeſſiones 'dilacerandas et diſſipandas profundit? Et quamdiu ſuſtinuit illam furioſitatem?'

Secondly, This brief muſt be preſented to the Judge, before whom it is to be ſerved; and muſt be ordered by him to be executed by his officer ſpecially upon the fatuous or furious perſon himſelf, and generally upon all others, after the ſame manner with the brief of tutory (§ 420.).

Thirdly; After the *induciæ* on which it is executed are paſt, and the day on which it is to be ſerved is come, an inqueſt or jury of 15 men muſt be impanneled by the Judge, to enquire into the preſent condition of the perſon alledged to be fatuous or furious, and into the other points on which their verdict muſt be returned.

Therefore, *fourthly*, Proof muſt be made of his ideotiſm or madneſs. And upon this matter two points muſt be conſidered by them, his *preſent* condition, and the time during which he *has been non compos*.

His preſent condition ought regularly to be proved by an open exhibition of the fatuous or furious perſon, *Da.* 31. For it is, ſtrictly ſpeaking, impoſſible for a jury to find that one is fatuous or furious at that individual point of time at which they return their verdict, unleſs he is actually preſent at that time before their eyes. But evidence of preſent facts may be got from paſt ones; and it is poſſible, that ſatisfactory proof may be brought of one's preſent condition from his condition in times paſt, and from the nature of his diſeaſe. It may have continued long, and it may be periodical. 'Tis not therefore neceſſary in all caſes to exhibit the fatuous or furious perſon to the jury; 'tis ſufficient that evidence be brought which *convinces* them concerning his preſent condition; and it muſt *ex neceſſitate* be, in all caſes, in their breaſts to determine concerning the nature of this evidence. But it is their duty to demand to ſee him in all caſes, in which they cannot otherwiſe ſatisfy their own conſciences, or pronounce deciſively concerning his ſtate.

The jury muſt enquire not only into his preſent condition, but alſo into the time during which he has been *non compos*, 1475, *c.* 66. becauſe every thing done by one, deprived of the uſe of reaſon, is null. So every thing done by one after the time, from which it is found by the verdict of an inqueſt that he has not had the uſe of his reaſon, is *ipſo jure*, and may be declared both to have been and to be null and void, without any other evidence; for the verdict of an inqueſt is *probatio probata*, creates a *præſumptio juris*, and affords inconteſtable evidence of the Ideotiſm or madneſs of the fatuous or furious perſon, *Fo.* 9th *Feb.* 1704, *Maxwell.*

'Tis plain from the nature of the thing, that the paſt condition of the ideot or mad man is provable by witneſſes alone, who have ſeen his behaviour, can depoſe to the abſurdity of his actions, and can, if required to do it, inſtance in particulars of his conduct, from which it may be impoſſible not to believe him to have wanted the uſe of reaſon.

Fifthly; The jury, after they have found one to be *non compos*, proceed to enquire, whether he, who claims to be his tutor and to have the care of him and of his affairs, is that perſon, whom the Law calls to the office. Therefore they enquire whether he is 1) His neareſt male agnate, 2) Is of lawful age, 3) Is careful of his own affairs, 4) Can find proper caution that he will be careful in the management of the affairs of others, and 5) Is not diſqualified from holding the office either by a natural or by a legal incapacity. Upon proof being made

to them of each of these particulars, they serve the claimant lawful tutor of the fatuous or furious person.

On this the Judge, before whom the service proceeded, interposes his authority to it, and returns the original brief with all his proceedings upon it to the chancery, from which it issued. As soon as the return is made, the person served ought, like other tutors (§ 432.), to find caution.

After he has found it, and no sooner (§ 420, 490.), a letter of tutory may be granted, signed either by the Director of the Chancery, or by his deputy, to the person whom the jury have found and have served to be the lawful tutor of the Ideot or mad man. This letter is a decree of Chancery, nominating, constituting, appointing, authorising, and impowering him who is served, to be tutor of the ideot or mad-man, to take care of his person, to manage his affairs, and to do the *duties imposed by Law on tutors* (See Titles VI. and VIII.).

§ 576. One, who is entitled by Law to have the tuition of a fatuous or furious person, is not like a tutor of Law (§ 422.), bound to cause himself to be served within any limited time; for he is never excluded from the office, till he has renounced it. So he may cause himself to be served at any time, at which he pleases to take upon himself the care of his relation, and to assume the management of his affairs, *Du.* 22d *Feb.* 1628, *Colquhoun*, provided he has not renounced. For a renunciation excludes him from the office forever.

But the *nearest* agnate of the delirious person may be disabled either by a temporary, or by a perpetual incapacity from holding the office. In this case the one, who is next in propinquity to him, is entitled, in the mean time, to be served. But the other who is incapable, having not *renounced* the office, retains his right to be served and to enter upon it as soon as he ceases to be incapable. Thus, if the nearest agnate is a minor, he is entitled, as soon as he comes of age, to be served even tho another should have been served in the mean time.

§ 577. But those relations who are entitled by Law to have the guardianship of the fatuous or furious, may either refuse or delay to take the charge of them, by causing themselves to be served their tutors; the Law does not in this case leave them defenceless, but grants power to the King to give them tutors by his Exchequer. For persons, who are by ideotism or madness deprived of the use of reason, may be compared to children, since they are at least equally incapable of taking care of themselves and of their affairs. Hence it is lawful to the King, indeed the public utility requires, that power be allowed him, to *give* tutors to such as want them, in the one as well as in the other case; for the disposition of Law ought to be the same in all cases, in which there is the same reason for its being so. Therefore tutors may be given by the exchequer to persons, who are, either by ideotism or by madness, deprived of the use of reason, as well as to those who through nonage have not attained it. 'Tis true, these tutors-dative can never exclude the tutors of Law: for the latter may cause themselves to be served at any time they please to accept; and as soon as they are served the nomination of the former becomes void. But in the mean time, before those who are entitled cause themselves to be served, the tutors-dative have the same power, and lie under the same obligations to manage the affairs of the ideots or mad men committed to their care, which tutors of Law would have, if they were served, *Du.* 22d *Feb.* 1628, *Colquhoun.*—*G.* 67.—*Fo.* 28th *Feb.* 1710, *Moncrief.*

But it must be remarked, that a father seems not to have power to name tutors to have the tuition of his children after they come of age. 'Tis true the Law empowers him to name both tutors and curators to them during their nonage. But the office of those nominated by him determines as soon as the children come of age; and the guardianship of fatuous or furious persons devolves on those, who are called by Law, 1585, *c.* 18. to take care of them. It would not however be a great extension of it to allow a father to name persons to be tutors of his fatuous or furious as well as of his infant children; for he has the greatest affection for them, is most anxious about their welfare, and may be presumed to be most capable of providing for it, (*arg.* § 406, 407.).

§ 578.

§ 578. The diſpoſition of Law ought to be the ſame in all caſes, in which the reaſon of it is the ſame. Therefore it is no matter from what cauſe the want of the uſe of reaſon ariſes, whether from ideotiſm, madneſs, deafneſs, dumbneſs, or a perpetual diſeaſe, § 4. *J. de curat. l.* 2. *ff. eod.* for Law diſtinguiſhes not between the different cauſes, by which perſons may be deprived of the uſe of it. All into which it enquires, is the truth of the fact, whether one is or is not deprived of it by a cauſe, which uſes to make the deprivation perpetual; for a phrenzy, which is only temporary, *v. g.* which ariſes from the heat of a fever, is not a ſufficient cauſe for ſubjecting the delirious perſon to the tutorſhip of others, becauſe the incapacity will be removed, as ſoon as the violence of the diſeaſe abates.

§ 579. The duties, the obligations, the powers, and the rights of thoſe, who have the guardianſhip of perſons deprived of the uſe of reaſon, are the ſame with thoſe of the tutors of pupils. 'Tis needleſs therefore to go into the detail, and to make a minute repetition of theſe (§ *See Titles* VI. VIII.). I ſhall content myſelf with making the following obſervations:

Firſt; The tutors of perſons deprived of the uſe of reaſon are bound to provide them with the decent comforts of life in as frugal a way as poſſible. For money ought not to be ſpent in purchaſing fineries to them; hence the Law ſays *inveniet iis* neceſſaria, *R. M. l.* 2. *c.* 46. § 2.

Secondly; They are bound to do all which they can do to hinder the perſons, committed to their care, from doing harm either to themſelves or to others. Indeed, if they are negligent of them, they are culpable, and are therefore liable to be puniſhed with an arbitrary puniſhment proportionable to the circumſtances of their delinquency, *l.* 14. *ff. de off. præſid.*—*ſ. ſt. R.* I. *c.* 24. § 1, 2, 5.

Thirdly; They ought not to ſpend money on their education, unleſs they ſee ſome probable proſpect of the poſſibility of their being either cured or bettered by it; for they ought to do, what they can do, to get them cured.

Fourthly; All deeds, done by perſons found by the verdict of an inqueſt to be deprived of the uſe of reaſon, are *ipſo jure* void, *Q. A. c.* 29. § 3. and are therefore liable to be ſet aſide, *ex capite furoris aut dementiæ*, without other evidence than that of the verdict of the jury; for it is *probatio probata*, and affords inconteſtable evidence, ſince it is a proof found and proved to be true by the ſolemn declaration of the jury.

But it is not neceſſary, that one hath been found by the verdict of an inqueſt fatuous or furious, in order to make deeds done by him during his phrenzy liable to be ſet aſide *ex capite furoris aut dementiæ*. Every deed done by one, who is actually at the time of doing it deprived of the uſe of his reaſon, is liable to be ſet aſide; whether he is alive or dead, lives in Scotland or in another country, has or has not been found by a jury to be fatuous or furious. 'Tis true, it muſt in this caſe be proved, for it is competent to prove it otherwiſe than by verdict, that he was deprived of the uſe of his reaſon at that time, *Q. A. c.* 29. § 3.—*Du.* 26th *July* 1638, *Loch.*—*H.* 537.—*Fo.* 13th *Feb.* 1700, *Aird.*

Fifthly; It muſt be remarked, that one, who has been found to be an ideot, a mad man, a lunatic, deprived of the uſe of reaſon, in any other country, according to the form of the Law of that country, cannot be held in Scotland to be an Ideot, a mad man, a lunatic, or to be deprived of the uſe of reaſon. For no proof made, no judgment given can hurt one who was not a party to it, *tit. C. inter alios acta, l.* 47. *ff. de re jud.* ſo it cannot be effectual againſt one, who lives in a country different from that, in which it was taken; becauſe one is not, by any ſummons, amenable to courts to whoſe juriſdiction he is not ſubject, *arg. R. M. l.* 3. *c.* 32. § 21, 22.—*Fa.* II. 70. Beſides, the Law of Scotland hath pointed out a particular way, in which it ſhall be tried and determined, whether one is deprived of the uſe of reaſon, and whether the character of being an ideot, a mad man or a lunatic ought conſtantly to be affixed to him. If this way is not followed, the general character cannot be affixed to him, becauſe it is not ſtamped

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in the proper manner; and it will be neceſſary in every particular caſe to prove, that he was deprived of the uſe of reaſon at that particular time, at which occaſion requires it to be proved. But this proof can have effect in that particular caſe alone, to which it relates; and a new one muſt be brought on every new occaſion. The verdict of the jury is alone that evidence which relates to every caſe, and on which one can found on every occaſion, becauſe it decides *generally* concerning his *ſtate*. Therefore it is in Scotland lawful at any time to have inquiſition made by a jury into the ſtate of any one who is alive, and to have the preciſe point aſcertained by their verdict, from which he was *non compos*. The conſequence of which declaration is, that every deed done by him after that time is *ipſo jure* void, and may be, either by an action of reduction, or, in ſome caſes, by exception, declared to be ſo.

§ 580. This ſpecies of tutory determines, among other ways (§ See Title VII.), as ſoon as the perſon ſubject to it comes to be of ſound mind, and is reſtored to the uſe of reaſon. Hence every thing done by him during thoſe lucid intervals, at which he has the uſe of his reaſon, is valid, *R. M. l.* 1. *c.* 30. § 3, 4.—*l.* 6, 7. *C. de cur. furioſi.*—*arg. Q. A. c.* 29, § 3. Thoſe therefore, who have dealt with him or have acquired from him at any of thoſe times, are entitled to prove that he enjoyed the ſo'ber uſe of it at the times at which he made the deeds in their favour, and to avail themſelves of this plea, in order to hinder them from being ſet aſide. 'Tis true the verdict of the jury is proof of his condition always till it is diſproved; and the preſumption muſt, in moſt caſes, be made againſt every thing done by him after the time from which he is found to have wanted his reaſon; becauſe one, who has once been found to be deprived of it, may well be preſumed to continue ſo, unleſs he, who dealt with him, proves him to have had a lucid interval. For it is an eaſy matter for one who deals with a mad man, indeed he would be but a ſimple rogue who ſhould not take care, to make the deed done by him appear *ex facie* to be a rational one. Beſides, it is probable that advantage hath been taken of a man, who has been once diſordered. The only caſe therefore, in which one may preſume for the deed, and relieve him to whom it is granted from the *onus probandi*, is, when the condition of human affairs and the intereſt of commerce impoſe not any neceſſity on one to enquire minutely into the condition of thoſe he deals with, *v. g.* if one buys goods in a ſhop, or in a public market, from one who appears to be like other people: for one who makes bargains about moveables, is not bound to make enquiry into a circumſtance ſo ſingular as that, whether thoſe, with whom he deals, have not been found by the verdict of a jury to be deprived of the uſe of reaſon. Such an obligation would lay an embargo on commerce, and would ſoon produce a ſtagnation of it. In other caſes, he ought not to be freed from the burden of proving the perſon, who hath granted the deed, to have been of ſound mind at the time at which he granted it.

But a jury may have been packed; they may have pronounced their verdict precipitately, without proper evidence; or they may have omitted to return preciſe anſwers to thoſe points, into which they are ordered to enquire. Beſides, one, who has been found to be deprived of the uſe of reaſon, may be reſtored to it, and may become capable of dealing with others. The verdict of the jury therefore may either be prevented from being returned, or ſet aſide after it is returned: for it is not like that of a jury pronounced in a criminal caſe, which cannot be impeached. Hence contentious litigations may ariſe concerning it either at the time of the ſervice, *or* after it is returned; and the remedies of advocation, ſuſpenſion, petition, or reduction muſt be applied according to circumſtances. In caſe it is ſerved before the inferior ordinary Judge, advocation is the proper remedy for correcting wrongs committed by him at any time before he is *functus*, or has made his return to the Chancery. In caſe it is ſerved before the macers or other judges appointed *extra ordinem* by the Court of Seſſion, a ſummary petition

tition to that Court is the proper remedy before they are *functi* or have made their return. After they are *functi*, have made their return, and the writ of tutory is iſſued from the Chancery, ſuſpenſion and reduction are the proper remedies; and the office of the tutors determines, as ſoon as their rights are ſuſpended or ſet aſide.

§ 581. Perſons deprived of the uſe of reaſon are in the ſame ſtate with pupils. Conſequently, the ſame privilege of reſtitution is competent in the one, which we have ſaid is competent in the other caſe. It is competent either to thoſe perſons themſelves, who have been declared by the verdict of a jury to be deprived of the uſe of reaſon, or to their heirs. In the firſt caſe, it muſt be uſed within four years from the time, at which they are reſtored to perfect ſoundneſs of mind; in the other, within four years after their death.

TITLE XVIII.

Of Interdiction.

§ 582. EVERY one, it has been ſaid (§ 572.), who is of age, has full power to manage his own affairs without the intervention of any other, unleſs he is incapacitated either by nature or by Law. But the brief, which has been explained in the foregoing title, relates to ſuch perſons alone, as can properly be called fatuous or furious. 'Tis concerning their condition that it orders enquiry to be made. By conſequence they can alone be found by inquiſition to be unable to take care of themſelves, and by a grant of tutory be ſubjected to the power of their neareſt agnates. There is not therefore known in the Law of Scotland any brief of prodigality, which, acknowledging a man to be *compos mentis*, is iſſued in order to deprive him of the management of his own affairs, either becauſe he is thoughtleſs and prodigal, or becauſe he is not poſſeſſed of that energy of mind, which diſtinguiſhes ſome individuals of human race. The Law does not allow a common inqueſt, ſummoned on a brief iſſued out of the chancery, to deprive one of the power of diſpoſing of his own affairs, unleſs they can find him to be actually *non compos mentis*. Ideotiſm and madneſs are the higheſt degrees of inſanity, at which it is poſſible for man to arrive, and are eaſily diſtinguiſhable by every jury. But no others than people of diſcernment ought to be allowed to determine the preciſe degree of facility, which is neceſſary for depriving one, who cannot properly be ſaid to be either furious or fatuous, of the power of managing his own affairs; that being a ſtrong violation of the natural rights of mankind.

But one, who cannot be ſaid to be either an ideot or a mad man, may however be very unfit for being entruſted with unlimited power over his own affairs. Weak, without being fatuous; extravagant, without being furious; facile, without wanting his reaſon; he may be liable to be impoſed on by every ſharper, and may manage his affairs with little diſcretion. Thus, he might eaſily ſquander his eſtate, and reduce himſelf to want, if he were truſted with the abſolute diſpoſal of it. The Law therefore attending to the different tempers, inclinations, paſſions, and abilities of human kind, hath thought it proper to invent a way, by which men may be ſecured againſt their own facility and profuſion. For this purpoſe, it interpoſes its authority on ſome occaſions, and in order to ſecure them againſt both themſelves and others, lays them under a legal reſtraint, by *interdicting* them from the abſolute and unlimited power of managing their own affairs.

Interdiction may be defined to be 'a reſtraint impoſed on one, on account of 'the facility of his temper, either voluntarily by himſelf, or judicially by proceſs 'at Law, which, after ſolemn publication is made of it, both incapacitates him-

'ſelf from doing with others, and makes it unlawful for others to do with him 'any deed, which may be hurtful to his heritable eſtate, without the conſent 'of certain perſons,' who are called his interdictors. From this definition it is plain, I. That interdictions are either voluntary or judicial. II. That perſons are interdicted on account of the facility of their tempers. III. That interdictions muſt be ſolemnly publiſhed. IV. That the effect of them, after they are publiſhed, is to incapacitate the interdicted perſons, V. From doing deeds, VI. Which may be hurtful VII. To their heritable eſtates, VIII. Without the conſent of their interdictors.

From theſe axioms it will be eaſy to ſhew 1) Who may be interdicted; 2) To whom people may be interdicted; 3) The manner of interdicting them; 4) The effects of interdiction.

§ 583. People are interdicted on account of their facility (§ 582, *ax.* 2.). Therefore facile people can alone be interdicted, that is, ſuch as are weak, ſilly, or incapable of managing their affairs with diſcretion. Thoſe, who have abilities and diſcretion, ſtand not in need of the aſſiſtance of others, and cannot be deprived of the right which all men naturally have to manage them. As little can ideots, mad men, or pupils; becauſe they have no underſtanding, can do no deed, cannot concur with their interdictors, and, beſides, are taken care of by Law after another manner.

But minors who have not curators, and all perſons of age, women as well as men, old as well as young, married as well as unmarried, may be interdicted; provided they are not either abſolutely *non compotes mentis*, or of vigorous underſtanding.

§ 584. One is interdicted, that he may have the aſſiſtance of his interdictors in the management of his affairs (§ 582. *ax.* 8.). Therefore theſe ought to be perſons capable of giving him aſſiſtance and advice in the management of them. From hence it follows, that one cannot either interdict himſelf or be interdicted 1) To minors, 2) To perſons deprived of the uſe of their reaſon, for they are unfit for giving others good advice about their affairs; or 3) To his own wife, or 4) To the wife of any other man; for a wife is always *ſub poteſtate mariti.* So it would be abſurd, as well as *contra bonos mores*, to inveſt her with power either over her own huſband, *St.* 27th *Feb.* 1663, *Milton*, or over any other perſon.

But one may either interdict himſelf, or be interdicted to all others, who are fit for having power over the affairs of another; for inſtance, to his own ſon, if he is a proper perſon, *l.* 1. § 1. *l.* 2. *ff. de curat. fur.*

§ 585. Interdictions are either voluntary or judicial (§ 582. *ax.* 1.). Voluntary interdictions are thoſe, which are impoſed voluntarily by one upon himſelf. 'Tis true, neither the Roman Law, *l.* 6. *ff. de curat. fur.* nor the antient ſyſtem of the Law of Scotland, *Ha.* 2d *July* 1607, *L. Auchinbowie.*—*Ho. interdiction*, 30th *Jan.* 1618, *Robertſon*, ſeems to have allowed of voluntary interdictions, impoſed *ſine cauſæ cognitione.* Experience, however, ſoon ſhewed the uſefulneſs of them. For few people are willing to bring an action, which might expoſe the imbecillity of their friend to public notice, and their own conduct, perhaps, to obloquy and miſrepreſentation. The Judges themſelves had few opportunities of knowing who ſtood in need of interdiction, and of interpoſing their authority. But people of facile tempers might eaſily be prevailed on to interdict themſelves to perſons, with whom they were connected by the ties either of blood or of friendſhip. Hence the Law hath ſuſtained voluntary interdictions, and hath given the ſame force to them which it hath given to judicial ones, *Du.* 11th *Dec.* 1622, *Seton.*

Voluntary interdictions, therefore, are 'ſuch as are granted extra-judicially by 'one who, being conſcious of his own facility, interdicts himſelf voluntarily to 'certain perſons, and binds himſelf to do no deed, relating to his heritable eſtate, 'without their conſent.' The uſual way, in which they are made, is this: He who

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is to be interdicted, grants to certain persons a bond, by which he binds himself to do no deed, relating to his heritable estate, without the consent of these persons. Those, to whom he grants the bond, and without whose consent he obliges himself to do nothing, are called his *interdictors*.

The cause, for which persons are interdicted, is the facility of their tempers. 'Tis not however absolutely necessary to express it in the bond; for few people can be brought to confess their own infirmities. Therefore all which is necessary to be done is, that a bond, obliging the interdicted person to do no deed without the consent of those to whom he interdicts himself, be granted by him to them. For Law will presume, that there is good reason, why one who has granted a bond of this tenor, and has thereby deprived himself of the absolute power of managing his own estate, ought not to be trusted with it; and that the facility of his temper was the very reason, for which the bond was granted, *St.* 10th *Nov.* 1676, *Stuart*.

§ 586. Judicial interdictions are 'such as are judicially imposed on one by decree of the Lords of Session, *post causæ cognitionem*, after they have taken cognizance of his facility, either at the suit of any of his relations, or *ex proprio motu*.' For judicial interdictions are of two sorts; either such as are imposed at the desire of those, who have a right to bring an action in order to get one interdicted by decree of the Lords of Session, or such as are imposed by the Lords themselves, *ex proprio motu*, without any motion made, or action brought by any one for that purpose.

In order to obtain a judicial interdiction of the first sort, 'tis necessary for one of the friends of the facile person to bring an action against him in order to get him interdicted by decree of the Lords. This action may be sued by any of his relations. But it is surely most natural that those, who are most nearly connected with him, should sue it, since they have greatest interest in the preservation of his estate; such, for instance, is his heir. It must be brought against that person himself, whom they want to get interdicted; for he is principally interested in the suit, and must therefore be made a party to it. It is competent to be brought before the Lords of Session alone; for interdiction is an extraordinary remedy, which those alone, who have, like the Lords of Session, a *nobile officium* and Prætorian powers, are entitled to apply.

In this suit the Lords take cognizance of the case, and enquire into the character of the defendant, either by causing him to be presented before themselves, or by examining witnesses concerning his conduct, or by both ways. For they may, indeed it is their duty to employ every mean of proof, by which they can best find out the truth. If it shall appear to them from the evidence taken by them, that the defendant is of a facile, prodigal, or extravagant turn, and ought to be interdicted, they do by their decree interdict him to certain persons, whom they find to be most fit for having the power both of restraining him from doing, and of authorising him to do such deeds, as the Law says an interdicted person has not power to make.

But the Lords are not bound to wait till application is made to them; they may happen to discover, in the course of a cause litigated before them, that one is simple, and is liable to be made a prey by any who can be so wicked as to think of preying on him. Therefore they interpose sometimes their *nobile officium*, and, without waiting the desire of any body, interdict one *ex proprio motu*, *St.* 17th *Feb.* 1681, *Robertson*.

§ 587. * Interdictions lay, as it were, an embargo on the dealings of mankind, by incapacitating the interdicted person from doing with others, and by making it unlawful for others to do with him any deed, which relates to his heritable estate, without the consent of his interdictors. There ought therefore to be some legal way, by which the world may be made acquainted with the condition

* This is true of inhibitions.

tion of the interdicted perſon, may come at the knowledge of the reſtraint impoſed on him, and may be put *in mala fide* to deal with him; for it would be extremely hard, if people, who neither knew, nor could be ſaid to be culpable for being ignorant of an interdiction, were made to ſuffer by their dealings with one who, they had reaſon to believe, had the management of his own affairs, as he appeared in all reſpects to act like other men, and ſeemed to exert over his eſtate the ſame powers, which others exerted over theirs. To prevent therefore the inconveniencies and the injuſtice, which might ariſe from an unblameable ignorance, and to put the world *in mala fide* to deal with interdicted perſons, the Law hath ordained every interdiction to be publiſhed, 1581, *c.* 119.

* The manner, in which it muſt be publiſhed to the world that one is interdicted, is by 1) Executing, and 2) Regiſtring a writ or letters of publication of the interdiction. Theſe letters of publication are 'a writ, which is iſſued in 'name of the King at the ſuit of the interdictors, paſſes his ſignet, and is con-'trived for making publication of the interdiction.' Therefore they contain 1) A narrative of the interdiction, 2) A command given in the name of the King to meſſengers at arms to execute and publiſh the letters themſelves †.

They contain a command iſſued in the name of the King, they paſs the ſignet, and they muſt be ſerved by the officers of the Law; they cannot therefore be iſſued executed and publiſhed by the authority either of the interdictors themſelves, or of any other private perſons. They muſt be iſſued by public authority; *i. e.* by authority of the Lords of Seſſion; for they alone have authority over the Signet in matters belonging to their own juriſdiction, and are impowered to order writs, which muſt paſs the Signet, to be iſſued. But it has been ſaid, that interdictions are either voluntary or judicial. If they are voluntary, then the bond of interdiction either does or does not contain a clauſe, by which the interdicted perſon, who grants it, conſents to the regiſtration of it in the books of Council and Seſſion, that letters of publication and other neceſſary execution may proceed upon it. If it does contain ſuch a clauſe, no more is neceſſary than regiſtration of the bond. For an extract of the regiſtred bond is equivalent to a ſolemn decree of the Lords, and is a warrant for iſſuing Letters of publication of the interdiction. If the bond does not contain ſuch a clauſe, it is neceſſary, that a bill be exhibited to the Lord Ordinary on the bills, praying his Lordſhip to grant warrant for iſſuing them. The deſire of this bill is always granted, provided proof is made to the Lord Ordinary, that a bond of interdiction has been granted; and proof of it ought regularly to be made by production of the bond itſelf. If the interdiction is judicial, then the decree of the Lords of Seſſion, by which they interdict the facile perſon, contains, among other things, a warrant for iſſuing letters of publication of the judicial interdiction.

‡ After letters of publication have been iſſued and have paſſed the Signet, they muſt be executed either by a meſſenger or by ſome other proper officer, at the market-croſs of the head-borough of the ſhire or ſtewartry, within which the interdicted perſon dwells. The formal manner, in which they muſt be executed, is this: the meſſenger goes to the market-croſs of the head-borough of the ſhire or ſtewartry, within which the interdicted dwells, and there calls aloud the word 'Oyez' three ſeveral times, in order to convoke the lieges and to make them attend to the publication of the Letters. After he has called 'Oyez' three ſeveral times, he muſt read the letters of publication in an open, public and audible manner. Beſides, he muſt leave a copy both of them, and of the execution of them, ſigned by himſelf, affixed to the market-croſs.

For all theſe ſolemnities he muſt obſerve before two witneſſes; and he muſt return a proper *execution* of his obſervance of them. An execution is 'a writ, 'by

* This is true of inhibitions.
† See the tenor of them in DALLAS.
‡ All, that follows, true of inhibitions.

'by which a meſſenger or other officer, employed to execute a lawful order iſſu-'ed by the King or by a Judge, certifies under his own hand and thoſe of the 'witneſſes who were preſent and ſaw him execute it, that he has executed it.' Therefore it muſt contain a minute and particular detail of the *res geſta*, in order to ſhew that every punctilio of the forms required by Law hath been obſerved by him, and muſt be ſigned by the two witneſſes as well as by himſelf, 1686, *c.* 4. But it is not neceſſary, that that copy either of the letters themſelves or of the execution, which muſt be left affixed to the croſs, be ſigned by them; 'tis ſufficient that it be ſigned by himſelf, and that they be named in it, 1693, *c.* 12.

I ſay, the letters muſt be executed at the market-croſs of the *head-borough* of the ſhire or Stewartry* within which the interdicted perſon dwells. But there is one exception to this rule; for if the interdicted perſon dwells within either a bailiry or a ſtewartry†, either of royalty or of regality, they muſt be executed at the head-borough of the Bailiry or ſtewartry, in caſe there is one, 1597, *c.* 268. Thus, if one who lives at Glaſgow is interdicted, letters of publication of his interdiction muſt be executed not at Lanerk, the head-borough of the ſhire, but at the market-croſs of Glaſgow, the royal borough, within which the interdicted perſon dwells. But all heritable bailiries and ſtewartries were aboliſhed, and the regiſters of hornings, inhibitions, and interdictions, kept in them, were ordained to be tranſmitted to his Majeſty's general regiſtry at Edinburgh, by act 20th G. II. for taking away and aboliſhing the heritable juriſdictions; it became therefore impoſſible, after this Law was enacted, to execute letters of publication of interdictions at thoſe places, which had, before the act of Parliament, been the head-boroughs of thoſe bailiries or ſtewartries, becauſe it made them ceaſe to be bailiries and ſtewartries. Conſequently, all letters of publication of interdictions muſt at preſent be executed at the market-croſs of the head-borough of the ſhire or ſtewartry, within which the interdicted perſon dwells; except he dwells within the limits either of a royal borough, or of ſuch a borough either of regality or of barony as was not aboliſhed by the act, *Aſ.* 29th *Feb.* 1752. For by the act for taking away and aboliſhing the heritable juriſdictions it is ſpecially provided, that the juriſdiction, authority, privileges, and immunities, belonging either to royal boroughs, or to ſuch boroughs either of regality or of barony as are independent of the Lord of regality or barony, ſhall remain to them and ſhall be poſſeſſed by them after the act, in the ſame manner as they would have done, if the act had never been made. So that if letters of publication uſed to be executed at thoſe boroughs before the act, they muſt continue to be executed at them after it.

Letters of publication of interdictions, which are not executed or ſerved preciſely in this formal manner, are not effectual againſt the lieges.

But they need not be ſerved upon the interdicted perſons themſelves‡: for interdictions are, in all caſes, ſufficiently notified to them; ſince they proceed either on their own voluntary bonds, or on decrees of the Lords of Seſſion. But it is impoſſible to ſuppoſe them to be ignorant either of the contents of bonds granted by themſelves, or of decrees to which they were parties, *Du.* 11th *Dec.* 1622, *Seton.*

** But few people uſe to be preſent at the execution of legal formalities; and thoſe few who uſe to attend to them, are low, ignorant people, who neither mind them nor know the meaning of them. Hence the Law does not account this form of executing letters of publication alone ſufficient for notifying interdiction

* A ſtewartry muſt in this place be taken for a tract of land, different from, independent of, and not comprehended within a ſhire. Of this kind there are now, I believe, no more than two in Scotland, Orkney and Kircudbright.

† A ſtewartry here ſignifies a tract of land, which is part of a ſhire; ſuch, for inſtance, was the ſtewartry of Annandale, and that of Menteith; the former was part of the ſhire of Dumfries, the latter part of that of Perth.

‡ 'Tis otherwiſe with inhibitions.

** True of inhibitions.

to the world. Anxious about the ſecurity of the people, it hath further ordained, that both the letters of publication and the execution of them ſhall be regiſtred in the regiſtry of interdictions, within forty days from and after the day on which they were executed. For they are not regiſtrable after 40 days from it. Conſequently, if they are not regiſtred before full 40 days have paſt from the day of execution, they muſt be executed a-new; and muſt be regiſtred together with the new executions of them within 40 days from that on which they were laſt executed, 1581, *c.* 119.—1597, *c.* 268. They muſt be regiſtred both in the regiſtry of interdictions, kept by the clerk of, and belonging to the ſhire, ſtewartry, or borough, within which the interdicted perſon dwells, and in thoſe of all the ſhires, ſtewartries, or boroughs, within which his immoveable eſtate is locally ſituated: or, inſtead of inſerting them in all thoſe regiſtries, they may be regiſtred in the general regiſtry of interdictions, kept at Edinburgh by the Lord-regiſter and his deputies, 1600, *c.* 13.—*D.* II. 333. *Jan.* 1732, *Stirling.* Therefore, if they are not duly regiſtred either in *all* the particular regiſtries, or in the general one, they are void, *i. e.* they are not effectual againſt the lieges; becauſe the legal method, by which Law ordains them to be put *in mala fide* to deal with the interdicted perſon, has not been followed. One may know of an interdiction, before it be publiſhed and regiſtred; this affords not, however, a good reaſon for ſetting aſide any deed granted by the interdicted perſon in his favour. For private knowledge of it is not ſuppoſed to put the lieges *in mala fide* to deal with the interdicted perſon; publication and regiſtration are indiſpenſably neceſſary; and the lieges are always preſumed by Law, *præſumptione juris et de jure*, to be ignorant of the interdiction, and to be *in bona fide*, till it is both publiſhed, *C. Nov.* 1586, *Cranſton*, and regiſtred, 1581, *c.* 119.—1693, *c.* 13, 14. For they are always, till the diligence is completed by doing the laſt ſtep of execution, allowed to believe, that it was never intended to be made effectual, or to be completed.

But tho they have not been regiſtred in the general regiſtry, they are effectual with regard to all the immoveable eſtate of the interdicted perſon ſituated within a particular ſhire, ſtewartry or borough, in the regiſtry of which they have been duly regiſtred; provided they have been alſo regiſtred in the regiſtry belonging to that inferior juriſdiction, within which the interdicted perſon dwells. For, if they are duly regiſtered in both theſe regiſtries, every body is held to be ſufficiently certified of the interdiction in ſo far as it can concern that part of the immoveable eſtate of the interdicted perſon, which is ſituated within the limits to which theſe regiſtries extend. But the interdiction is null, and can produce no effects upon any lands ſituated in ſhires, *&c.* where the letters and execution have not been regiſtred; for every body is preſumed to be ignorant of the interdiction as to theſe lands: ſo that, if the heir of the interdicted perſon ſhall acquire either an active and paſſive title, by cauſing himſelf to be ſerved heir to the eſtate of his predeceſſor, or a paſſive one, by behaving as heir, he will be liable perſonally to *all* the debts of his predeceſſor, and all that part of his eſtate may be attached for them, which is not ſecured by interdiction, *St.* 11th *Feb.* 1662, *Ramſay.* But, if the letters and executions have been duly regiſtred in the general regiſtry of interdictions kept at Edinburgh, no part of it will be liable to be attached: for this general regiſtry is deſigned for the whole country; and regiſtration made in it is held to be made, as it were, in every particular regiſtry, and is effectual upon lands ſituated in any the moſt diſtant corner of Scotland *.

§ 588.

* The act of parliament 1581, *c.* 119. ordains both the principal letters of publication and the principal executions, thoſe, to wit, which are returned by the officer employed to ſerve them, ſigned by himſelf and by thoſe who were witneſſes of the ſerving of them, and which are preſented to be regiſtred; it ordains theſe to be ſigned by the clerk, who regiſters them. In conſequence of this, an inhibition was found to be null, for this among other reaſons, that the execution of the letters of inhibition was not marked and ſigned by the clerk, *B.* 90. But the contrary was afterwards adjudged, *D.* II. 329. 16th *June* 1727, *Dutcheſs of Argyll*; and juſtly, for it is ſaid, that interdictions ſhall be of no force or avail, if they are not 'duly regiſtred;' and is not

§ 588. Publication, it has been ſaid, of the interdiction is a ſolemnity indiſpenſably neceſſary, and abſolutely required by Law, in order to notify it to the people; and private knowledge of it does not put them *in mala fide* to deal with the interdicted perſon (§ 587.). However there is one exception to this rule: for the Law holds thoſe, to whom one is interdicted, to be *in mala fide*, even before publication of letters of interdiction; provided they know he was interdicted to themſelves, *Ha.* 22d *Feb.* 1612, *Graham.* Law preſumes them, *præſumptione juris et de jure*, to know of the interdiction, if they have accepted of it, *v. g.* if a voluntary bond of interdiction has been *delivered* to them; or if they have acted the part of interdictors, after a judicial interdiction; or if they have ſigned an acceptance of it, *St.* 24th *July* 1678, *Grierſon*——*D.* I. 479. *Dec.* 1725. *Tenants.* For one, who has accepted of the office of interdictor, cannot be ignorant of the interdiction. Therefore every deed, which would have been liable to be ſet aſide, if the letters had been publiſhed before it was granted to the interdictor, muſt be voidable, in caſe it was granted after the Law preſumes him to have known of the interdiction, tho before the letters were publiſhed. It muſt be ſo for this among other reaſons, that an interdictor cannot, any more than a tutor or a curator, be *auctor in rem ſuam.*

But if the interdictor did not know of the interdiction, deeds granted to him are not, any more than thoſe granted to others, before publication of the letters of interdiction, liable to be avoided, *Ho. interdiction,* 19th *Jan.* 1621, *Pringle.* One can hardly be ſaid to be an interdictor, unleſs he accepts of the office. Conſequently, one cannot well, before his acceptance, be held by Law to be *in mala fide,* unleſs he either delays or refuſes to accept out of a fraudulent intention, in order to prevent deeds, granted to himſelf, from being liable to be ſet aſide. In either of theſe caſes, his fraud will ſupply the place of his knowledge and acceptance. And, in general, it may be remarked, that it will be a violent preſumption of fraud againſt any deed, if it is proved to have been granted to one, after he knew that he was himſelf named to be an interdictor of the grantor. If this is proved, and proof is alſo made, that he who granted it was a facile weak perſon, and was hurt by granting it, it muſt be voidable, not indeed *ex capite interdictionis,* but *ex capite fraudis et circumventionis.* For one, who knew the character and the condition of the grantor of it, may well be ſaid to be a rogue, who wanted to defraud a poor weak creature. Indeed, all reductions of deeds, granted by interdicted perſons before publication of the interdiction, ſeem to be reductions rather *ex capite fraudis* than *ex capite interdictionis.*

§ 589. The lieges, it has been ſaid, are not held to be put *in mala fide,* till the letters of interdiction and the executions of them are both publiſhed and regiſtred. But this ſeems to admit of one exception: for an interdiction is good and effectual againſt every body, after it is duly publiſhed, and before it is regiſtred; provided 1) the perſon, againſt whom it is pleaded, knew it was publiſhed, and 2) it was duly regiſtred. For regiſtration is employed only for publiſhing it more ſurely and more effectually. Therefore, if one knows it was publiſhed, regiſtration is uſeleſs as to him. Beſides, it is no where ſaid, that the lieges are not put *in mala fide* till the letters are regiſtred; on the contrary, it is ſaid in all our books, that they are put *in mala fide* by *publication.* 'Tis true it is ſaid, that the interdiction ſhall be of no avail, force or effect, if the letters are not duly publiſhed. But it is effectual from the time of publication, provided it is duly regiſtred: ſo that the regiſtration is drawn back to the publication of the interdiction, provided it is proved, that he, againſt whom it is pleaded, knew it was publiſhed. Indeed, if the party who founds on the interdiction does not prove, that he againſt whom he pleads it knew it was publiſhed, law will not preſume

not ſaid, that they ſhall be of no force, if they are not duly regiſtred *and ſigned by the clerk.* Inhibitions and interdictions go hand in hand in this reſpect, and an argument may be brought from the one to the other: for in many reſpects they reſemble one another.

ſume he knew it before the date of the regiſtration. So the burden of proving, that he did know of it, is put on him, who founds his plea on the interdiction.

590. I ſaid, that letters of publication of every interdiction muſt be iſſued and executed, in order to notify the interdiction to the world, and to put people *in mala fide* to deal with the interdicted perſon. But inſtead of letters of publication, letters of inhibition are ſometimes iſſued on an interdiction; which, if they are duly executed and regiſtred, produce all the ſame effects with thoſe, which letters of publication of the interdiction would have had. For they both of them lay the ſame reſtraint both on the interdicted perſon and on the lieges, and incapacitate them equally from granting and from acquiring deeds prejudicial to the heritable eſtate of the interdicted perſon. Conſequently, as the effects produced by them are the ſame, it matters not, whether letters of publication of an interdiction, or letters of inhibition be uſed upon it, *St.* 10th *Nov.* 1676, *Stewart.* But it muſt be remarked, that letters of inhibition, iſſued on a judicial interdiction, muſt be ſerved not only upon the lieges, but alſo upon the perſon interdicted. 'Tis otherwiſe with voluntary interdictions: for it ſeems not to be neceſſary to ſerve the letters of inhibition upon one who has voluntarily granted a bond interdicting himſelf; ſince the bond granted by himſelf is a ſufficient notification of the interdiction to him, and, beſides, reſtrains him from doing any deed without the conſent of his interdictors. No matter, therefore, whether it is or is not ſerved upon himſelf, provided it be ſerved upon the lieges, in order to put them *in mala fide.*

§ 591. The effect of an interdiction, after the letters of publication are duly executed and regiſtred, is to incapacitate the interdicted perſon from doing with others, and others from doing with him, any deed which may be hurtful to his heritable eſtate, without the conſent of his interdictors. There are therefore ſome things, which an interdicted perſon has power to do without their conſent, and others, to which it is abſolutely neceſſary. What theſe are, it will be eaſy to ſhew, by conſidering 1) the powers which one interdicted has over his perſon, 2) thoſe which he has over his moveable eſtate, 3) thoſe which he has over his heritable eſtate.

One who is interdicted has, notwithſtanding his interdiction, over his perſon the ſame powers, which either himſelf, if he had not been interdicted, would have had, or any other man who is not interdicted has.

By conſequence, interdiction extends not to that eſtate which accompanies, is veſted in the perſon, *ſequitur perſonam* of its owner. Therefore it has no effect upon one's *moveable* or *perſonal* eſtate. Of courſe one, who is interdicted, has over his perſonal eſtate the ſame powers, which he would have had in caſe he had not been interdicted. Conſequently, he can diſpoſe of his moveables, and can grant perſonal obligations, after he is interdicted, in the ſame manner as he could have done before. So he can alienate them either for onerous, for rational, or for gratuitous cauſes; and this he can do 1) by any proper deed, made 2) either *inter vivos* or *mortis cauſa*, 3) as well without as with the conſent of his interdictors. For interdiction lays no ſort of reſtraint on an interdicted perſon, and produces no ſort of change on his condition, either *quoad* his perſon, or *quoad* his moveable eſtate. So every contract into which he enters, every bargain which he makes, every obligation granted, every agreement made, every deed done by him, muſt be as effectual againſt both his perſon and his perſonal eſtate, as it would have been, if he had not been interdicted. Conſequently, it may be the foundation of diligence either againſt his moveable eſtate, by arreſtment, by poinding, or by any other diligence by which moveables may be attached; or againſt his perſon by horning and caption, in the ſame manner as if he had not been interdicted. The reaſon is, that an embargo would, in ſome ſort, be laid on all commerce, if the effects of interdiction extended to the moveables of interdicted perſons. Moveables are eaſily conveyed from hand to hand; and the property

perty of them may be concealed as eaſily as the poſſeſſion of them may be tranſferred from one to another. Conſequently it would be impoſſible for one, let him be ever ſo willing, to diſcover the true owner of every moveable thing. Frauds therefore and impoſitions would be innumerable. Beſides, moveables have always been regarded by the feudal Law as of ſmall value. For theſe reaſons it has conſidered every interdicted perſon to be in the ſame ſituation, *quoad* his moveable eſtate, and to have the ſame powers over it, as if he had not been interdicted. Conſequently every deed done by him, tho without the conſent of his interdictors, muſt make both his moveables and his perſon liable to be attached by all the ſame diligences, to which it would have made them liable, if he had not been interdicted, *Du.* 11th *July* 1634, *Bruce.*—15th *March* 1637, *Brown.*—*St.* 11th *Feb.* 1662, *Ramſay.*—20th *June* 1671, *Crawford.*—24th *July* 1678, *Grierſon.*—*Fo.* 8th *Feb.* 1684, *Davidſon.*—*H.* 645.

But it is otherwiſe with reſpect to his heritage. For no deed done by him, without the conſent of his interdictors, can be, in any ſort, effectual againſt it; no matter, whether it be a deed reſpecting directly his perſon, his moveable, or his heritable eſtate; for the Law intends interdiction to be a ſecurity of the heritable eſtate of the interdicted perſon. Therefore, it minds not the appearance which a deed hath, but provides in general that, let it bear what face it pleaſes, it ſhall, in nowiſe, affect his heritage.

Heritage is not in this caſe uſed in its moſt extenſive ſenſe, for *every thing which goes to heirs:* it ſignifies rather *res ſoli*, lands, houſes, immoveables, and the appurtenances and acceſſories of theſe; and comprehends not thoſe things, which are perſonal, though they may be heritable *deſtinatione*. Thus interdiction extends not to bonds granted to the interdicted perſon and his heirs, excluding his executors; for theſe are parts of his perſonal eſtate, *Da.* 45.

Perſonal deeds, therefore, or obligations cannot be employed againſt the heritage of the interdicted perſon. But they may be attempted to be put to this uſe; and it muſt in this caſe be competent to him to oppoſe them, and to *prevent* this uſe from being made of them, either by making the exception of interdiction, or by ſuing reduction of them *ex capite interdictionis*. For interdiction muſt, in this caſe, be pleadable by way of exception, in order to repel the force of an action brought, on a *perſonal* deed, againſt the heritage of the interdicted perſon. A perſonal deed may, in ſome ſort, be ſaid to be improperly uſed in order to affect the heritage of the interdicted perſon; ſince the tenor of it ſhews it to be directed primarily againſt his perſon. Conſequently, it muſt be competent to *prevent* it from being applied to this uſe, by oppoſing to it what if the deed were an heritable one, *i. e.* related to the heritable eſtate, were obligatory on it, and were directed againſt it immediately, it would not be competent to plead by way of exception, to wit, interdiction. It cannot be neceſſary in this caſe to bring an *action* of reduction in order to get it ſet aſide, becauſe being perſonal merely, it is not voidable *in totum;* it is voidable *ex parte* only, to wit, in ſo far as it either may be or hath been made the foundation of any action, diligence, or mean uſed for affecting heritage; and all which is intended in this caſe is not to get it ſet aſide, but to *prevent* it from being employed againſt the heritage of the interdicted perſon. Of courſe, no form of Law can require a reduction to be brought, ſince a total reduction is not wanted to be obtained.

But a perſonal deed may happen to have been made effectual againſt the heritage of the interdicted perſon; and it cannot then be impeached otherwiſe than by ſuing an action of reduction, in order to get it ſet aſide.

If perſonal deeds, or deeds directed againſt his moveable eſtate, cannot be made effectual or be employed againſt his heritage; much leſs can deeds, which relate directly to it, be good. Theſe muſt be voidable; for by interdiction the Law limits the powers of an interdicted perſon, and hinders him from doing any deed which may be hurtful to his heritage, without the conſent of his interdictors. Hence, alienations, wadſets, charges, annual-rents, *&c.* granted out of it muſt

be voidable. For they are not *ipso jure* void; they are not employed *in order* to affect his heritage; they are completed, and are already effectual againſt it; their effect is not to be *prevented;* it muſt be *deſtroyed;* and an *action* of reduction muſt be brought in order to get them ſet aſide.

§ 592. But every deed which is done by an interdicted perſon without the conſent of his interdictors, and relates immediately to his heritage, is not voidable. In order to make one voidable, the interdicted perſon muſt be leſed by it. It muſt be a deed hurtful to his patrimonial intereſt (§ 582. *ax.* 6.). *Go.* 27th *Feb.* 1672, *v.*

By conſequence, a deed, which is equal and onerous, is not voidable *ex capite interdictionis;* becauſe the interdicted perſon cannot, in this caſe, ſay that he is leſed by it. No matter, whether it be an heritable or a moveable one, *C.* *July* 1582, *Sempil.*—*Ha.* 7th *Feb.* 1607, *Earl Athole.*—*Ho. interdiction,* 5th *March* 1613, *Douglas.*—*Du.* 29th *July* 1624, *L. Collinton.*—*Fo.* 22d *June* 1697, *Bowman.*

But every deed, which is not onerous, is voidable, and that, though it be a rational one: for one, who needs to be interdicted, cannot be ſuppoſed to be a competent judge of what is and is not rational; he is, *ex hypotheſi,* leſed; and the rationality of the deed ought not to deprive him of the right, which Law gives him to get it ſet aſide, ſince it was done without the conſent of his interdictors, and he could not have been compelled to do it.

§ 593. Reduction *ex capite interdictionis* may be ſued either 1) by the interdicted perſon himſelf, either with or without the conſent of his interdictors, or even againſt their will *, *Ha.* 22d *Feb.* 1612, *Graham;* or 2) by the interdictors themſelves either during the life or after the death of the interdicted perſon, either with or without his concurrence, or that of his apparent heir, *Ha.* 20th *Dec.* 1593, *L. Ruthven.*—21ſt *Dec.* 1610, *L. Broxmouth;* or 3) by the heirs of the interdicted perſon, becauſe they are held by Law to be the ſame perſon with himſelf, and ſucceed to every right which he had, *D.* I. 481.—27th *Dec.* 1725, *Tenants;* or 4) by creditors, *St.* 20th *Feb.* 1666, *Lord Salton;* or 5) by thoſe ſingular ſucceſſors, to whom the right of ſuing reduction has been conveyed by a ſpecial aſſignment; for every right which one has, may be conveyed by him to another.

§594. The effect of interdiction being only to incapacitate the interdicted perſon from doing deeds of certain kinds without the conſent of his interdictors, it is plain, that, with their conſent, he can do every thing which one, who is not interdicted and has the abſolute management of his own affairs, has power to do; for interdiction is impoſed, in order to force the interdicted perſon to take the advice of his interdictors, and to ſupply the defect of his own judgment by the help of their counſel. Conſequently, if they, after having been conſulted by him, conſent to the deed he wants to do, the defect is held to be ſupplied, and the deed is preſumed to have been done by one of perfect ability. It cannot therefore be impeached to have been done *a non habente poteſtatem,* and is not liable to be ſet aſide; no matter, whether the interdicted perſon is or is not leſed by it, whether it was granted for an onerous, a rational, or a gratuitous cauſe. The reaſon is, that one who deals with an interdicted perſon in that way which is approved by Law, is in no ſort culpable. Any bargain therefore, which he hath made after this manner, ought not to be liable to be ſet aſide; ſince it was done in the way deviſed by Law for protecting facile, weak and ſimple people. By conſequence the only remedy by which the interdicted perſon can get reparation of his loſs, is by ſuing his interdictors, if they have fraudulently given their conſent. For interdictors are bound *bonam fidem præſtare,* to do their duty with honeſty and fidelity. Thoſe therefore, who act a diſhoneſt part, and fraudulently give their conſent

* It was otherwiſe in antient times; for the old Law of Scotland did not allow one to impeach a deed done by himſelf, *M.* 14th *March* 1554, *Ure.*

conſent to deeds which they ſee to be hurtful to the intereſt of the interdicted perſon, ought to ſuffer for it; ſince they have been unfaithful to the truſt repoſed in them.

However deeds, done by interdicted perſons with the conſent of their interdictors, are in ſome caſes liable to be ſet aſide. They are ſo, 1) if the conſent of the interdictors was extorted by force: for in this caſe they do not, in truth, conſent; ſo the deed, to which their conſent is extorted, muſt be conſidered in the ſame light, as if it had been done without their conſent; and is therefore voidable. 'Tis true, the reduction can hardly be ſaid to be *ex capite interdictionis* alone; it is rather one *ex capite vis et metus*, as well as *interdictionis;* for it may be conſidered as an action compounded of two reductions. The one is a reduction of the conſent of the interdictors *ex capite vis et metus;* the other is a reduction of the deed done by the interdicted perſon *ex capite interdictionis*, as done by him without the conſent of his interdictors, ſince their conſent was extorted *vi et metu*, and is of courſe void. 2) Deeds done by interdicted perſons, tho with the conſent of their interdictors, are liable to be ſet aſide, if the conſent of the interdictors was obtained by fraud; for every deed obtained, every end accompliſhed by fraud, is liable to be avoided. Indeed, theſe can hardly be ſaid to be exceptions to the general rule, ſince they are neceſſary conſequences of the general principles of the common law. For every deed, that is either extorted by force or procured by fraud, is voidable at common law; and the conſent of interdictors cannot give ſuch force to any deed done by an interdicted perſon, as to hinder it from being affected by the general principles of law, and from being liable to be ſet aſide, if it is voidable, for good reaſons of reduction.

Beſides, it muſt be remarked, that one who is interdicted has not power to make, even with the conſent of his interdictors, any ſettlement by which the ſucceſſion to his eſtate may be altered. For interdiction is intended for hindering the interdicted perſon from hurting himſelf; his intereſt as well as his honour is held to be intimately connected with thoſe of his family and of his heir; but every ſettlement made of his heritage muſt be hurtful to them, ſince it may deprive them of rights which they have, but cannot confer new ones upon them. Beſides, it is *ex hypotheſi* made without a valuable conſideration, and is of courſe hurtful to him. Therefore every deed, by which he either alters a ſettlement made of it by his predeceſſors, or ſettles it on others than his heirs at Law, or attempts to limit their powers over it, is voidable, whether he does it with or without the conſent of his interdictors. In this reſpect perſons interdicted reſemble minors, *D.* I. 482. 27th *Dec.* 1725, *Tenants* (§ 497, 510.).

§ 595. From what has been ſaid it is plain, what is the buſineſs of interdictors. It conſiſts *in auctoritate præſtanda*, in giving their conſent to thoſe deeds of the interdicted perſon, to which they are deſired, and they think they ought to give it. 'Tis in this, and in this alone that their office conſiſts. They have nothing to do with any others of his affairs; they have no management of his eſtate; they are not bound, indeed they have no right to meddle with it in any ſhape.

It conſiſts in giving their conſent to thoſe deeds alone, to which they are deſired to give it; they cannot therefore be guilty of any omiſſions.

But they may refuſe, when aſked to give their conſent to deeds to which they ought to give it. Therefore the Lords of Seſſion may, on a ſummary petition and complaint exhibited to them by the interdicted perſon againſt his interdictors, either interpoſe their own authority to the deeds, in order to ſupply the want of the conſent of the interdictors, *Ha.* 7th *Feb.* 1607, *Earl Athole;* or, if the matter admits of delay, oblige by proper remedies the interdictors themſelves to give their conſent; or, if they obſtinately refuſe to give it, may remove them from their office; or do any other thing, which circumſtances require.

The office of interdictors conſiſts in giving their conſent, and deeds to which their conſent is neceſſary, if they are done without it, are voidable; they

they muſt therefore give it *legitimo modo*, *i. e.* by ſigning the deeds to which they conſent, as conſenting *qua* interdictors. For writ is neceſſary to every deed, to which their conſent is neceſſary; ſince their authority relates to the heritable eſtate alone of the interdicted perſon, and is not required to give validity to any thing, which may be done without writ.

Their conſent muſt be given *legitimo modo*; it muſt therefore be given by ſuch a number of them, as is required to give validity to the deeds of the interdicted perſon. Conſequently, if there is one named *ſine quo non*, he muſt always be one of the conſenters; if a certain number is declared to be neceſſary for making a quorum, that number muſt conſent to every deed; if all the interdictors are named jointly, they muſt every one of them conſent; if they are named jointly and ſeverally, the conſent of any one of them is ſufficient, *Du.* 12th *Feb.* 1633, *Forbes* (§ 467.)

§ 596. Interdictors cannot, any more than tutors or curators, be *auctores in rem ſuam*; for Law preſumes they would be more attentive to their own intereſt than that of the perſons interdicted to them (§ 454.). *Ha. ult. Feb.* 1607, *Wardlaw.*—22d *Feb.* 1612, *Graham.*—*St.* 24th *July* 1678, *Grierſon.*—*D.* I. 482. *Dec.* 1725, *Tenants.*

Their office is not either a mercenary or a lucrative one; they cannot therefore either take or ſtipulate that they ſhall receive a gratification for giving their conſent, *Ha. pen. July* 1622, *Carnouſie.*

§ 597. One, who is interdicted, may be looſed from the reſtaint impoſed upon him.

Voluntary interdictions may be looſed either voluntarily or judicially. They may be looſed voluntarily, by any voluntary deed of the interdicted perſon and of his interdictors, done by them in order to looſe it. *Nihil tam naturale eſt, quam eo genere quidque diſſolvere, quo colligatum eſt, l.* 35. *ff. d. r. j.* But it muſt be a joint deed done by them both: for the interdicted perſon cannot, by any deed done by himſelf alone, looſe himſelf from the reſtraint impoſed on him by the interdiction; ſince the interdictors have acquired a right, of which it is for his intereſt that he has not power to deprive them. Beſides, the authority of the Court of Seſſion ought to be interpoſed to the looſing of them: for the reſtraint impoſed upon the interdicted perſon is notified to the world by publication and regiſtration of the letters of interdiction. Therefore the reſtraint ought to be taken off in ſome formal manner, which may deprive the interdicted perſon of the power of pleading it afterwards againſt deeds done by him.

But his interdictors may not be willing to let him looſe from it; and there may not remain any good reaſons for continuing to keep him under reſtraint. In that caſe, he may get himſelf looſed from it, without the conſent of his interdictors, by bringing an action againſt them before the Court of Seſſion, in order to get his interdiction ſet aſide. The Lords, if it is made appear to them that there is no cauſe for continuing the reſtraint, *v. g.* that the perſon interdicted is become *rei ſuæ providus*, and may be truſted with the unlimited power of managing his own affairs, ſet aſide the interdiction, and declare him to be looſed from the reſtraint it laid upon him.

Judicial interdictions can be ſuperſeded in a judicial way alone, by the authority of that ſame Court by which they were impoſed, *l.* 35. *ff. d. r. j. F.* 8th *Dec.* 1708, *Hepburn.*

But it may be doubted, whether theſe interdictions can be ſet aſide at the ſuit of any other than either the interdicted perſon himſelf, or his interdictors. For they, at leaſt judicial ones, are always impoſed in a ſolemn way, by the authority of the Lords of Seſſion, for good reaſons. Conſequently thoſe, who want to deal with an interdicted perſon, if he appears to them to be *rei ſuæ providus*, ought to take care, ere they conclude their bargain with him, that he get himſelf declared by the proper authority to be *rei ſuæ providus*, and to be looſed from the interdiction: and if they proceed to deal with him before this is done, they

they can impute any loſs they may happen to ſuſtain, to their own raſhneſs alone.

Interdictions may alſo expire without any deed either of the interdictors or of the law; 1) by the death of all the interdictors, 2) by the want of a quorum, 3) by the death of a *ſine quo non* (§ 473.).

§ 598. After an interdiction is determined, no action lies between the interdicted perſon and his interdictors, except in one caſe; and that is, when they have fraudulently given their conſent to a deed to which they knew they ought not to have given it (§ 594.). For they are bound *bonam fidem præſtare*, and are therefore liable to make up to him any loſs, which they cauſe him to ſuſtain through their fraud. But this caſe excepted, no action lies between them; becauſe there is nothing, on which action can be founded. For interdictors have no management of the eſtate of the interdicted perſon; they have not any right, and are not bound to meddle either with his lands, with his goods, or with his money; all which they are bound to do is to give their conſent to deeds done by him, to which they are deſired, and they think they ought to give it (§ 595.). By conſequence they cannot be liable to omiſſions, ſince they cannot be guilty of any: for they are bound to give their conſent in thoſe caſes alone, in which they are deſired to give it. Of courſe, unleſs they give it fraudulently, knowing that they ought not to give it, they are not, in any wiſe, liable to be ſued by the interdicted perſon.

TITLE XIX.

Of Inhibition.

§ 599. EVERY one who owes a debt may, in ſome ſort, be ſaid to poſſeſs a part of the eſtate of him, to whom he owes it. *Qui debet*, ſays CICERO *, *æs* retinet *alienum*. For his creditor is entitled to get payment; that is, to get made over to him as much of the eſtate poſſeſſed by his debtor, as is equivalent to the debt due to him. Therefore he has a right, in caſe his debtor will not voluntarily make ſatisfaction to him, to effectuate payment by legal means. By conſequence, he may attach, *or* may take out of all the eſtate of his debtor, as much as is equivalent to the debt due to him. The eſtate therefore of every debtor amounts *really* to leſs than it *appears* to do, by a quantity equivalent to that debt: for his creditor may diminiſh it by that quantity. Hence in eſtimating the real amount of one's eſtate, the debts due by him muſt be deducted; *id enim bonorum cujuſque intelligitur, quod æri alieno ſupereſt, l.* 11. *ff. de jure fiſci*; and a debt may be held to be part of the eſtate, not of the debtor who owes it, but of the creditor to whom it is due.

The juridical language of moſt nations is defective. *Algebra* is a ſcience, which, by an ingenious application of general ſymbolical repreſentations of quantity and of its affections, reſolves, with the greateſt facility, problems inſolvable by common arithmetic; and among the expreſſions uſed in it, there is one which marks, with the utmoſt and an happy preciſion, the juridical idea of a debt. It divides all quantities into *poſitive* and *negative*, and would call a debt 'a *negative* part 'of the eſtate of the debtor.' For it is a part of his eſtate: but it diminiſhes it, or is a decrement; therefore it is a *negative* part of it.

This manner of conceiving it is preciſely agreeable both to the language and to the principles of the Roman Law. For the Romans called debt due by one *æs alienum*, debt due to one *æs ſuum*, *l.* 213. § 1. *ff. de verb. ſignif.* and they held

* Pro Cn. Planco.

held that, which one had an action at Law to recover, to be a part of his eſtate, *l.* 52. *ff. de acquir. rer. dom. l.* 49. 143. *ff. de verb. ſignif.*

§ 600. Every one has a right to diſpoſe of his own property, and to hinder it from being alienated by another; and nobody ought to have power to alien that which belongs not to him. Every creditor, therefore, has a right to hinder his debtor both from alienating that part of his eſtate, which is equivalent to the debt due by him, and from doing any other deed, by which he may himſelf be diſappointed of payment, *or* of recovering out among the eſtate of his debtor that which, it has been ſaid, may be conſidered as his property. Hence he is entitled to uſe legal means not only for recovering payment, but alſo for enſuring himſelf of recovering it. It follows, that he muſt, among other things, be entitled to hinder his debtor from doing any deed, by which he may become inſolvent, or unable to pay his debt. But a debtor may become inſolvent by alienating his eſtate. By conſequence, his creditor ought to have a right to deprive him of the power of alienating it, and of rendering it impoſſible for him to pay his debt.

One, who has a right, muſt have ſomebody bound to him; and one, who lies under an obligation, is bound to fulfil it: therefore he, who has the right, muſt be entitled to incapacitate him, whom he has bound, from doing any deed by which it may become impoſſible for him to fulfil his obligation. For that, it may eaſily be proved, is doing no more than depriving him of the power of diſpoſing of the property of another.

§ 601. Great regard is due to the preſervation of the rights of creditors, but greater to that of the commercial intereſts of mankind. Therefore the power, which creditors have of hindering their debtors from alienating their eſtates, ought not to be allowed to be infinite; it ought to be reſtrained within thoſe boundaries, which are not inconſiſtent with the maintenance of commerce among mankind. Of courſe, it ought not to extend to moveables; it ought to extend to heritage alone.

For theſe reaſons, the law of Scotland hath introduced a diligence, which it calls *inhibition*. By it the abſolute and unlimited power, which debtors would otherwiſe have, of diſpoſing of their heritage, is reſtrained; and they are incapacited from doing deeds, by which their creditors may be diſappointed of recovering payment out of it.

§ 602. Inhibition therefore may be defined to be 'a prohibitory diligence, 'by which a creditor, or one who has a right, incapacitates his debtor, or him 'whom he has bound, from doing with others, and others from doing with him 'any voluntary deed, prejudicial to the right which he has at the time of the exe-'cution of the diligence, either of recovering payment out of the heritage of 'his debtor, or of hindering it from being rendered ineffectual; and becomes 'thereby entitled to get every ſuch deed ſet aſide." And it may be conſidered, as it is a reſtraint impoſed either on the debtor, the perſon who is bound, or on *all* the lieges. When it is conſidered as a reſtraint impoſed on the debtor or perſon bound, it may be defined to be 'a reſtraint impoſed on a debtor, or obligor, 'by ſerving upon him a writ of inhibition, which is iſſued at the ſuit of his cre-'ditor, the obligee, paſſes the ſignet, and incapacitates him from doing any vo-'luntary deed by which his heritage may be affected, to the prejudice of the 'right of or debt due to him, to whom he is bound.' When it is conſidered as a reſtraint impoſed on the lieges, it may be defined to be 'a reſtraint impoſed on the lieges, by ſerving upon them letters of inhibition, by 'which they are prohibited, and it is made unlawful for them to do with a 'debtor or obligor any voluntary deed, by which his heritable eſtate may be af-'fected to the prejudice of the right of or debt due to him, at whoſe ſuit the writ 'is iſſued.' From theſe definitions it follows, I. That inhibition is a prohibitory diligence; II. That it may be uſed by creditors, obligees, or thoſe who have rights. III. That it is uſed by them, in order either to ſecure to themſelves payment

ment of the debts due to them, or to hinder their debtors or obligors from defeating their rights. IV. That it is executed in conſequence of letters of inhibition, which paſs the ſignet, and muſt be duly publiſhed. V. By being ſerved both upon the perſon who is inhibited and upon the lieges, and by being regiſtered. VI. That its effect is to incapacitate the perſon inhibited, VII. from doing any *voluntary* deed, VIII. hurtful to the right, on which inhibition is uſed. IX. That it extends to heritable things alone. From theſe axioms it will be eaſy to ſhew, 1) who have right to uſe inhibition; 2) who may be inhibited; 3) the grounds, on which it may proceed; 4) the manner of inhibiting them; 5) the things to which it extends; 6) the effects of it.

§ 603. The ſecond axiom defines the perſons, who can uſe inhibition; they are creditors, obligees, or thoſe who have rights (§ 602. *ax.* 2.). For it would be improper to ſay, that they were creditors alone. The word *creditor* is not among us uſed in a ſenſe ſo extenſive as that, in which it was uſed by the Romans. Among them it ſignified 'one who had a right.' '*Creditores* eos ac-'cipere debemus, qui aliquam actionem vel civilem habent, (ſic tamen ne excepti-'one ſummoveantur) vel honorariam actionem, vel in factum,' *l.* 42. § 1. *ff. de oblig. et act. l.* 10. 11. 12. *p. ff. de verb. ſignif.* Among us it is commonly uſed to ſignify 'one to whom money is due.' But thoſe, to whom it is due, are not the only perſons, who may ſue out inhibition; it may be iſſued at the ſuit of every one who has a *patrimonial right*, or has another perſonally bound to him. For every one, who has a right, is neceſſarily entitled to cauſe him whom he has bound to be inhibited from doing any deed, by which this right may be rendered ineffectual. Thus heirs, ſubſtituted by deeds of entail, may inhibit thoſe who are either inſtituted or ſubſtituted before them, in order to prevent from being done any deed, which may defeat their right to ſucceed to the eſtate entailed on them. For they have rights, as well as thoſe to whom money is due; and are entitled to prevent them from being defeated.

But inhibition, we ſhall ſee, cannot be iſſued on every right. For one may have a *natural* right, which cannot by legal means be made effectual. Therefore the right, on which inhibition proceeds, muſt be one, which may by legal means be made effectual; and inhibition can be ſued out by thoſe alone who have ſuch rights. *Si natura debeatur, non ſunt loco creditorum, l.* 10. *ff. de verb. ſignif.*

§ 604. Every debtor, every obligor, every one who lies under an effectual obligation, may be inhibited. For he is bound to fulfil it; therefore he may be incapacitated from defeating the right of him, to whom he is bound.

But the obligation, by which he is bound, muſt be an effectual one; that is, one, which he is by legal means compellable to fulfil. It would be abſurd to inhibit one, who cannot be compelled to fulfil his obligation, but has it in his own option, whether he will or will not do it. *Debitor intelligitur is, a quo invito exigi pecunia poteſt, l.* 108. *ff. de verb. ſignif.* Therefore thoſe alone, who lie under legal and effectual obligations, can be inhibited; thoſe, who lie under *natural* ones, cannot.

§ 605. Inhibition may be uſed on every effectual right, obligation, or debt. For every one, who is effectually *bound*, may be inhibited (§ 604.).

But it cannot be iſſued either on natural obligations, or on any which one cannot by legal means be compelled to fulfil. For it would be abſurd to inhibit one from defeating an obligation, which the law does not compel him to fulfil.

Hence inhibition may be uſed not only on debts which are due already, but alſo on ſuch as are conditional, granted *in diem*, or *ex die*. For a debt, which is due *ſub conditione*, *in diem*, or *ex die*, is no leſs a debt than one which is due *purè*; the debtor is as much bound in the one caſe as in the other; ſince he has it not in his power either to be or not to be obliged according to his pleaſure, and will become compellable to fulfil his obligation on the exiſtence of the condition or the arrival of the day. Conſequently, inhibition may be uſed on ſuch debts as well as on others. 'Tis true, the effect of the diligence muſt, from the nature

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of the thing, be ſuſpended, till the debt becomes pure by the exiſtence of the condition or arrival of the day, becauſe the effect of the obligation itſelf is ſuſpended till that time. But as ſoon as the condition exiſts or the day comes, the inhibition gives the creditor, who uſed it, the ſame right and the ſame preference which he would have had, if the debt had been pure at the time, at which the inhibition was made; becauſe the debt is, on the exiſtence of the condition or arrival of the day, held to have been pure from the beginning, and produces the ſame effects which it would have produced, if it had actually been ſo. *Nam conditio exiſtens ad principium retrotrahitur, Di.* 116.—*Go.* 8th *July* 1670, *Hamilton.*—*Ha.* 19th *March* 1622, *Napier.*—*l.* 11. § 1. *l.* 9. *p.* § 1. *ff. qui pot. in pig.*—*arg. l.* 13. § 5. *l.* 14. *p. de pig. et hyp. l.* 12. § 2. *ff. qui pot. in pig.*

Inhibition can be uſed by ſuch alone as have acquired rights which are independent of the will of the debtors, and cannot be avoided by them at their pleaſure. The debt therefore on which it is uſed, muſt be ſuch that it is not in the power of the debtor, whether he ſhall or ſhall not be obliged, whether he ſhall or ſhall not owe it. For one, who has it in his option either to be or not to be bound, cannot be called debtor; ſince he is not obliged, and does not owe any thing. So nobody can, in this caſe, be ſaid to be creditor, or to have a right, till the debtor has declared whether he does or does not chuſe to be bound. Till that time there is not, in truth, either a debt, a debtor, or a creditor (§ 148, 149.). Thus, ſuppoſe one to bind himſelf, by a written deed, to pay a ſum of money, 'if he ſhall borrow it;' in this caſe, there is no obligation, no debt, no debtor, no creditor created, till the money is actually borrowed, *l.* 30. *ff. de reb. cred.* By conſequence, inhibition cannot be uſed on ſuch a deed; becauſe it does not conſtitute a debt. For it cannot be uſed by any, who have no right veſted in them, independent of the will of the debtor. Therefore an inhibition, uſed by any ſuch perſons, is inept, is void, and gives no right. Hence one uſed on an obligation, ſuſpended by a condition, the exiſtence of which depends on the will of the debtor, before the condition is fulfilled, is void; becauſe the creditor has not at the time, at which he uſes it, a right, ſince the debtor does not become obliged till he fulfills the condition, *D.* I. 542. 28th *Nov.* 1734, *Dickie.* Of courſe, one acquires not, in this or in other ſimilar caſes, any right by his inhibition, unleſs he cauſes it to be iſſued and executed, after a debt is become truly due, and himſelf is conſtituted a creditor, *arg. l.* 1. § 1. *l.* 9. §1. *l.* 11. *p. ff. qui pot. in pig. l.* 4. *ff. quæ res pig. vel hyp. dat.*

§ 606. Inhibition is a prohibitory diligence, which deprives the perſon inhibited of the power of diſpoſing of his property; a power, which every one is naturally entitled both to have and to exerciſe, unleſs there be ſome good reaſon for depriving him of it. And it may, in ſome ſort, be ſaid to be a defamatory diligence, as it makes both the character and the credit of the inhibited perſon liable to be ſuſpected. Like interdiction too, it lays an embargo on the dealings of mankind. 'Tis plain therefore, that this reſtraint cannot be impoſed *privata auctoritate*, or *brevi manu*, by every one who has a right; it muſt be impoſed by public authority, *i. e.* by the authority of the Court of Seſſion. Hence it is that a bill muſt be exhibited to the Lord Ordinary on the bills, praying his Lordſhip to grant warrant for iſſuing letters of inhibition, * both againſt the perſon ſued to be inhibited, and againſt the lieges. For the reſtraint is, as it has been ſaid (§ 602. *ax.* 4. 5.), impoſed by the execution, publication, and regiſtration of theſe letters; and as they paſs the ſignet, they muſt be iſſued by authority of the Lords of Seſſion.

The prayer of this bill is uſually granted; for the bill is uſually paſſed *ſine cauſæ cognitione*. 'Tis true it was otherwiſe in antient times; for inhibition was by our forefathers regarded in an odious light, and a ſummary cogniſance of the cauſe was uſually taken before warrant was granted for iſſuing the letters, *Ba. Inhibition*, 11th *July* 1543, *Maxwell.*—*S.* 12th *July* 1543, *Queen's advocate.* And even at preſent when bills, preſented to the Lord Ordinary on the bills in order to obtain warrant from his Lordſhip for iſſuing letters of inhibition, are paſſed of courſe,

* See the ſtyle of them in DALLAS.

courſe, *ſine cauſæ cognitione, periculo petentis,* the Court of Seſſion, upon application made to them by the perſon who is to be inhibited, in order to get them refuſed or recalled, nay without application, uſe not only to ſtop them from being iſſued or executed till cogniſance of the cauſe of uſing them is taken, but alſo to recall them, if it appears that there is no cauſe for iſſuing them, *Fo.* 15th *Feb.* 1699, *Murray.* — 23d *Feb.* 1704, *Counteſs-dowager of Caſſilis.* — 9th *Feb.* 1706, *Jean Wiſhart.*—*Fa.* I. 162.

Inhibition therefore is a diligence, which ought not to be uſed wantonly, without a good cauſe for uſing it. Conſequently, warrant for iſſuing the letters ought not to be granted to every one, who *ſays* that another is his debtor or is *bound* to him. An aſſertion is eaſily made; therefore, it ought to be *proved* that the perſon ſought to be inhibited owes a debt, or is effectually *bound* to him who ſues for letters of inhibition, by ſome other evidence and in ſome other way.

The law of Scotland allows proof of this to be made in two ways alone; by production either of a liquid obligation on the perſon ſued to be inhibited, or of an action depending againſt him either before the Court of Seſſion, or before ſome other competent court before which decree may be recovered. Hence it is ſaid, that inhibition may proceed either on a liquid obligation, or on a depending action.

By a liquid obligation, in this matter, is not underſtood an obligation for a liquid and determinate ſum of money. For one may have a right, it may be evident that a debt is due, tho the preciſe extent of it be not defined, and tho it conſiſt not of money. By a liquid obligation therefore here is underſtood ‘ a ‘ written obligation, which, alone and by itſelf, proves clearly and fully, that ‘ the perſon ſued to be inhibited owes a debt, or is effectually *obliged* to him who ‘ wants to uſe the inhibition,’ *Fo.* 4th *Dec.* 1695, *Martin.*

Firſt; The obligation muſt be conſtituted by writ: otherwiſe the evidence of its reality would reſt on the mere aſſertion of him, who ſues for the inhibition. But we have ſaid that the law, in order to authoriſe an inhibition to be iſſued, requires ſome farther evidence of the exiſtence of the right, which is the foundation of it, than his bare aſſertion. Beſides, it has provided, we ſhall ſee, a remedy for all thoſe caſes in which a debt is truly due, but the reality of it is not proved by writ: for in theſe action may be commenced before the Court of Seſſion, and inhibition may be uſed on the dependence.

Secondly; The writ, by which the obligation is conſtituted, muſt be full and direct evidence of the debt. By conſequence, it muſt be either a deed granted by the perſon ſued to be inhibited, and conſtitutive of an obligation directly and immediately on him; or a ſeries of deeds which are connected together, and make full proof, *ſcripto,* of the devolution of the obligation of another upon him: for deeds of any other ſort are not alone direct evidence againſt him. Therefore, inhibition cannot be uſed on an obligation granted by one, whom the perſon ſought to be inhibited actually repreſents, and with whom he is held by Law to be *una et eadem perſona,* in caſe his repreſentation cannot be proved by a ſeries of connected writs. For the repreſentation not being proved, the obligation, or the writ by which it is conſtituted, does not alone prove directly that the perſon ſought to be inhibited is he who is bound to fulfil it. Therefore, if the repreſentation cannot be proved by writ, an action ought to be commenced and to be made to depend, before inhibition can be properly uſed. If it is uſed ſooner, it is uſeleſs and void.

Thirdly; It is neceſſary that the deed conſtitutive of the obligation be ſuch as alone makes full proof of it; therefore it muſt not labour under any viſible defect, which renders it void; for inhibition, uſed on a deed which is void, muſt, like the obligation on which it proceeds, be void.

A deed, which makes proof of an obligation on the perſon ſought to be inhibited being a ſufficient ground on which inhibition may proceed, it is plain that it is no matter, 1) whether the deed be a bond, a bill, or what it be, provided

it be a good one: 2) whether it be granted for money or for any other thing, provided that, for which it is granted, have a pecuniary value; for, if it has not a pecuniary value, inhibition is uſeleſs, and can ſerve no purpoſe, ſince the debtor will be as capable of fulfilling his obligation, after he has alienated his eſtate as he could be before: 3) whether it be or be not regiſtered: 4) whether diligence has or has not been done on it.

But if the reality of the debt is not proved by writ, or if the writ, by which it is inſtructed, is not obligatory directly on the perſon ſought to be inhibited, an action muſt be commenced and made to depend before either the Court of Seſſion, or ſome other competent court, at the inſtance of the creditor, againſt the perſon he wants to get inhibited, in order to recover decree for the debt; and on this action, as ſoon as it can be ſaid to *depend* before the Court, inhibition may be uſed. In this matter, therefore, we muſt attend to the condition of the perſon ſought to be inhibited; whether he is the original debtor himſelf, or one who repreſents him and is liable to his debts; or one, who cannot be proved to repreſent him, but is entitled to ſucceed to him. In caſe the perſon ſued to be inbited is either the original debtor himſelf, or one who, it can be proved, repreſents him univerſally and is liable to his debts, an action is made to *depend* againſt him, as ſoon as a ſummons is *ſerved* upon him, in order to recover a decree for payment of the debt or performance of the obligation, *B.* 9.—*Da.* 119.—*D.I.* 541. *Dec.* 1726, *Ferguſſon.—arg. F.* 19th *July* 1706, *Elphiſton.—Fo.* 4th *Dec.* 1711, *Bangour;* for an action is not ſooner held to depend. Therefore, if letters of inhibition are iſſued on a warrant of the Lord Ordinary on the bills granted *before* the ſummons is ſerved, the inhibition is void, becauſe the warrant for uſing it was iſſued *ſine cauſa.* It was obtained by obreption, and was granted on the faith of the truth of the facts which were aſſerted in the bill, and were neceſſary for rendering inhibition lawful, but were not true. For the Lord Ordinary, if he had known that the ſummons was not executed, and that therefore the cauſe could not be ſaid to depend, would not, he could not have granted his warrant for iſſuing the letters of inhibition.

But if it cannot be proved, or is not certain that the perſon, who is entitled to ſucceed or is heir at law to the original debtor, repreſents him and is therefore liable to his debts, it is ſafeſt for a creditor, who wants to get him inhibited, not to cauſe a ſummons to be executed upon him for payment of the debt, but to cauſe him to be charged to enter heir to the original debtor; for a ſummons may be executed, letters of inhibition may be iſſued on the dependence againſt one, and the inhibition may notwithſtanding be altogether ineffectual, its effect depending entirely on that of the ſummons. If he, at whoſe ſuit the ſummons was executed, prevails in his cauſe, and recovers a decree againſt the defendant for payment of the debt, the inhibition will be effectual; but if he does not recover one, it muſt be ineffectual; *Fa.* II. 215. Now, if the perſon, who is ſummoned and is inhibited, does not, in any ſort, repreſent the perſon by whom the debt was originally due, a decree cannot be recovered againſt him; for he is not liable to his debts, ſince he does not repreſent him. Conſequently he cannot be decreed to pay them; and the inhibition muſt be ineffectual. In all caſes therefore, in which it cannot be proved, or is not certain, that one, who is legally entitled to inherit the eſtate of the original debtor, does not repreſent him, it is ſafeſt to give him a charge by ſerving upon him a writ contrived and iſſued for charging him to enter heir to the original debtor, to make thereby an action to *depend* againſt him, and on this dependence to purchaſe letters of inhibition. For an action may be ſaid to depend, not only when a ſummons is *executed* either upon the original debtor or upon his repreſentative in order to get the amount of the debt aſcertained, and to recover decree for payment of it; but alſo when a charge is given and *executed* upon one to enter heir to his predeceſſor. A charge is given, in order to pave the way for the creditor to get at the eſtate of his original debtor, and to effectuate payment out of it. As ſoon therefore as

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a charge is given one by *executing* or ſerving upon him letters iſſued in order to oblige him either to enter heir, or to renounce the ſucceſſion of his predeceſſor, inhibition may be uſed againſt him, and that as well before as after the expiration of the 40 days allowed him to declare his option either to enter or to renounce; for it would be hard either to hinder a creditor from uſing a diligence which the Law allows him to uſe for his ſecurity, or to put it in the power of the debtor to do any deed, by which he might hurt the intereſt of his creditor.

But it muſt be remarked, that an inhibition, uſed on a charge given one to enter heir to his predeceſſor, can be effectual and beneficial to thoſe debts alone, which are particularized and ſpecially mentioned in the letters of charge, *Fo.* 25th *June* 1706, *Davidſon.—F.* 17th *Feb.* 1713, *Livingſton;* whereas an inhibition, uſed on an executed ſummons, is effectual, tho the ſum or quantity, for recovering payment of which the action is brought, be not particularized in the ſummons, *K.* 36. The reaſon of the difference ſeems to be this; the effect of an inhibition, uſed on an executed ſummons, depends on the effect of the ſummons. If a decree is recovered on it, by that decree the quantity of the debt is determined, after, perhaps, a very contentious litigation; and the inhibition becomes effectual for that quantity. 'Tis therefore no matter, whether the preciſe quantity or the ſpecial ground of the debt be or be not particularized in the ſummons, ſince it muſt be particularized in the decree. But on a charge to enter heir ſometimes no decree follows; and when it does, it is uſually pronounced of courſe, *ſine cauſæ cognitione*, without contradiction, for every thing demanded by the purſuer. Therefore, the preciſe quantity and ground of the debt ought to be particularized in the letters of charge, that the amount of the ſum for which the inhibition is to be effectual, may be aſcertained.

But it may be aſked, What purpoſe can an inhibition, uſed on a charge to enter heir, ſerve? for the perſon charged may renounce: and, if he does renounce to be heir within the 40 days allowed him for making his option, will not the inhibition be ineffectual and uſeleſs? I anſwer, No: for an eſtate which one *may* acquire, as well as one which he *has acquired*, may be attached by his creditors, in order to effectuate payment of the debts due to them. The inhibition therefore will be ſo far available to the perſon who uſes it, as to give him a right to get ſet aſide, *ex capite inhibitionis*, every deed poſterior to it, by which the eſtate, on which the inhibited perſon might enter, may be affected, and to be preferred according to thoſe conſiderations on which the preferences of creditors depend. For the perſon who uſes the inhibition may be ſuppoſed to be a creditor either of him who is inhibited, or of his predeceſſor to whom he is charged to enter heir. In caſe he is a creditor of the latter, he will be preferred according to the date of his inhibition, and will have a right to get ſet aſide every deed done by the perſon inhibited, poſterior to the inhibition, by which the heritable eſtate of his predeceſſor may be attached, and the fund of payment of the debt due to the inhibitor may be diminiſhed. If he is a creditor of the perſon inhibited himſelf, he will not be preferred to the creditors of the predeceſſor; provided they have done diligence to attach his eſtate within three years from his death; for the creditors of one who is dead, are always preferable to thoſe of the perſon entitled to be his heir, in caſe they do diligence for attaching his eſtate and ſeparating it from that of his heir within three years from his death 1661, *c.* 52. Every man's eſtate ought in the firſt place to be applied towards payment of debts due by himſelf. But they may neglect to do diligence within that time, and thereby to ſeparate the eſtate of the predeceſſor from that of the heir; they muſt therefore loſe their right to be preferred, and muſt be preferable according to the priority of the diligences by which they affect the eſtate of the deceaſed.

§ 607. Letters of inhibition muſt, like letters of interdiction, be executed, publiſhed, and regiſtered (§ 602.). They muſt be executed, publiſhed, and regiſtered, in the ſame place and after the ſame manner with interdictions, 1581, *c.* 119.

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for the tenor, the end, and the effect of them both are almoſt the ſame; they differ in one particular only. Letters of interdiction, it has been ſaid (§ 587.), need not be ſerved upon the interdicted perſon himſelf; but it is otherwiſe with letters of inhibition. They muſt be ſerved not only upon the lieges in general, but alſo upon the inhibited perſon in particular. The reaſon of the difference is plain; interdiction is, in all caſes, ſufficiently notified to the perſon interdicted, before the letters are iſſued; there is therefore no occaſion to ſerve them upon him, after they are iſſued. But letters of inhibition are uſually purchaſed againſt the will and without the knowledge of the perſon inhibited; he is not made privy to the bill or to the intention of his creditor; the reſtraint therefore, under which he is laid, ought to be notified to him, as ſoon as it is impoſed upon him, *i. e.* the letters of inhibition ought to be ſpecially ſerved upon him.

They muſt be ſerved upon him after the ſame manner, in which law ordains ſummonſes to be ſerved upon thoſe againſt whom they are iſſued, 1540, *c.* 75. In caſe he is within the kingdom of Scotland, they muſt be ſerved 1) by a meſſenger or other proper officer, 2) againſt the perſon inhibited, 3) either perſonally or at his dwelling-houſe *, 4) by delivering a ſigned copy of them, *St.* 28th *July* 1671, *Keith*, together with a ſigned copy of the execution, *Fo.* 15th *Jan.* 1706, *Loch.*—*F.* 8th *July* 1713, *Baillie;* either to the inhibited perſon himſelf, if he is perſonally apprehended; or to his wife, ſervants, or family, if he is not perſonally apprehended, and acceſs is got into his dwelling-houſe, *St.* 11th *Dec.* 1679, *Counteſs of Caſſilis.*—*N.* 77.—*Ha.* 916. or by knocking ſix times at the door, *St.* 29th *July* 1680, *Hay.*—*Fo.* 24th *June* 1707, *Gordon*, and in caſe acceſs is not thereby got into the houſe, by affixing a copy of them to the door of it, *H.* 839.—*Fo.* 8th *July* 1698, *Blair.* In caſe he is without the kingdom of Scotland, they muſt be ſerved upon him at the market-croſs of Edinburgh, pier and ſhore of Leith. They muſt be ſerved at the market-croſs of Edinburgh, *Du.* 4th *June* 1631, *Chryſtie;* becauſe it is a place of the moſt public reſort. EDINBURGH is the metropolis of the kingdom, the ſeat of the Courts of Juſtice, the reſidence of the retainers of the Law, and the *communis patria* of every Scotchman; it is therefore the moſt proper place, at which public notifications can be made to perſons abroad. But they muſt alſo be ſerved at the pier and ſhore of Leith; becauſe LEITH was the port of the kingdom, from which correſpondence was maintained with foreign parts, and it was moſt probable notice of the inhibition would arrive at the perſon intereſted, *arg. Go.* 15th *July* 1669, *Leith.*—16th *June* 1671, *Lord Lovat.*—*St.* 22d *Feb.* 1681, *Ewing.*—*Fa.* II. 128. They are ſerved at the market-croſs, pier, and ſhore after the ſame manner with interdictions (§ 587.). The meſſenger who ſerves them muſt, at *each* of theſe places, call the word *Oyez three* ſeveral times with an audible voice, in order to convoke the lieges, and to draw their attention to the execution of the letters, *arg. Fo.* 20th *Feb.* 1680, *Gordon.*—*Da.* 141. Then he muſt read the writ all over, that he upon whom it is ſerved may know the import of it, *Da.* 141. *arg. F.* 14th *Feb.* 1706, *Earl of Leven.* Next, he muſt affix a ſubſcribed copy of it to the market-croſs, that people may have it in their power to read it at leiſure, and that there may thereby be more chances of conveying notice of it to the perſon inhibited, *St.* 12th *Feb.* 1670, *Napier.*—*Di.* 413. All theſe things muſt be done before two witneſſes; and after all, a formal writ of execution muſt be made out and ſigned both by the meſſenger and by the two witneſſes, and a *copy* of it, ſigned by the meſſenger, for it needs not be ſigned by the witneſſes alſo, 1592, *c.* 141. affixed, as well as a copy of the letters themſelves, to the croſs, pier, and ſhore, *arg.* 1693, *c.* 12.—*Di.* 413.—*Fo.* 15th *Jan.* 1706, *Loch.*—*F.* 8th

* The act of parliament ſays, the dwelling-place, where the perſon to be ſummoned dwells, and has his *actual reſidence for the time.* From which words it is plain, that a ſummons may be legally executed *upon* one at any place, at which he dwells and has his *actual reſidence for the time*; and that it is not *ſummo jure* neceſſary, that one be in all caſes ſummoned at his *own* dwelling houſe; he may lawfully be ſummoned at the houſe of another, provided he dwells and has his actual reſidence at it for the time, *F.* 22. *Dec.* 1710, *Baillie.*

8th *July* 1713, *Baillie*. Thus every one, who happens to read them, will ſee, that the matter is ſerious. After this manner muſt the letters be ſerved upon the inhibited perſon himſelf. They muſt be ſerved, as has been ſaid, before two witneſſes; and a formal principal certificate of the *execution* of them muſt be made out and ſigned both by the meſſenger and by the witneſſes.

Beſides, they muſt be ſerved upon the lieges, in order to put them *in mala fide* to deal with the inhibited perſon. They are ſerved upon them at the market-croſs of the head-borough of the ſhire, within which *he* dwells, after the ſame manner in which they are ſerved upon him at the market-croſs of Edinburgh, in caſe he is out of Scotland, or in which interdictions are publiſhed. For it is not neceſſary, that they be ſerved at the head-borough of the ſhire, within which his lands are ſituated, *Du.* 30th *Jan.* 1629, *Stirling.*—*Fo.* 11th *Jan.* 1710, *Lord Gray.*—*F.* 14th *Feb.* 1710, *idem.*—*D.* I. 262. *Jan.* 1732, *Stirling;* not even when he is out of Scotland; provided he has a known fixed dwelling-houſe in it, *Fa.* II. 128. Indeed, if he has not a proper dwelling-houſe within it, they muſt be ſerved upon the lieges as well as upon himſelf, at the market-croſs of Edinburgh, pier and ſhore of Leith. For they muſt be ſerved upon them at ſome place; but if no other can be pointed at which they fall naturally to be ſerved, they muſt be executed at the market-croſs of Edinburgh, pier and ſhore of Leith.

Theſe particulars excepted, letters of inhibition muſt be executed, publiſhed, and regiſtered for the ſame reaſons, at the ſame places, within the ſame juriſdictions, and within the ſame time with letters of interdiction; ſo that it is needleſs to repeat what has been ſaid concerning the execution, publication, and regiſtration of letters of interdiction: for every thing, which has been ſaid of them, may, *mutatis mutandis*, be ſaid of letters of inhibition (§ 587.).

§ 608. Inhibition is intended to prevent the perſon inhibited from defeating the right of him to whom he is bound; and in order to effectuate its purpoſe, it means to make his eſtate remain, after the inhibition is executed, as much liable to be attached by his creditor, as it was at the time of executing it. Therefore, it puts it out of his power to withdraw it from diligence.

But the law, which has a great regard for the preſervation of the rights of creditors, cannot be forgetful of the commercial intereſts of mankind. Therefore it cannot extend the effects of inhibition ſo far, as to make them prove hurtful to ſociety; it muſt not allow them to be inconſiſtent with the good of it. Hence it cannot extend them to every thing, moveable and immoveable, becauſe moveables cannot be withdrawn from commerce. It both extends and confines them to heritable things.

Hence, it extends 1) to land, 2) to houſes, 3) to mills, 4) to all immoveables.

For the ſame reaſon, it extends 5) to all heritable rights, which are actually completed by ſeiſin. For things, which can be ſeiſed, are held to be immoveable.

Extending to the immoveables themſelves, it muſt alſo extend 6) to all the acceſſories of them, and all rights to them; tho ſeiſin has not actually been taken upon them. Therefore, it extends 7) to conveyances, or, as they are called in the law of Scotland, *diſpoſitions* of the property of immoveables; 8) to decrees of adjudication of them, tho they are not completed by ſeiſin; becauſe the land is itſelf the fund out of which the creditor is to effectuate his payment, and the nature of that right, which the inhibited perſon has to it, cannot have any influence on the matter. For, be it of what kind it will, it may be adjudged; and, by means of the adjudication, acceſs may be got to the land. No deed therefore made by him, who has a title, tho incomplete, to the property of it, ought to be allowed to withdraw it from diligence.

By conſequence, it extends 9) to tacks of immoveables: for they *ſolum ſpectant*, they are heritages concerning immoveables; and they are expreſsly ſpecified in writs of inhibition. A tenant therefore cannot alienate the tack granted to

him, even tho it gives him expreſsly a power of aſſigning it. I would not be miſunderſtood: for I mean not to ſay that a landlord is, by being inhibited, incapacitated from granting leaſes of his eſtate; the reſtraints impoſed on him will be more particularly conſidered afterwards; I am at preſent treating of the *things* to which inhibition extends.

It extends to the heritage of the inhibited perſon; therefore it is of no moment, whether it belongs to him at the time at which the inhibition is executed, or is acquired by him afterwards. For he is forbidden by the letters of inhibition to alienate any part of his eſtate to the prejudice of the right of him, at whoſe ſuit he is inhibited; and they do not diſtinguiſh between the different times, at which the reſpective parts of it happen to be acquired. By conſequence, inhibition muſt extend to *acquirenda* as well as to *acquiſita*. For the prohibition laſts, as long as the debt on which it proceeds remains unpaid, *Du.* 5th *July* 1623, *Kirkwood.*—*St.* 15th *Dec.* 1665. 27th *Feb.* 1667, *Elies.*—*Fo.* 16th *July* 1700, *creditors of Lanton.*

§ 609. But it extends to heritage alone. It extends not to moveables of any ſort. Therefore it extends not either 1) to the *corpora mobilia* belonging to inhibited perſons, *Du.* 22d *March* 1623, *Braco*; or 2) to *nomina*, *jura mobilia*, or debts due to them, *Du.* 24th *Jan.* 1629, *Dickſon.* Hence it does not extend 3) to the price of land; for the price of land is moveable, *N.* 111. 4) to the emoluments or price of any office, *D.* I. 473. 17th *Dec.* 1725, *Taylor*; 5) to *debita fundi* which are become already due, for all arrears are moveable (§ 155). Conſequently they become the abſolute property of the inhibited perſon at each ſucceſſive time, at which they become due, and are not attachable by the inhibitor by virtue of his inhibition. 'Tis true, they are attachable by him as well as by the other creditors of the inhibited perſon by thoſe lawful means or diligences, by which moveables may be attached, *Fa.* II. 138.

But it is not to moveables alone, to which it does not extend; it extends not 6) to perſonal bonds, containing clauſes excluding executors from ſucceeding to them. For theſe are *ſua natura* moveable; and go to the heirs of creditors, becauſe they are expreſsly deviſed to them. But it is the real nature of the thing itſelf, not the *genus* of him who is to ſucceed to it, on which it depends, whether inhibition does or does not extend to it. Therefore, 7) it extends not to bonds, which are made heritable by the inſertion of clauſes of ſeiſin, but on which it has not been taken, *Da.* 45.—*Fo.* 31ſt *Dec.* 1703, *Oliphant.*

When I ſay, that inhibition does not extend to moveables, I mean, that it does not in any ſort affect them, does not ſecure them to the perſon at whoſe ſuit it is iſſued, does not incapacitate the inhibited perſon from diſpoſing of them according to his pleaſure, and does not hinder them from being attached by thoſe lawful diligences, by which moveables may be attached, as well by other creditors of the inhibited perſon as by him who uſed the inhibition. For one has over his perſon, his perſonal and his moveable eſtate, after he is inhibited, the ſame power which he had over it before he was inhibited. The deeds he does after are as effectual with regard to theſe as thoſe he did before. So that inhibition gives to him, who uſes it, no additional ſecurity over the perſon or the perſonal eſtate of the inhibited perſon. In ſhort, it is a diligence, by which moveables are, in no ſort, affected; it is effectual againſt heritage alone.

§ 610. Inhibition, it has been ſaid, is intended to ſecure all thoſe things to which it extends (§ 608.), as a fund out of which he, who has a right, may make it effectual. In order to do this, it muſt hinder them from becoming, after it is executed, leſs liable to be attached by him than they were before. Its effect therefore muſt be to incapacitate the perſon inhibited from doing any voluntary deed, that may be hurtful to the right on which it is uſed (§ 602. *ax.* 6. 7. 8.); or rather, to give the perſon, who uſes it, a right to get aſide, *ex capite inhibitionis*, every *voluntary* deed done by the inhibited perſon, *after* he is inhibited, by which his *heritable* eſtate may be affected to the prejudice of the right on which

inhibition

inhibition is uſed. From hence it will be eaſy to ſhew, 1) the deeds, which he is incapacited from doing; 2) the right, which the purchaſer of the inhibition acquires by it; 3) thoſe, to whom this right is available; 4) thoſe, againſt whom it may be made effectual.

§ 611. The deeds, which an inhibited perſon is incapacitated from doing, muſt be 1) poſterior to the inhibition, 2) voluntary, 3) hurtful to the right of him at whoſe ſuit the writ is iſſued.

A thing cannot, before itſelf exiſts, produce an effect; for every effect muſt be poſterior to its cauſe (§ 11.). Therefore inhibition ſtrikes againſt ſuch deeds alone, as are *poſterior* to it. For it follows from the nature of property, that every one has naturally an abſolute unlimited power over his own. This power remains with him, till he is legally deprived of it; for it remains with him as long as his property. But one is not legally deprived of it, till inhibition is executed upon him. Beſides, the Law has not a retroſpect in caſes of this kind. Therefore, letters of inhibition reſpect the future time alone; one is always prohibited by them to do deeds *after* the inhibition is executed.

From hence it muſt follow, that all deeds granted by the inhibited perſon, *before* he was inhibited, are as valid and as effectual, as they would have been in caſe he had never been inhibited. Therefore all the ſame diligences may proceed on them, all the ſame effects may flow from them, after the inhibition, which could have proceeded on them, if inhibition had not been uſed. Thus ſuch as were creditors of the inhibited perſon, before he was inhibited, may do diligence againſt the eſtate of their debtor, by adjudging it, and by bringing it to a judicial ſale, in the ſame manner as if no inhibition had been uſed. The right of one creditor cannot be hurt by the poſterior diligence of another; inhibition is a diligence, which is iſſued at the ſuit of creditors; one creditor is entitled to uſe one ſort of diligence, at the ſame time that another employs either the ſame or a different ſort; and he, who completes his diligence ſooneſt, is uſually preferable; *nam jura vigilantibus*. Conſequently, one, who was creditor before his debtor was inhibited, may proceed to do any ſort of diligence, which Law allows him to do, in order to effectuate payment of his debt. Of courſe he may not only attach his moveables by arreſtment and poinding, but adjudge his heritage. In truth, diligences are deeds not of the perſon inhibited, but of his creditor and of the law. But inhibition lays a reſtraint on the inhibited perſon alone; it lays none on his creditors or any other mortal; they have full power to do, it notwithſtanding, every thing which it would have been lawful for them to have done, if inhibition had not been uſed.

But the deeds, which an inhibited perſon is incapacitated from doing, muſt not only be poſterior to the impoſition of the reſtraint; they muſt alſo be *voluntary*. For inhibition ſtrikes againſt voluntary deeds alone; that is, deeds which it was in his option either to grant or not to grant, and which, if he had refuſed, he could not, by legal means, have been compelled to do. It affects not *neceſſary* ones; that is, deeds which it was not in his option either to grant or not to grant, and which, in caſe he had refuſed, he could by legal means have been compelled to make. The law does not diſfavour ſuch as agree voluntarily to do that, which it can compel them to do; it likes not to be laid under the neceſſity of interpoſing its authority and of applying its ſharpeſt remedies; and it regards not with favourable eyes ſuch, as wait its order and compulſion to do deeds, which they know they can be forced to do.

On this principle it is plain, that every deed, which one lay under a valid and effectual obligation, antecedent to the inhibition, to grant, is not affected by it, tho the inhibited perſon ſhould grant it, *after* he is inhibited, voluntarily, without waiting the compulſions of law. For one, who is validly and effectually bound, may be forced to fulfil his obligation; and, if he fulfils it without laying the law under the neceſſity of uſing force, he does no more than it was not only lawful, but reaſonable for him to do. Beſides, it is no matter to him, who uſes the inhibition,

hibition, it is *jus tertii* to him, whether the inhibited perſon granted the deed voluntarily, or was forced to grant it. It muſt be effectual againſt him, ſince it was granted to fulfil an effectual obligation anterior to the inhibition.

From hence it is plain, that it matters not of what kind the obligation be, provided it be ſuch a one as is effectual, and may be made good by proceſs at law. Thus a huſband, who hath bound himſelf by his marriage-contract to make certain proviſions for his wife, or for the children whom he ſhould happen to have by her, will not be incapacitated, by being inhibited afterwards, from making thoſe proviſions. Therefore, if he ſhall make them after he is inhibited, they will not be affected by it, and will not be liable to be ſet aſide *ex capite inhibitionis*. For the perſon, who made them, lay under an obligation to make them antecedent to the inhibition; but inhibition, as it has been ſaid, has no ſort of effect on deeds anterior to it, *St.* 10th *Feb.* 1672, *Beg.*—23d *July* 1675, *Gordon.*—23d *June* 1681, *Gardner.*—*Go.* 24th *June* 1673, *Haliburton.* In the ſame manner, if one lies under an obligation to make over land or any other immoveable to another, a deed, by which he makes it over, will not be affected by an inhibition prior to it, but poſterior to the obligation, *Du.* 6th *March* 1639, *Scotſtarbat.*—*Ho. inhibition, ult. Jan.* 1617, *Stirling.*—*Go.* 21ſt *July* 1675, *Menzies.*—*F.* 16th *Jan.* 1713, *Gordon.*

From hence it followed, that a wadſetter or an annualrenter, whoſe right was redeemable by another, might accept of payment of that, for which it could be redeemed; that he might grant a renunciation of it to the redeemer; and that this renunciation was not affected by the inhibition of the wadſetter or annualrenter, becauſe he, who had the redeemable right, might have been compelled by the reverſer, who had right to redeem, to accept of the redemption-money, and to grant the renunciation, *St.* 27th *Feb.* and 16th *July* 1667, *Elies.*—7th *Jan.* 1680, *Maclellan.*—*Di.* 96. But this was hurtful to the intereſt of the creditors of wadſetters and annualrenters; becauſe the money, with which the right was redeemable, was not arreſtable, as it was ſecured by infeftment. To prevent therefore this evil, it was provided, *Aſ.* 19th *Feb.* 1680, that, if one, who had inhibited a wadſetter or an annualrenter, ſhould notify, by the inſtrument of a notary, to the reverſer, that the wadſetter or annualrenter ſtood inhibited by him, and ſhould produce, in preſence of the reverſer and of the notary, the inhibition duly regiſtered, no renunciation or grant of redemption, tho made on true payment, ſhould be ſuſtained, unleſs the redemption proceeded on an action, to which the inhibitor was cited, and made a party. It was the intention of the act, that the inhibitor ſhould have to the redemption-money the ſame right which he had to the wadſetted land; for *ſurrogatum ſapit naturam ejus, in cujus locum ſurrogatur*. The money was, for the ſecurity of the inhibitor, ſurrogated in place of the redeemable right, which the wadſetter or annualrenter had.

But every neceſſary deed granted by one after he is inhibited, is not abſolutely good. In order to hinder it from being liable to be impeached, it muſt be altogether neceſſary. One, which is partly voluntary, partly neceſſary, is voidable *ex capite inhibitionis*, in ſo far as it is voluntary, *Fo.* 3d *July* 1700, *Dunbar.* Therefore, in order to render a deed abſolutely good, it muſt be limited to the ſtrict terms of the obligation; if it goes beyond them, it will be ſo far voidable; becauſe in ſo far it is voluntary, and cannot be ſaid to be done to fulfil the obligation. Thus a debtor cannot, after he is inhibited, make over his eſtate to his creditor, infeft him in it, or do any other voluntary deed, in ſecurity of the debt due to him; becauſe the conveyance, deed, or infeftment, is a voluntary deed; the creditor could not have compelled his debtor to grant it. Therefore, if he does grant it, it muſt be voidable *ex capite inhibitionis*, *A. inhibition*, 9th *March* 1633, *Fleming.*—*H.* 628.—*F.* 14th *Feb.* 1708, *Strahan.*—*D.* I. 474. *Feb.* 1730, *Campbell.* 'Tis true, a creditor, to whom a debt was due before his debtor was inhibited, may uſe all legal diligence either againſt the perſon or againſt the eſtate of his debtor, in order to effectuate payment of the debt due

to

to him; and his diligence will not be affected by the inhibition, or liable to be ſet aſide; becauſe it proceeds on a debt which was prior to the inhibition, and is therefore in no ſort affected by it. Indeed if it proceeds not on the original debt itſelf, but on a deed corroborative of it, granted after the inhibition, it will be voidable. Thus an adjudication, recovered on a bond of corroboration poſterior to the inhibition, is liable to be avoided, tho the debt corroborated was prior to it; becauſe it proceeded on a bond which the inhibition incapacitated the grantor from granting, *Fo.* 29th *Jan.* 1696, *Wilſon.* A deed therefore, poſterior to inhibition, is voidable not only in thoſe caſes in which the inhibited perſon lay under no ſort of obligation to grant it, but alſo in thoſe in which he lay under one to grant ſome ſuch deed, did not adhere to the preciſe terms of his obligation, and granted one different from that which he was bound to grant. Thus if one is bound, before he is inhibited, to grant another an annual-rent out of his eſtate, and, after he is inhibited, does not grant an infeftment of annual-rent, but makes a conveyance of the property of it to the obligee, that conveyance is liable to be ſet aſide *ex capite inhibitionis.* The perſon, who made it, did not adhere to the ſtrict terms of his obligation; he did a thing quite different from that, which he was bound to do; for a conveyance of the property of land is not an infeftment of annual-rent out of it. Therefore it was a voluntary deed, which he could not have been compelled to grant, *Ho. inhibition,* 14th *March* 1614, *Oliphant.*—*Da.* 21ſt *Jan.* 1629 *Scot.*—8th *March* 1631, *Brown.*

In ſhort, every deed, onerous, rational, or gratuitous, which one could have been decreed to grant, is reckoned neceſſary; and every one, which he could not have been decreed to grant, is held to be voluntary. Deeds of the firſt ſort, tho poſterior to an inhibition, are not affected by it; thoſe of the laſt, if granted after it, are liable to be ſet aſide *ex capite inhibitionis.*

One, whoſe intereſt is not affected by a deed, ought not to be allowed to impeach it. Therefore the deeds, againſt which inhibition ſtrikes, muſt not only be poſterior to it, and voluntary; they muſt alſo be 3) hurtful to the right of the inhibitor. If they are, in no ſort, hurtful to him, he can have no *intereſt* to object to their validity; for, as the law expreſſeth it, it is *jus tertii* to him to do it.

But deeds relating immediately to thoſe things, to which inhibition does not extend (§ 608. 609.), are not hurtful to the intereſt of the inhibitor; for his inhibition gives him no ſecurity over theſe. Therefore, it does not incapacitate the inhibited perſon from doing with them as he pleaſes. 'Tis ſuch deeds alone as relate directly to thoſe things to which the diligence extends (§ 609.), that he is incapacitated from doing; for by them alone is the ſecurity, acquired by the inhibition, directly diminiſhed.

But deeds which are perſonal, and which relate not immediately to thoſe things to which inhibition extends, may be employed to affect them, and may thereby become the means of leſſening the ſecurity of the inhibitor. Inhibition impoſes a reſtraint on others as well as on the perſon inhibited, and by being publiſhed is notified to the world. Therefore they are *in mala fide* to think, that deeds, granted by him afterwards, can be made effectual againſt his heritage; and they muſt be held in all their dealings with him to have relied on the ſecurity afforded them by thoſe things alone, to which inhibition does not extend. Hence, as ſoon as a deed is employed to hurt the ſecurity the inhibitor has over thoſe things to which it extends, it becomes liable to be impeached by him; for he has a right to hinder any deed, done by the perſon inhibited, from being made hurtful to him. Therefore the latter muſt be held to be incapacitated from giving to *any* of his deeds the effect of being employed to that end.

Beſides, inhibition is not intended to deprive one of the power of managing his affairs; it means only to ſecure the heritage of the inhibited perſon as a fund, out of which the inhibitor may make good his right; it does not deprive him of the property of his eſtate; he continues proprietor, it notwithſtanding. There-

fore it does not incapacitate him from doing any deed of ordinary administration, by which the security acquired by the inhibition is not diminished. It annulls those alone, which are prejudicial to it. Hence one has, after he is inhibited, power to grant leases of his heritage on terms, which are not hurtful to the right of the inhibitor; for he cannot grant them on others. 'Tis true, a lease cannot properly be said to be an alienation; the heritage, which is let, continues afterwards to be attachable by the inhibitor. But it may be rendered less valuable to him; and in case it is, the lease must be held to have been granted, in order to defraud his diligence and the law. Therefore it must be liable to be set aside.

From this must be accurately distinguished another case, which is entirely different. A landlord may grant leases of his property; but a tenant cannot assign those granted to him, for a lease is attachable by creditors by adjudication. Therefore, inhibition deprives him of the power of assigning it.

Lastly; In order to make any deed liable to be set aside *ex capite inhibitionis*, it is necessary not only that it be voluntary, be posterior to the inhibition, and be hurtful to the rights of the inhibitor; it must also be granted by the inhibited person himself; it must be a deed done by him. For inhibition is a prohibitory diligence, which lays its commands on that person alone who is inhibited; it affects him alone; it is, therefore, personal to him. It has no effect either against his heirs, against his creditors, or against any others. The restraint imposed on him does not descend or continue to lay on his heir; as soon as he who was originally inhibited dies, it ceases; for it was personal to him. So one, who has used inhibition, is entitled to get set aside *ex capite inhibitionis* such deeds alone, as were done by that individual person whom he inhibited: he is not entitled to impeach any, which are done by his heir; for inhibition extends not to heirs, *Ho. inhibition, ult. June* 1612, *Pierie*. Therefore one who wants to lay the heir under the same restraint, under which he laid his predecessor, must inhibit him by executing letters of inhibition upon him just as if none had been issued against his predecessor: and this new inhibition will have no other effect than it would have had in case one had not been executed against the predecessor, because every one is inhibited not *hereditario*, but *suo nomine*. If inhibition executed upon one lays no restraint upon his heir, and has no effect on his deeds; much less can it impose any restraint on such as were his creditors *before* he was inhibited *. They may do diligence, and may employ every lawful mean, in order to effectuate payment of the debts due to them. For at that moment, at which they become creditors, they acquire a right not only to get payment of the debts due to them, but also to use the means which law affords them for effectuating it. Of this right no deed either of their debtor or of any other can deprive them. Indeed, nothing can deprive them of it, till they receive payment of their debts. Therefore the diligences, which they do against the heritable estate of their debtor, are not affected by inhibition, and are not voidable *ex capite inhibitionis* †. For he, who used the inhibition, had no better right than they: he used inhibition, in order to secure himself against the posterior voluntary deeds of his debtor; all his creditors might have done the same. But inhibition is a diligence merely prohibitory, and does not directly transfer the property of any part of the estate of the debtor. Therefore it cannot give him who owes it any preference to those who were creditors before; all of them are equally

* I say, *before* he was inhibited, because inhibition strikes against all voluntary deeds done by the inhibited person, after he is inhibited, onerous as well as rational and gratuitous ones. Therefore such as become creditors of one, after he is inhibited, have none but themselves to blame if they shall suffer; they became his creditors with their eyes open, when they either saw or might have seen, that his heritable estate was already secured to another by the inhibition. So *sibi imputent*.

† I always add *ex capite inhibitionis*; because I am speaking of inhibitions and of their effects alone. For a deed may be voidable for other reasons, *v. g. ex capite fraudis*, tho it may not *ex capite inhibitionis*; or because the diligence is irregularly executed, and is therefore void.

equally entitled to do diligence and to attach the eſtate of their debtor; and he who does that act, by which the property of the eſtate of the debtor is transferred, or a preference is acquired to the debt due to him, muſt be preferred according to the rules of law.

From all which it is plain, that inhibition does not ſtrike againſt any thing, which is either caſually or conſtantly due to the ſuperior of the eſtate of the inhibited perſon. A ſuperior is a real creditor of his vaſſal; he is infeft in his lands as well as his vaſſal; this infeftment ſecures all thoſe things, which are due to him as ſuperior; for they are *debita fundi*, and are in effect due as ſoon as the vaſſal is infeft in his eſtate, becauſe they are reſerved by the ſuperior to himſelf, he takes the eſtate of his vaſſal bound for them at each ſucceſſive time at which they ſhall become due. By virtue therefore of this reſervation and infeftment, the ſuperior is, for thoſe duties, whether caſual or conſtant, a creditor preferable becauſe he is prior to every other: for the right, which he has to his duties, is coeval with that which his vaſſal has to his eſtate; and muſt of courſe be prior to every right flowing from the vaſſal. There is however one exception to this rule; for deeds done by one who is inhibited, and inferring recognition, hurt not the rights of him who uſed the inhibition, 1686, *c.* 15. becauſe the inhibition incapacitated the inhibited perſon from doing any voluntary deeds, that might be hurtful to the right, on which it was uſed. Indeed if it did not ſtrike againſt deeds inferring recognition as well as againſt others, it would be an uſeleſs diligence; for every debtor might, as ſoon as he pleaſed, alienate his eſtate, or do ſome other thing, which would infer recognition, and might thereby fruſtrate the diligence of his creditor. To prevent this conſequence, therefore, the law hath expreſsly declared land falling under recognition to be burdened with the inhibition, and with payment of the debt on which it was uſed*.

§ 612. Inhibition is intended to ſecure all the heritage of the inhibited perſon as a fund out of which the inhibitor may effectuate his right, or recover payment of the debt due to him (§ 608.): and the effect of it is to incapacitate the inhibited perſon from doing any voluntary deed, that may be hurtful to the debt on which inhibition is uſed (§ 610.). Therefore, it muſt give the inhibitor a right to hinder his intereſt from being hurt by deeds granted by the perſon inhibited; that is, it entitles him to get them ſet aſide, if he thinks it proper, *ex capite inhibitionis*.

In order to underſtand the preciſe method in which he can avail himſelf of his inhibition and get them ſet aſide, it is neceſſary to diſtinguiſh two different caſes. For it may be ſuppoſed either that there is, or that there is not a judicial competition between the creditors of the inhibited perſon about thoſe things, to which inhibition extends.

'Tis uſually in the firſt caſe that an inhibitor has occaſion to exerciſe his right, and to take the benefit of his inhibition. In competitions it commonly happens that there is not enough to ſatisfy the debts due to all the creditors of the inhibited perſon. Thoſe therefore are fortunate, who can, by their diligence, hinder others from drawing out of the common fund for paying them all. This his inhibition entitles the inhibitor to do. For in the competition he is entitled to oppoſe it to all the deeds againſt which it ſtrikes, and which are employed in order to affect the heritage of the inhibited. And he is entitled to do it without purchaſing a ſummons or bringing a formal action of reduction of them; for competitions imply actions of every kind, and every competitor is held to have actually brought in his own name, every proceſs which it is neceſſary for him to be ſuppoſed to have brought. Therefore the inhibitor is entitled, by founding on his inhibition, to get *every* deed, which is produced in the competition, and againſt which his inhibition ſtrikes, ſet aſide in competition with him. And it matters not, whether it

* It was otherwiſe in antient times, *St.* 16th *Dec.* 1680. *Hay.—Home, March* 1683, *King's advocate.—H.* 829. But this doctrine can be of little uſe now, that tenure by ward is aboliſhed: for it is ſeldom or never, that land can fall under recognition.

it be one relating directly to those things, over which the security acquired by the inhibition extends, or one relating to those, over which it does not extend. For the inhibition gives the inhibitor a right to get all the heritage of the inhibited person secured as a fund for paying him; all of it must be allowed to remain entire for his attachment; and he is entitled to hinder every deed, against which his inhibition strikes, from being employed in order to affect it.

But it is not in competitions alone, that the inhibitor is entitled and may have occasion to avail himself of his inhibition. For he has a right to get set aside every deed against which it strikes, and which relates to those things to which it extends. The proper way, in which he can get this done, is by raising a summons and suing an action of reduction. For except in competitions, a deed, which has been done, cannot be set aside without suing an action in order to get it reduced; it is not impeachable by way of exception (§ 565.), *St.* 23d *July* 1674, *Johnston.*

But it is not every deed which he is entitled thus to get set aside. For we must distinguish between such as relate directly to those things, to which inhibition extends, and such as relate directly to those, to which it extends not. 'Tis the former alone, which he is entitled to bring an action in order to get set aside; for they alone are hurtful to him. And it deserves to be remarked, that he is entitled to get them annulled, whether he is or is not immediately hurt by them. The law enquires not into that matter; it has respect to the inhibition alone, considers that it establishes a right in the inhibitor, and presumes him to be at least in danger of losing his money always till the debt, for securing which it was used, is actually paid. Till, therefore, it is paid either by the original debtor himself or by somebody for him, the inhibitor must prevail in the reduction of every deed, relating directly to those things to which inhibition extends. For if it is satisfied, he cannot prevail; because the ground of his inhibition is cleared, he has no interest, therefore he can have no right to get any deed set aside by means of his inhibition.

But he is not entitled to sue an action, in order to get set aside such as relate to things, to which inhibition does not extend; for they do not diminish his security, since they concern not the things over which it extends. Of course, he has no interest in suing a reduction of them. All, which he is either concerned or entitled to do, is to hinder them from being employed to affect the heritage of the inhibited person. As soon as this use is made of them, he is entitled to sue a reduction of them.

Hence it follows, that he is not so much as entitled to hinder them from being employed to attach those things, to which inhibition relates; for instance, from being made the foundation of an adjudication of them. He is not entitled to prevent one from *recovering* a decree: for it may be essential to the interest of him who is suing it, to recover one; and it is *jus tertii* to the inhibitor to allow it to be made, because he has it always in his power to hinder it from being employed to affect any of those things to which his security extends, and for this purpose to sue an action for getting it set aside.

From these principles several corollaries, useful for making the nature and the effects of this diligence understood, may be deduced: some of them it may not be improper to mention on this occasion.

§ 613. Inhibition, it has been said (§ 612.), gives the inhibitor a *right* to get those deeds, which offend against it, set aside; but it gives him no more. Therefore they are not *ipso jure* void; they are voidable only, or liable to be set aside. By consequence, till he exercises his right, and gets them actually avoided, they are as valid as they would have been; they produce all the same effects which they would have produced; and they give him, in whose favour they are granted, the same rights which they would have given him, in case he who granted them had not been inhibited. Thus a conveyance, by which a parcel of lands is made over by the inhibited person to another, divests him of the property

of

of it, and transfers it as effectually as it would have done, if he had not been inhibited. If the conveyance contains a procuratory of resignation and precept of seisin, the person, in whose favour it is made, may get himself infeft in the land either by surrendering it on his procuratory of resignation, and by obtaining a charter and seisin from the superior of the inhibited person, or by getting himself seised of it on his precept of seisin. And after having thus completed his title to the estate, he may do every thing which one, vested and seised of the property of a landed estate, can do; for he has a complete right to it. Consequently, he may exercise every act of property; he may either cultivate the land himself, or let it out to be cultivated by tenants; may sue actions, in order to get removed those tenants, whom he is entitled to cause to move; may demand payment of the rent from them, and if they will not pay it voluntarily, he may sue them for it, as it becomes his absolute property at each successive term, at which it becomes due. By consequence, it may be attached by his creditors, by any diligences by which the law makes rent liable to be attached, *H.* 634.—*N.* 77. He may impose charges on his estate if he pleases: and he may exert the most ample of all the powers of a proprietor, that is, he may convey his rights, his property, and his estate to others; and those others to whom he conveys them, will as soon as they have completed their titles, have all the same rights which he, who made the conveyance, had. All these rights he may continue to exercise, till the inhibitor shall think it proper to exercise *his* right, and get the deeds done by the inhibited person, and all that has followed on them, reduced; for as soon as the original deed on which all the rest are founded is set aside, the whole superstructure built on it must fall to the ground. Nay the estate may be affected by his creditors, if they please to sue an adjudication of it. 'Tis true, the adjudication will not convey the absolute property of it to the adjudger: for an adjudication cannot convey to the adjudger any thing, which belongs not to the person from whom it is adjudged. But the *absolute* property of the estate did not belong to him, from whom it was adjudged; because his right was liable to be set aside at the suit of the inhibitor *ex capite inhibitionis*, since it was originally derived from one who was inhibited, and therefore had not power to convey an indefeasible right to another. Consequently, the adjudication will give the adjudger the same rights, which other adjudgers have, only till the inhibitor gets all the rights, flowing from the inhibited person, annulled; and, besides, it will give him a right to acquire the property of the estate adjudged by continued and uninterrupted possession during the course of the positive prescription.

In the same manner, if the inhibited person owes a personal debt, his creditor may do diligence to get satisfaction for it, by adjudging the landed estate of his debtor: and the adjudication will produce the same effects, which it would have produced if the debtor had not been inhibited, *medio tempore* till the inhibitor shall use his right and make it effectual, by getting avoided the deeds done by the inhibited person, and the rights derived either originally or progressively from him, against which his inhibition strikes.

In one word, every deed done by an inhibited person is always considered as it were done by one who was not inhibited, till it is set aside, *i. e.* till the date of the decree of reduction; for till that time it is an effectual deed, *H.* 634.—*N.* 77.

§ 614. This right, which inhibition gives, of getting set aside every deed against which it strikes, is not personal to him, at whose suit the inhibition was issued. It descends 1) to his heirs; for every right, which one had, descends to them. 2) It is transmissible to his creditors; for it is a faculty which is competent to him, and may be profitable to them. Consequently, if it is necessary for their interest, *i. e.* if their debtor is insolvent, they may found upon it, in order to get the estate of the inhibited person made a fund of their payment. 3) It is transmissible by assignment to the voluntary assigns of the inhibitor; for every right, which one has, may be made over by him to another. But the assignment

muſt be ſpecial; for this faculty will be preſumed not to have been comprehended in any general aſſignment. But it cannot be exerciſed by any others; it cannot be profitable to any others; no others can found on it.

§ 615. This diligence, as has been ſhewn (§ 606.), muſt be founded on grounds which are ſpecial, and of a determinate extent. Therefore, when one exerciſes his right, and gets deeds by which his inhibition is contravened ſet aſide *ex capite inhibitionis*, the benefit of the decree of reduction accrues to thoſe ſpecial grounds or debts alone, on which the inhibition was iſſued; it ſerves to protect them alone. Conſequently, 'tis in competition with them alone, that the deeds, which have been ſet aſide, are held to be void; for they are held to be good againſt all others. They may enter into competition with them; they may be made the titles of law-ſuits; they may give complete rights, juſt as if they had not been reduced. For they are held to be valid and effectual in reſpect of every other deed, except thoſe on which the inhibition was uſed; in ſo much that the benefit of the reduction accrues not to other debts that may happen to be due, even to him who raiſed the inhibition, than thoſe ſpecial ones on which it proceeded; it is proper to them. So that he, to whom the debts ſecured by the inhibition are due, cannot, after they are ſatisfied or out of the field, ſay, that the deeds, which he hath got ſet aſide *ex capite inhibitionis*, are void. He cannot object nullity to them now, when they are contending not with debts ſecured by the inhibition, but with others which cannot lay claim to any benefit from it, *Du.* 26th *Jan.* 1636, *Lady Borthwick.—St.* 7th *Jan.* 1680, *Hay.*

§ 616. But this right which an inhibitor has to found on his inhibition, and to ſue for reduction *ex capite inhibitionis*, does not laſt for ever; it muſt be exerciſed before it is preſcribed. For every perſonal right, on which *document* is not taken within forty years, is loſt *non utendo*. Theſe forty years begin to run not from the date of the execution, publication, or regiſtration of the inhibition, but from the time at which the inhibition is contravened, *i. e.* a deed which affects the heritable eſtate, and at which the inhibition ſtrikes, is done, and is made ſo public that law muſt preſume him, who had right to get it ſet aſide, to have known it was granted. For till that time he is *non valens agere*, and ſo preſcription cannot run againſt him, *St.* 19th *Feb.* 1680, *Lutefoot.—N.* 32.

§ 617. Inhibition is intended for enſuring the inhibitor of recovering that, which is due to him. Of courſe, as ſoon as he gets payment, his debt is cleared, and his diligence can no longer be available to him.

Every debtor is entitled to diſcharge debts due by him, and to clear diligences iſſued againſt him. From hence it follows, that the original debtor, *i. e.* the perſon inhibited, may pay the debt ſecured by the inhibition, and may thereby clear both it and the diligence iſſued upon it. This he may do at any time after that, at which the creditor is bound to accept of payment, is paſt, provided he gives him timely notice of his reſolution to pay. And if his creditor had done no diligence in order to effectuate payment of the debt, the debtor will clear it by paying no more than he would have been bound to pay, in caſe inhibition had not been uſed; for no debtor is bound to pay for the anxiety of his creditor, and a creditor, who hath cauſed inhibition to be ſerved, has nothing but his own unneceſſary anxiety to blame for the coſts of the execution of this diligence.

'Tis otherwiſe in caſe the creditor hath been put to charge in doing diligence for effectuating payment: the debtor muſt, according to the common rules of law, refund thoſe charges, which his creditor has been neceſſitated to lay out in order to effectuate payment of the debt due to him; otherwiſe the creditor would not be fully paid.

But the inhibited perſon may be either not able or not willing to pay his debt; and the inhibitor may be obliged to uſe the right he has to get ſet aſide every deed at which his inhibition ſtrikes. In this caſe every one, in whoſe favour ſuch a deed has been made, is entitled to pay the whole debt due by the debtor, *i. e.* the whole ſum, principal, intereſt, and every thing which the original debtor would

would have been bound to pay at that point of time, at which this one offers to clear the debt. For a creditor is not bound, and cannot be forced to accept from any one a ſum leſs than that which his original debtor was obliged to pay him. Every one therefore, in whoſe favour a deed, at which the inhibition ſtrikes, was granted, has right to clear the inhibition by clearing the debt, which was the ground of it; for every one, who has a legal intereſt in doing it, can force a creditor to accept of payment of a debt due to him *. This right may be exerciſed at any time after the inhibition is raiſed, as well before as after the inhibitor has begun to ſue for reduction *ex capite inhibitionis*; and as ſoon as it is exerciſed, the inhibition is cleared, and the inhibitor is diveſted of every right which it gave him. Indeed he, who cleared the debt due by the inhibited perſon, has in ſome caſes a right to get from him, to whom he paid, an aſſignment not only to the original debt, and to the grounds, evidences, and inſtruments of it, but alſo to the inhibition, and to every other diligence which he had done, in order either to enſure or to effectuate payment, upon refunding the coſts of theſe diligences. This follows from the common principles of law: for one, who pays a debt due by another, has a right to get conveyed to him by the creditor, to whom he pays, not only the original debt itſelf, and the grounds, evidences, and inſtruments of it, but alſo all the diligences he had done in order to get payment; provided the granting the aſſignment be not to the hurt of the aſſignor. For all, which a debtor, or one who pays for him, is *ſtricto jure* entitled to demand, is an acquittance or diſcharge of the debt due by him; and the obligation to aſſign is founded on that natural one, under which every man lies, *præſtare innoxiam utilitatem*. Therefore he who pays, in caſe the aſſignment may be made *cum innoxia utilitate* of the aſſignor, has a right to get one *beneficio cedendarum actionum*, that he may be the better able to get himſelf reimburſed. But a diſpute can ſeldom ariſe upon this matter, becauſe he is not bound to pay, and may refuſe to do it, unleſs the creditor will agree to aſſign to him.

§ 618. Every creditor, as well one who hath as one who hath not uſed inhibition, may do diligence either againſt the eſtate or againſt the body of his debtor, in order to effectuate payment of his debt, or to get ſatisfaction made to him for it. For inhibition is a prohibitory diligence (§ 602. *ax.* 1.); the uſe, the intention, and the end of it is not to effectuate payment, but to ſecure a fund out of which it may be effectuated. But it would indeed be hard, if one were incapacitated, by having uſed it, from employing means to recover actual payment; that would be to make the diligence of the creditor become an abſolute diſcharge to the debtor. It muſt therefore be lawful to a creditor, who hath inhibited his debtor, to uſe every mean afforded him by law for recovering payment of his debt.

Thus he may, the inhibition notwithſtanding, recover an adjudication of the heritable eſtate of his debtor in the ſame manner and to the ſame effect, as he could have done, if he had not uſed inhibition. 1) He will get it adjudged to him for payment of the *ſame accumulated ſum*, for which he would have got it adjudged, in caſe he had not inhibited his debtor; for it ought not by any means to hurt the intereſt and the rights of a creditor, that he hath been ſo careful of them as to cauſe his debtor to be inhibited. Therefore 2) his adjudication muſt be redeemable for a ſum no leſs than that for which every ſimilar one is redeemable, *i. e.* the whole accumulated ſum, for payment and in ſecurity of which the eſtate is adjudged, and by which the adjudication would have been redeemable, in caſe inhibition had not been uſed. For a creditor, who hath inhibited his debtor, hath, if he cauſes his eſtate to be adjudged, over and beſides the rights ariſing to him from his inhibition, all thoſe which he would have acquired by his adjudication, in caſe he had not inhibited him, 6th *Jan.* 1742, *Corſan v. MacGowan.*—*Fa.* II. 122 †. For the ſame reaſon, 3) the *legal* of the adjudication

* See eſſay *Jus tertii, poſ.* 3.

† It was otherwiſe in antient times. For an adjudication obtained by one, who had inhibited his debtor, was found to be redeemable by payment of the principal ſum originally due, of the intereſt of it, and of the penalties alone; without any accumulations, or intereſts of the accumulated ſum, *N.* 48. *H.* 631.

cation cannot be longer than that of any other of the ſame kind; it muſt be redeemed within the ſame legal time, within which other adjudications of the ſame kind muſt be redeemed, and itſelf would have been redemable, if inhibition had not been uſed. It would indeed be hard, if the time, within which it was redeemable, was prolonged beyond the ordinary courſe of law. Conſequently, if it is not redeemed within that legal term, the property of the eſtate is irrevocably transferred to him, to whom it was adjudged; becauſe it ceaſes to be redeemable, as ſoon as the legal expires, *St.* 24th *Feb.* 1666, *Grant.*—8th *July* 1670, *Lady Lucy Hamilton.*

§ 619. Inhibition, it has been ſaid (§ 602. 618.), is a diligence *merely prohibitory*; it is not a mean, by which payment may be effectuated; for it gives not direct or immediate acceſs to the eſtate of the inhibited perſon. It is only a mean by which the way is cleared for getting acceſs to it; and a fund is ſecured, out of which payment may be effectuated. By conſequence, 1) it produces no change on the nature of the debt, on which it was iſſued; a debt, which was perſonal before the inhibition, remains perſonal after it. Therefore 2) the creditor, to whom it is due, and who hath ſued out inhibition, not only *may* (§. 618.), but if he wants to get payment of it, *muſt* uſe the common legal means, which creditors muſt employ in order to effectuate payment of their debts; that is, he muſt do diligence either againſt the body of his debtor by horning and caption, againſt his moveables by arreſtment and forthcoming, or horning and poinding, or againſt his heritage by adjudication.

From hence it is plain, 3) that the rank or preference, which a debt acquires by being ſecured by inhibition, muſt depend not on the inhibition, but on the diligence done in order to obtain it a preference, and to effectuate payment. It may be obliged to contend either with deeds againſt which its inhibition does not, or with thoſe againſt which it does ſtrike. Let us compare it with each of theſe, and mark the conſequences.

§ 620. Deeds, againſt which inhibition does not ſtrike, are not affected by it; and a debt, ſecured by it, is not affected by them. The comparative preferences, therefore, of it and of them muſt be governed by the common rules of law; for inhibition produces no ſort of change on the nature of the debt, on which it is uſed.

Conſequently, if the debt, on which inhibition is uſed, was originally and continues to be a perſonal one, all the debts which are ſecured by infeftment on the eſtate of the inhibited perſon, muſt be preferable to it. Hence, 1) if one has got an heritable bond containing a clauſe of infeftment, the debt, for which this bond is granted, muſt be preferable to the perſonal one on which the inhibition was uſed, provided ſeiſin be actually taken. 2) If one has got an infeftment in ſecurity of a debt due to him, this infeftment muſt make the debt ſecured by it, preferable to that on which the inhibition was uſed. 3) If one has got an infeftment of relief, in order to ſecure him of being relieved in caſe he ſhall be forced to pay a debt due by another, this infeftment makes the debt, in ſecurity of relief of which it was granted, preferable to that on which inhibition was uſed. 4) If one has got an infeftment of annual-rent, this infeftment gives the annual-rents ſecured by it a preference to the debt, on which inhibition is uſed; for every perſonal debt muſt be poſtponed to ſuch, as are made real charges on the eſtate of the inhibited perſon, by being ſecured by infeftment in it.

But debts at which the inhibition does not ſtrike, tho they be not ſecured by infeftment on the eſtate of the inhibited perſon, but be merely perſonal, may, notwithſtanding, come to be preferable to the debt ſecured by the inhibition; for diligence may be done on them in order to effectuate payment of them, and thoſe diligences, tho poſterior to the inhibition, will not be affected by it (§ 611.). Suppoſe therefore a creditor, at whoſe debt the inhibition does not ſtrike, to obtain an adjudication of the heritable eſtate of the inhibited perſon, this adjudication will give the debt, for payment and in ſecurity of which it is obtained,

tained, a preference to the debt on which the inhibition was uſed; provided it is either rendered effectual itſelf, *i. e.* provided either actual infeftment is taken on it, or a charge is given the ſuperior of the eſtate adjudged in order to obtain infeftment in it, or is within year and day of the firſt adjudication which is rendered effectual; and he to whom the debt, on which inhibition was uſed, is due, does not obtain an adjudication of the eſtate belonging to the common debtor, within year and day of the firſt effectual one. A preference is in this caſe eſtabliſhed to that firſt effectual one; the debt on which the inhibition was uſed, and the adjudication obtained for payment and in ſecurity of it, muſt be poſtponed to it; and the inhibitor will have no farther right than to the reverſion, or to redeem the adjudication itſelf by paying the whole ſum for which it is redeemable.

The preference eſtabliſhed in favour of the firſt effectual adjudication muſt, it is plain, extend and be communicated to all thoſe adjudications, which are obtained within year and day of it, and are not affected by the inhibition; becauſe all adjudications obtained within year and day of the firſt effectual one are, by the common rules of law, entitled to come in *pari paſſu* with it.

From hence it follows, that an adjudication of the heritable eſtate of the inhibited perſon, obtained for payment and in ſecurity of the debt on which inhibition was uſed, may not only be entitled to come in *pari paſſu* with other debts and adjudications at which the inhibition does not ſtrike, but be preferable to them all. It is entitled to come in *pari paſſu* with them, when it is obtained within year and day of the firſt effectual one; for every adjudication, obtained within year and day of the one which is firſt made effectual, is, as has been ſaid, entitled to come in *pari paſſu* with it. It is preferable to them all, if no adjudication is obtained within year and day of the time, at which it was obtained.

But it may acquire a preference not only to perſonal debts and to adjudications obtained for payment and in ſecurity of them, but alſo to real debts ſecured by infeftment; for an adjudication may be obtained for payment and in ſecurity of the debt on which inhibition was uſed, and infeftment may be taken on this adjudication before it is taken in order to ſecure the debt intended to be made a real charge on the eſtate. In this caſe, the infeftment taken on the adjudication recovered for the debt ſecured by inhibition muſt be preferable to the other, becauſe it is prior to it. The real creditor, who delayed to take infeftment, hath nothing but his own negligence to blame for being poſtponed to the adjudger. *Nam jura vigilantibus favent.*

From hence it it plain, how and by what rules the preferences of debts on which inhibition has been uſed, and of diligences done on them, and of thoſe debts and diligences at which the inhibition does not ſtrike, may be determined.

§ 621. It is not difficult upon theſe principles to ſettle the preference of debts on which inhibition has been uſed, and of deeds at which it ſtrikes. For *every* deed, at which the inhibition ſtrikes, is voidable; he, who has a right to ſue the reduction, may get them ſet aſide, and may himſelf do diligence againſt the heritable eſtate of the inhibited perſon by getting it adjudged to him; and his debt muſt thereby become preferable to their debts, and his diligence be preferable to their diligences. Therefore out of the common fund of payment his debt muſt be paid in the firſt place; and if any remainder is left, the debts, at which the inhibition ſtrikes, muſt debate their preferences among themſelves, and be ranked according to their ſeveral rights: it is plain, therefore, that the deficiency, if there is any, muſt fall on thoſe ranked in the laſt place; for the inhibition, as ſoon as it is cleared and is removed out of the way, cannot have any influence on the rights or preferences of the other debts, *Fa.* I. 160.—II. 126.

§ 622. It will be eaſy to apply theſe principles to more complicated caſes, and from them to ſee, how the preferences of a debt on which inhibition has been

uſed, and of the diligences done on it, of debts and diligences at which the inhibition does not ſtrike, and of debts and diligences at which it does ſtrike, may be determined. The rule is, the debts on which inhibition has been uſed, and the diligences done on them, muſt, in the firſt place, be compared with thoſe at which the inhibition does not ſtrike, and the preferences, which they have among themſelves, be ſettled in the ſame way and by the ſame rules, as they would have been, in caſe none of the debts and diligences, at which the inhibition ſtrikes, were in the field. No regard is had to thoſe at which the inhibition ſtrikes, becauſe there can be no competition between them and thoſe ſecured by the inhibition, ſince they are voidable at the ſuit of the inhibitor.

Thus, if there is a common fund which is not able to clear all the debts contending about it, the rights and the preferences of thoſe on which inhibition has been uſed, and of the diligences done on them, and of thoſe debts and diligences at which the inhibition does not ſtrike, muſt be determined; the ſums, which each of theſe creditors are entitled to draw out of the common fund, muſt be aſcertained; and every thing, relating to the competition between them, ſettled juſt as if the deeds, at which the inhibition ſtrikes, had never exiſted. For the debts on which inhibition has been uſed, and the diligences done on them, are entitled to have the ſame preference which they would have been entitled to have, and to draw the ſame ſums which they would have been entitled to draw, in caſe the deeds at which the inhibition ſtrikes had never been granted; becauſe theſe can never hurt thoſe ſecured by it, ſince they are all liable to be ſet aſide *ex capite* of the inhibition. In this way the ſum, which the debt ſecured by the inhibition is entitled to draw, is eaſily inveſtigated.

After the preferences of thoſe debts on which the inhibition was uſed, and of thoſe at which it does not ſtrike, are determined; their proper places are aſſigned to each of them; the proportions, according to which each of them is entitled to draw, are fixed; and the particular ſums which each of them would be entitled to draw, if the deeds at which the inhibition ſtrikes had never exiſted, are inveſtigated; then all the debts and diligences which are contending, not only thoſe, at which the inhibition does not ſtrike, and thoſe at which it does ſtrike, but thoſe alſo which are ſecured by it, muſt be compared together; and the rights and preferences of each of them be determined, juſt as if inhibition had been uſed on none of them. For the inhibition is profitable to him alone, to whom the debt on which it was uſed is due; it is not either profitable or prejudicial to any others; ſo the rights of all the others muſt be among themſelves the ſame, which they would have been, if thoſe debts, on which the inhibition was uſed, had not been ſecured by it.

After the rank, which every one of *all* the creditors, when they are all compared together, is entitled to take, is fixed; and the proportions, according to which each of them is entitled to draw, are determined; it is an eaſy matter to inveſtigate the particular ſums, which each of them is, in this ſituation, entitled to get. Now the ſum, which falls to the ſhare of the debts ſecured by inhibition, in this caſe in which all the debts indiſcriminately are compared together, may happen to be leſs than that which it is really entitled to draw, *i. e.* than that which was firſt inveſtigated, when the deeds at which the inhibition ſtrikes were held to have never exiſted, were neglected, and were therefore not taken into the computation; for this laſt is the ſum, which it is really entitled to draw. The difference of theſe two ſums is the gain, which the debt ſecured by the inhibition makes by its diligence. This gain is proper to itſelf; it belongs to itſelf alone; it is not obliged to communicate it to any other: for it ariſes to it from a right, which is proper to itſelf alone, and which no other creditor is entitled to have communicated to him, ſince the inhibition is not profitable to any other than that debt on which it was uſed (§ 615.). Therefore thoſe other creditors, who are entitled to come in *pari paſſu* with that debt on which inhibition was uſed, are not however entitled to come in *pari paſſu* with it for an equal ſhare of this gain;

gain; indeed they cannot be entitled to any ſhare of it, as it is gain made by the inhibition alone. Conſequently, it muſt belong to him alone, who has benefit by the diligence: but no other than he, to whom the debt ſecured by the inhibition is due, is entitled to make any benefit by it. The only thing, which he is bound to communicate with thoſe entitled to come in *pari paſſu* with him, is that leſſer ſum which falls to his ſhare, when *all* the contending debts indiſcriminately are compared together, and taken into the computation.

But the inhibition is hurtful to thoſe deeds alone againſt which it ſtrikes; therefore this difference, or gain which the debt ſecured by the inhibition makes by it, muſt be made to fall on thoſe deeds alone, at which it ſtrikes. Of courſe the debt, at which the inhibition does not ſtrike, muſt draw as much as it would have drawn, if the debt ſecured by it had not made this gain, or had not been ſecured by inhibition; for this is the ſhare, that the debt at which the inhibition does not ſtrike is really entitled to draw, ſince law does not allow it either to gain or to loſe by the inhibition. But it would gain, if it were to draw more; and it would loſe, if it were to draw leſs. The remainder which remains after the ſum of the quantity which the debt ſecured by the inhibition, and of that quantity which the debt at which the inhibition does not ſtrike is really entitled to draw, is deducted from the common fund of payment; this remainder is the ſhare of the debt, at which the inhibition ſtrikes.

Perhaps, all this may be more plain by being illuſtrated and expreſſed in *Algebraical* terms. Call the common fund, out of which all the creditors are to be paid, *a*. Call the ſum, which falls to the ſhare of the debt ſecured by the inhibition, when the deeds at which the inhibition ſtrikes are neglected, and all the other creditors are ranked, their preferences are determined, and the preciſe ſums each of them is entitled to draw are inveſtigated, juſt as if thoſe deeds, at which the inhibition ſtrikes, had never exiſted; call this ſum x. Call the ſum which falls to the ſhare of the debt ſecured by inhibition, when *all* the debts, as well thoſe at which the inhibition does ſtrike, as thoſe at which it does not ſtrike, and thoſe which are ſecured by it, are taken into the computation; call this ſum y. Then x is the ſum, which the debt ſecured by the inhibition is really entitled to draw; and $x-y$ is the gain which it makes by its inhibition: $x-y$, therefore, is gain, which belongs to itſelf alone, and which it is not obliged to communicate to any others, even to ſuch, if there are any ſuch, as are entitled to come in *pari paſſu* with it. The quantity, which alone it is bound to communicate with thoſe entitled to come in *pari paſſu* with it, is repreſented by y. Call the ſum, which falls to the ſhare of the debt at which the inhibition does not ſtrike, when *all* the creditors indiſcriminately are taken into the computation; call this ſum z. Then $a-x-z$ will repreſent the ſum which the debt, at which the inhibition does ſtrike, is really entitled to draw: and becauſe $x-y$ muſt be ſo proportioned that the debt, at which the inhibition does not ſtrike, may draw z, the ſum it is really entitled to draw, $a-y-z$ is the ſum to which it would be entitled, if the inhibition had not ſtruck at it, when *all* the debts are taken into the computation. Now x being the ſum, which the debt ſecured by the inhibition is entitled really to draw, it is not $a-y-z$, but $a-x-z$, which is the ſum that the debt, at which the inhibition ſtrikes, is entitled really to draw: for $x-y$, the gain which the inhibitor makes by his inhibition, muſt be deducted from it. So the remainder, $a-x-z$, is the real quantity that falls to the ſhare of this debt, at which the inhibition ſtrikes. This rule is general, and may be applied to every ſimilar caſe, in which debts ſecured by inhibition occur *.

From

* I always uſe the ſingular number, and ſpeak only of one debt, at which the inhibition does not ſtrike. But it muſt be carefully attended to, that this one debt is put for all thoſe, at which it does not ſtrike; for it cannot alter the argument whether we ſuppoſe that there is only one, or that there are more debts, at which the inhibition does not ſtrike, ſince the inhibition can have no ſort of effect either on the preferences of thoſe debts among themſelves, or on the quantities they are bound to communicate to one another. No doubt, if one debt at which the inhibition does not ſtrike, was bound to communicate any quantity to another at which it does not ſtrike, that quantity it would be bound to communicate to it, tho it ſhould be equal to the whole quantity which it would have been entitled to draw, if the debt ſecured by inhibition had not been ſecured by it.

From hence it is plain that debts, at which the inhibition ſtrikes, may happen to be entitled to draw ſomething out of the common fund, at the ſame time that thoſe, on which it is uſed, may not be entitled to draw any thing. This may at firſt ſight appear to be a paradox; it is however a very ſimple one, and may be proved by a very obvious example. Suppoſe an adjudication to be obtained on a debt at which the inhibition does not ſtrike, and to be firſt made effectual by actual infeftment; ſuppoſe alſo ſeveral adjudications to be obtained for debts at which the inhibition does ſtrike, within year and day of the firſt effectual one. Suppoſe alſo that the debt, for which the firſt adjudication is obtained, or, which is the ſame thing, the total accumulated ſum with which it is redeemable, amounts to more than the value of the eſtate adjudged, ſo that nobody will chuſe to redeem it; and ſuppoſe that an adjudication of the ſame eſtate is obtained for the debt, on which the inhibition is uſed, but not within year and day of the firſt effectual one. 'Tis plain from this ſuppoſition, that the adjudication obtained for the debt, on which inhibition was uſed, will draw nothing; becauſe it is not within year and day of the firſt effectual one. By conſequence it cannot come in *pari paſſu* with it. It has therefore no more than the hope of the reverſion, or the right of redemption. But reverſion there can be none, becauſe the debt, on which the firſt effectual adjudication is obtained, does more than exhauſt the total value of the eſtate adjudged, and will never be ſatisfied by it. The right of redemption nobody will chuſe to exerciſe, becauſe the ſum, for which the adjudication is redeemable, is more than that value. So nothing can poſſibly fall to the ſhare of the debt, on which inhibition was uſed. The benefit of the firſt effectual adjudication muſt belong to itſelf; but not to itſelf alone; for *ex hypotheſi* there are other adjudications, obtained within year and day of it. Theſe are therefore entitled to come in *pari paſſu* with it, and to draw a proportionable part of the value of the eſtate adjudged: for the inhibition, as it cannot hurt, ought not to be profitable to thoſe deeds, at which it does not ſtrike; and when itſelf cannot draw any thing, is not entitled to come in for any ſhare, it ought not to affect the preferences of other debts, deeds or diligences among themſelves. So that this general rule may be laid down, that in all caſes in which a debt or diligence, at which the inhibition does not ſtrike, and with which the debt on which inhibition was uſed, and the diligence done on it, are not entitled to come in *pari paſſu*, exhauſts the whole fund of payment, nothing can fall to the ſhare of that debt, on which inhibition was uſed, *D.* I. 184. 15th *Feb.* 1698, *Miln of Caridden.—Da.* 89.

By a ſimilar method of reaſoning we may ſee, that a debt, on which inhibition has been uſed, may happen to draw full payment at the ſame time that one at which it does not ſtrike, and which is preferable to it, may happen to draw no more than a part of the money due upon it. For alter the former hypotheſis only a very little, and ſuppoſe the firſt effectual adjudication to be obtained for a very ſmall debt, and after being ſatisfied, to leave a remainder of the total value of the eſtate adjudged more than ſufficient for diſcharging the debt, on which the inhibition was uſed. In this caſe it is evident, that the debt, on which the inhibition was uſed, will be fully ſatisfied; for there is no more than one debt and one adjudication preferable to it, for diſcharging which the value of the eſtate adjudged is ſo much more than ſufficient as to leave a remainder ſufficient for diſcharging that, on which inhibition was uſed. But the firſt adjudication is not profitable to him alone, at whoſe ſuit it was obtained; for *ex hypotheſi* there are ſeveral other adjudications entitled to come in *pari paſſu* with it, becauſe they were obtained within year and day of it. So the whole fund, which would have fallen to have been divided proportionally between that debt at which the inhibition does not ſtrike and thoſe at which it does ſtrike, muſt be divided between them ſo that the debt, againſt which the inhibition does not ſtrike, may draw the ſame ſhare it would have drawn, if the debt ſecured by the inhibition had not been ſecured by it, and had therefore drawn nothing. Thus he by whom the

the firſt effectual adjudication was obtained, may happen to draw a very ſmall matter for his debt, tho the inhibition does not ſtrike at it, in caſe the other adjudications, entitled to come in *pari paſſu* with his, are obtained for debts amounting to more than the value of the eſtate adjudged.

If it may happen either that nothing may fall to the ſhare of the debt on which inhibition is uſed, at the ſame time that ſomething may fall to that of thoſe debts at which it ſtrikes, or that the debt on which inhibition is uſed may be fully paid, at the ſame time that little may fall to the ſhare of thoſe at which it does not ſtrike, it is obvious that caſes may happen, in which every one of the three different ſorts of creditors may draw ſomething, and not one of them, however, get full payment of the debt due to him. This muſt be the caſe, when the debts and diligences at which the inhibition does not ſtrike, and thoſe ſecured by it, are entitled to come in *pari paſſu* together, and the common fund of payment is ſo ſmall as to be unable to diſcharge them. In caſe the debts, at which the inhibition ſtrikes, are entitled to come in *pari paſſu* with thoſe at which it does not ſtrike, the common fund of payment, it is plain, is not ſufficient for diſcharging the whole debts entitled to come in *pari paſſu* with one another; but every order of them will get ſomething, tho ſome of them may be affected by the inhibition.

Laſtly, It may happen, that the debts on which inhibition has been uſed, and thoſe at which it ſtrikes, may be either totally or partially diſcharged at the ſame time that debts, at which it does not ſtrike, may draw nothing. Suppoſe a voluntary infeftment for ſecuring a debt to be granted by one after he is inhibited; ſuppoſe an adjudication to be obtained on the debt on which inhibition was uſed, and to be made effectual; ſuppoſe another adjudication to be obtained for a debt at which the inhibition does not ſtrike, after year and day are paſt from the time at which the firſt adjudication was made effectual; ſuppoſe the value of the eſtate adjudged to be no more than ſufficient for diſcharging both the debt on which inhibition was uſed, and that ſecured by the voluntary infeftment. It is plain, that in this caſe nothing can fall to the debt at which the inhibition does not ſtrike, at the ſame time that both the debt on which it was uſed, and that at which it does ſtrike, will be fully diſcharged; for the adjudication, obtained on the debt ſecured by the inhibition, is preferable to that obtained on the debt at which it does not ſtrike, becauſe *ex hypotheſi* it was made effectual more than year and day before the other was obtained. It is alſo preferable to the voluntary infeftment, becauſe the infeftment was poſterior to the inhibition, and of courſe is voidable. So the debt, on which inhibition was uſed, muſt draw in the ſame manner as it would have drawn, if neither the one nor the other had been in the field, or had ever exiſted; and as the fund of payment is more than ſufficient for ſatisfying it alone, 'tis plain that it muſt be fully cleared. After it is cleared, and the voluntary infeftment and the other adjudication are left alone to diſpute the field between themſelves, it is plain, that the voluntary infeftment muſt be preferable to the adjudication, becauſe it is prior to it. Conſequently it muſt be fully diſcharged, ſince there is fund ſufficient for diſcharging it alſo. But the laſt adjudication, tho obtained on a debt at which the inhibition does not ſtrike, can draw nothing; for nothing remains to it, the whole fund being *ex hypotheſi* already exhauſted.

Alter the ſuppoſition only ſo far as to ſuppoſe the two adjudications to be within year and day of one another, and therefore to be entitled to come in *pari paſſu*. In this caſe they muſt be ranked together; and that one obtained for the debt, on which inhibition was uſed, muſt draw the ſame ſum it would have been entitled to draw, if the voluntary infeftment had not been on the field. If this ſum is equal to the amount of the debt, it will be wholly cleared; if it is leſs, only a part of it will be paid. And after the adjudication obtained for the debt, on which inhibition was uſed, has drawn its ſhare, the remainder is the common fund of payment, about which the voluntary infeftment and the other adjudication

muſt contend. But *ex hypotheſi* the voluntary infeftment is prior, by conſequence it is preferable to this other adjudication. Of courſe, if this remainder is ſufficient for diſcharging the whole debt ſecured by the voluntary infeftment, this debt muſt be *primo loco* ſatisfied, and the remainder, if there is any, be left to the adjudication. But no remainder may be left after the debt, ſecured by the voluntary infeftment, is diſcharged; and nothing will, becauſe there is nothing which can in this caſe fall to the ſhare of the adjudication, but that which it is entitled to draw by being entitled to come in *pari paſſu* with the firſt effectual adjudication, for the ſame extent to which it would have been entitled, in caſe an inhibition had not been on the field. For the inhibition ſtrikes not againſt it, and has no effect upon it.

It may be thought, that in this caſe the ſecond adjudger may redeem the firſt adjudication, and by getting an aſſignment to the debt, diligence, and inhibition, may exclude the voluntary infeftment. No doubt he may: but this will not alter the caſe; it will not either diminiſh or increaſe the fund of payment, and will not entitle any one of the creditors to draw either more or leſs than he would have been entitled to draw, if redemption had not been made. For every one, who redeems an adjudication, muſt redeem with money taken not out of the common fund of payment, but out of his own private pocket. Suppoſe therefore he did redeem it, and get an aſſignment to the debt, diligence, and inhibition; the only effect, which this redemption and aſſignment could have, would be to ſubſtitute him who had redeemed the adjudication, into the place of him from whom he had redeemed it, and to entitle him to draw the ſame ſum which the creditor, whoſe debt was ſecured by the inhibition, and from whom he had redeemed the adjudication, would himſelf have been entitled to draw. So he can gain nothing in this way; for he, as it were, gives out of one hand, what he receives with another. But if a ſum is drawn out of a common fund, it is no matter who draws it, whether it be he who was originally entitled to draw it, or another ſubſtituted into his place. The common fund will be as much diminiſhed, and the ſame remainder will be left in the one as in the other caſe. For the perſon, whoſe debt is ſecured by the inhibition, will draw nothing out of the common fund, becauſe the debt due to him is already diſcharged by the one who redeemed the adjudication. Again, the aſſignment of the debt, adjudication, and inhibition, will not ſecure to the aſſignee any more than was ſecured by the inhibition and adjudication aſſigned. It will not ſecure to him any debt, which was due to himſelf, and was not ſecured by the inhibition. *Quoad* theſe, therefore, he muſt debate in the ſame way in which he would have been bound to debate, he muſt be preferred to the ſame rank to which he would have been entitled, and will not be entitled to an higher one than he would have been entitled to, if the adjudication and inhibition had not been aſſigned to him. So this aſſignment will not alter the rights or the preferences of the contending debts. It will not give any preference to the debt on which the ſecond adjudication was led; for the voluntary infeftment, tho it is voidable at the inſtance of the debt ſecured by the inhibition, is, notwithſtanding, valid and effectual againſt all other debts, deeds, and diligences, and is entitled to diſpute or to enter into competition with them.

All theſe concluſions depend on this ſimple principle, that inhibition is profitable to thoſe debts alone, which are ſecured by it; that it cannot be hurtful to any others, than thoſe at which it ſtrikes; that the hurt, which it either does or is entitled to do to theſe, is profitable to thoſe debts alone, which are ſecured by it; that deeds which are either voidable or ſet aſide *ex capite inhibitionis*, are as valid and as effectual againſt all others that are not ſecured by inhibition, as they would have been, if inhibition had not been uſed; and that inhibition cannot vary the nature, rights, or preferences of others among themſelves, *Da.* 89.—*Fo. F.* 20th *Jan.* 1709, *Creditors of Langton.*—*D.* I. 184. *Feb.* 1730, *Campbell.*

A

SYSTEM

OF THE

PRINCIPLES of the LAW of *SCOTLAND.*

PART I.

BOOK VII.

TITLE I.

Of Reſtitution.

§ 623. AN inſtance of the difficulty, which lawyers find in giving a connected arrangement to their titles, occurs in this book. In the foregoing ones we have treated of thoſe obligations, under which one is brought to *reſtore* the property of another to its owner, and to *repair* the loſs which he has ſuſtained, by having accepted of an office which implies them. But people may otherwiſe be brought under theſe obligations. Therefore the three following books treat of ſome other caſes, in which men are brought under them.

One, who happens by accident to get poſſeſſion of a thing belonging to another, or is not entitled to retain it, muſt be bound to reſtore it to its rightful owner. Therefore we ſhall treat *firſt* of ſome caſes, in which one is bound to reſtore to another, *becauſe* he *has no right* to keep that of which he hath got poſſeſſion.

One, who does ſervice to another, ought not to be allowed to loſe by his goodneſs; he may have been out of pocket by doing it, and muſt be entitled to be re-imburſed. Therefore we ſhall treat next of ſome of thoſe caſes, in which one is bound to *make reſtitution*, or to *recompenſe* another for *good* done to him.

One is not entitled to *deprive* another of his property, to make him *loſe* it, or to do *damage* to it; and brings himſelf by doing ſo under an obligation to *repair* the *damage* done by him. Therefore we ſhall treat *thirdly* of ſome of thoſe caſes, in which one is bound to *make reſtitution* or to *repair damage*, *becauſe* he has done *ill* to another.

Many

Many of the principles which lawyers diſcover for connecting the ſeveral parts of their ſyſtems, it muſt be confeſſed, are little better than plays upon words; and this one, which has been explained, has much the appearance of one of theſe. Lord STAIR and others, who have written on the Law of Scotland, connect the following titles in a different manner. They divide obligations into thoſe which they call *obediential*, and thoſe which they ſay ariſe from *engagement*. The obediential are thoſe natural ones, which are brought on mankind without their own poſitive conſent, and which they are bound to fulfil, becauſe it is the will of GOD whom it is their duty to *obey*, that they ſhould fulfil them. But there are others, which they bring intentionally on themſelves by binding themſelves expreſsly to do certain particular things; theſe are called *conventional* obligations, and are ſaid to proceed from engagement. Hence, after having treated of the duties of huſband and wife, parent and child, tutor and pupil; they proceed immediately to thoſe of making *reſtitution*, of *recompenſing* others, and of *repairing damage*, which as well as the others they refer to the former claſs.

§ 624. By the obligation of making reſtitution is meant that obligation, under which one lies to reſtore the property of another to its right owner. Men may be brought under it in ſeveral different caſes. For one may acquire the poſſeſſion of the property of another either in a criminal or in a lawful way. In caſe one obtains it by his crimes, he is ſubjected by them to make reſtitution; for the owner intends not to make over his property to him, and retains the right of vindicating it, if it can be recovered, or, if it cannot, of getting reparation of the damage which he has ſuſtained. In caſe one gets it in a lawful way, he either may get it by mere accident, or it may be voluntarily delivered to him by the owner. In caſe it is delivered voluntarily to him, an expreſs ſtipulation concerning reſtitution either may or may not be made by him. One who binds himſelf, like a depoſitary, by an expreſs agreement to reſtore, enters into a contract; and the obligation, under which he brings himſelf expreſsly to make reſtitution, falls to be conſidered among conventional ones. 'Tis to thoſe caſes, in which the poſſeſſion is acquired either by mere accident, without the will of the owner, or at leaſt, without the intervention of an expreſs ſtipulation of reſtitution, and in which the obligation to make it ariſes from the nature and the circumſtances of the thing, that this book is aſſigned. We ſhall, after having derived the obligation from its principles, 1) give ſome inſtances of it in thoſe caſes in which the poſſeſſion is acquired without the will of the owner, by mere accident; and 2) proceed to conſider ſome, in which it is made over by him, and the obligation is not expreſſed, but implied in the circumſtances of the tranſaction.

§ 625. Property is ſomething ſo permanent that one, who has once had it, cannot loſe it otherwiſe than by ſome act either lawful or unlawful of his own. *Id, quod noſtrum eſt, ſine facto noſtro ad alium transferri non poteſt, l.* 11. *ff. d. r. j.* *. By conſequence, one does not, by loſing poſſeſſion, immediately loſe his property; he retains the latter, after another has got the former, no matter whether *titulo oneroſo* or *titulo lucrativo*, for a valuable conſideration or as the language of Scotch juriſprudence emphatically expreſſes it, for an *onerous* cauſe, or by gift, for that which is called a *gratuitous* one; *bona fide* or *mala fide*; whether he be the firſt who acquired it after it was loſt by the owner, or it has come to him through ſeveral intermediate hands. The owner has nothing to do with theſe things; he has no concern in them; his right depends not upon them; and it is not diminiſhed by them, provided he has not himſelf done any thing by which the property is transferred. This is ſo true, that one not only retains but may exerciſe every right which property gives, as well after he has loſt poſſeſſion, as while he retains it; provided it be capable of being exerciſed by one who has not the real poſſeſſion. Hence, if he has happened to loſe it, he has a right to claim the poſſeſſion from any one, who has acquired it; for the *facultas vindicandi* is a neceſſary effect of property.

Correſponding

* See GOTHOFREDI comment. ad l. 11. d. r. j.

Correſponding to this right, which every proprietor has to recover the poſſeſſion of any thing belonging to him, is the duty or obligation of reſtitution: for every one, who happens to get poſſeſſion of any thing belonging to another, is bound to reſtore it to its true owner, and that, whether he has acquired it for a valuable conſideration or by gift, *bona* or *mala fide;* for no body, be the title, on which he acquires poſſeſſion, what it will, has a right to any thing which belongs to another. By conſequence, he is not entitled to retain it, but is bound to reſtore it to him who has a right to have it; provided he has not acquired the poſſeſſion in a way, which gives him a good title to keep it: for one, who has a legal right to retain the poſſeſſion of a thing belonging to another, a tenant for inſtance, cannot be compelled to quit it even to the owner.

From hence it follows that one, who has by mere accident acquired the poſſeſſion of any thing belonging to another, is bound to reſtore it to the true owner: and the ſame doctrine holds in all thoſe caſes, in which one gets it delivered voluntarily from the owner, but the obligation to an eventual reſtitution is *implied* in the nature of the tranſaction and the circumſtances attending it. In the following titles we ſhall give ſome inſtances of the obligation both in the one and in the other caſe.

TITLE II.

Of Strays.

§ 626. ONE may *happen* to get poſſeſſion either of living creatures or of other movables belonging to others, either at land or by ſea, during peace or during war.

The animal is the moſt noble part of the creation (§ 42.); the firſt example, therefore, of the obligation to reſtitution we ſhall give in *ſtrays*, that is, '*all* 'ſuch beaſts, as have wandered from their owners, and from the places in which 'they uſe to feed;' for the name is general, and may be applied to *all* animals. 'Tis true, horſes, cows, oxen, bulls, ſheep, ſwine, and goats are thoſe, which are commonly poſſeſſed by the people of this country; becauſe they are both moſt valuable and moſt uſeful. Therefore the name of *ſtrays* has been generally confined to them. But this hinders it not from being applicable to other beaſts which have been appropriated, and to fowls, either tame or wild: and in this its extenſive ſenſe the word ſhall be uſed in this title.

The obligation, under which one lies with reſpect to ſtrays, may be conſidered in two points of light: it may be conſidered 1) what one, who happens to *ſee* cattle or other beaſts which he ſuſpects to be ſtraying, is bound to do; 2) what one, who has *taken* ſtrayed cattle into his *cuſtody*, is bound to do with them.

§ 627. I. Humanity requires, that one who *ſees* cattle ſtraying ſhould, as ſoon as he begins to ſuſpect them to have ſtrayed, if he can afford to do it without hurting himſelf, take them into his own cuſtody, prevent them from ſtraying farther away, feed them, and take care of them, till the owner comes to take them home, DEUT. *ch.* xxii. *v.* 1. 2. 3. For this is an *innoxia utilitas;* a duty, which is due from every man to every man. It ſeems however to be one of thoſe obligations, which are called *merely natural*, and ſeems not to be enforced by any poſitive title of the Law of Scotland. One, who ſees his neighbour's ox ſtraying, is not *civilly* bound to take any notice of it; he may let it continue to ſtray, and will not, by his inhumanity, be made liable to any proſecution at the ſuit either of the owner of the beaſt, or of any other.

§ 628. II. One, who *has taken ſtraying cattle into his cuſtody*, may be ſuppoſed either to know or not to know who is the owner of them. In caſe he knows to whom they belong, he ought, as ſoon as conveniently he can, to give him notice, that he has taken the cattle into his cuſtody, and will deliver them to him, as ſoon as he pleaſes to ſend for them. In the mean time, he muſt take care of them, and give them meat. But he, who has found them, is not by any means bound to ſend them to the owner. However, if he is ſo good as to ſend them to him, he will be entitled to get repaid thoſe expences, which he was obliged to lay out in ſending them home, as well as all the other reaſonable charges, which he has laid out in taking care of them, *l.* 1. § 3. *ff. de per. et com.*

But the owner is not obliged to wait, till notice be *ſent* him; he may, as ſoon as he gets notice of the place in which his cattle are, ſend for them, and get them back; and he, in whoſe cuſtody they are, is bound to deliver them up, provided the owner refunds to him all the expences, which he has been obliged to lay out in taking care of them: for he has a right to *retain* them, till theſe are repaid.

But the owner may neglect to ſend for them within a reaſonable time, after notice is ſent him of the place where his cattle are; and he, in whoſe cuſtody they are, is not bound to keep them for ever; *infinitam cuſtodiam nemo præſtare tenetur*. It is his duty therefore in this caſe to notify to the owner, that if he ſhall not ſend for them before a certain reaſonable time, they will be delivered to the ſheriff, or to him to whom eſcheats belong, that they may be ſold to pay the charges of maintaining, keeping, *&c.* of them, *l.* 1. § 3. 4. *l.* 4. § 2. *l.* 5. *ff. de per. et com. rei vendit.* for he, who finds them, is not entitled to keep them to himſelf; ſince every thing, which once had an owner, but is relinquiſhed by him, eſcheats to the Crown (§ 140.), and therefore belongs to thoſe to whom the Crown has granted right to eſcheats.

§ 629. Straying beaſts, the owners of which are not known, are properly ſaid in the juridical language of Scotland to be *waif**. One who has taken poſſeſſion of them, has no title to keep them to himſelf; for they can never fall to him, but eſcheat to the Crown (§ 140. 628.). Therefore he is bound to notify either to the ſheriff or to ſome other magiſtrate, that he has found them. This notification he ought to make, as ſoon as conveniently he can; for a long delay might afford juſt cauſe to ſuſpect him of having an intention to keep them to himſelf. Our hiſtorian BOES † tells us, that by one of the laws of KENNETH MACALPIN he was declared to be guilty of theft, who kept them for three days without diſcovering them; and CRAIG ‡ ſays one ought to be *puniſhed*, who keeps them for ſeven. The ſheriff does not immediately acquire the property of them; they do not inſtantly eſcheat; for it would be hard to make one loſe the property of his cattle, becauſe they had happened to ſtray from him. For this reaſon law orders inquiry to be made after the owner, who ought to have them, if he can be found. The ſheriff is therefore bound to order advertiſement of them to be made publicly to the people, by cauſing them to be proclaimed either at the church or at the market ‖, ſeveral times, on Sundays, or on market-days. Theſe proclamations are made, that the owner may, if he can, be found. He does not, however, loſe his property, tho he ſhould not appear immediately after the proclamation; the law is not ſo ſhort with him, but allows him a reaſonable time to appear. The time which it allows him is a year and day from that, on which public advertiſement was made of the ſtrayed cattle. At any time before this year and day are expired, the owner may appear, and claim his cattle; and he who has them in his poſſeſſion muſt reſtore them, provided he is repaid the expences,

* See SKENE *de verborum ſignificatione*, *voce* Waife.
† *lib.* 10. *c.* 12. ‡ *l.* 1. *D.* 16. § 43.
‖ 'Tis uſual at preſent to do this by advertiſements in the news-papers.

expences, which he has been obliged to lay out in taking care of them, and in cauſing them to be proclaimed; for he has a right to *retain* them, and cannot be forced to deliver them up even to the owner, till he is reimburſed of theſe. But if the owner does not appear, and does not claim them within that time, law preſumes him to have *relinquiſhed* them; for it preſumes *præſumptione juris et de jure*, that he might have eaſily in that time diſcovered, if he had been at any pains to inquire, where his cattle were. Holding him therefore to know where they are, and finding him neglecting to claim them, law preſumes that *he* hath *relinquiſhed* them. But relinquiſhed by him, they muſt of courſe eſcheat to the Crown, *Q. A. c.* 48. § 14. and muſt become the abſolute property of him to whom eſcheats of that kind belong; for the owner, tho he ſhould afterwards appear and claim them, will have no claim either to the cattle themſelves, or to the value of them, *Q. A. c.* 48. § 14. It muſt be remarked, that he to whom they eſcheat, muſt pay to him who found them, the expences which he was obliged to lay out on taking care of them, while they were in his poſſeſſion; and for this purpoſe the poſſeſſor has a right to *retain* them, till his expences are reimburſed; for one may have a right to retain them, who has not a hypothec upon them, *arg. R. M. l.* 3. *c.* 3. § 2. 3.

From hence it is plain, that he who happens to find them, if he does not diſcover them, but conceals them and keeps them to himſelf, is guilty of theft; for he ſeizes the property of another, by ſtealth, in a clandeſtine way, *lucri faciendi cauſa*. The cattle, he knows, do not belong to himſelf; and he has no right to them, whoever has; conſequently he has committed a crime, for which he is as much liable to be proſecuted criminally, as he would have been, if he had ſtolen them out of the ſtable of the owner. Indeed there ſeems to be little difference between the one caſe and the other; the definition of theft applies equally to them both. For in the one as well as the other caſe, we have 1) the *contrectatio fraudulosa*, 2) *rei alienæ*, 3) *lucri faciendi cauſa facta*, all the requiſites of theft. Accordingly we find this crime expreſsly defined to be theft both in our own, *Q. A. c.* 48. § 14.—*mod. ten. cur. c.* 63.—SKENE *de verb. ſign. voce* Waife, and in the Roman law, *l.* 43. § 4. *ff. de furt.*

The principles, which have been explained, are applicable to all beaſts, wild and tamed as well as domeſtic ones; provided they have once become the property of ſomebody. 'Tis true, the Roman lawyers held wild beaſts to be *res nullius*; therefore *cedebant occupanti*; ſo that one loſt the property the moment he loſt poſſeſſion of them, *l.* 1. § 1. *l.* 2. 3. 5. *p.* § 1. *l.* 55. *ff.* § 12. 13. *J. de acq. rer. dom.* *Tamed* ones, being *naturally* wild, continued to be *in dominio*, as long as they continued to be tame; and became *res nullius*, as ſoon as they reſumed their natural wildneſs, or laid aſide the intention and the uſe of returning to the habitations of their maſters; ſo that one loſt the property of theſe, as ſoon as they ceaſed to return to him, *l.* 4. *l.* 5. § 5. *ff.* § 15. *J. eod.* Domeſtic animals being *naturally* tame, continued the property of their owner, after they had ſtrayed from him; therefore he did not loſe it, in caſe they happened to go to a diſtance from him, *l.* 5. § 6. *ff.* § 16. *J. eod.*

But theſe principles ſeem not to have been adopted either by the Law of Scotland or by that of other modern nations; for the Law of this country makes little diſtinction between animals; the words uſed by it are *de* animali *invento wayff*, *Q. A. c.* 48. § 14. and it has not ſaid expreſsly that one, who loſes poſſeſſion of a wild beaſt, loſes alſo the property of it. Of courſe the general rules, which determine property, muſt take place in this as well as in other caſes. But it is a general rule, that one never loſes his property, unleſs *he* does ſomething by which he is deprived of it. Hence a wild beaſt, which has once become property, muſt continue to be *in dominio*, and muſt ceaſe to be in it in the ſame way with any other thing; for the Law of Scotland has not, in this matter, diſtinguiſhed them either from tamed beaſts, from domeſtic animals, or from other moveables. One would not, I imagine, at preſent be held to have loſt the property of a lion, which ſhould break

break looſe from him, and have thereby recovered its natural liberty; but he would be entitled to claim it, as ſoon as he heard it was catched, no matter at what diſtance of time. The intentions, the habits, or the actions of a beaſt, can never deprive one of his property; a thing *quæ in jure conſiſtit*, and accompanies the perſon of the proprietor.

§ 630. The feudal ſyſtem, in order to accompliſh its ends, annexed extenſive juriſdictions to the property of land; beſtowed power on the owners of it; and, converting every field into a kind of principality, erected thereby every landlord into the ſovereign of thoſe who lived within his domains. The influence which he every day felt he had over theſe, the incenſe which they were continually offering to him, the veneration with which he found himſelf regarded by them, the independence in which he lived, his own and their ignorance of every thing ſuperior to him; theſe and other cauſes conſpired together to make him value himſelf on the importance of his family, and to contemn the reſt of his kind. Thus the feudal ſyſtem tended naturally to foſter vanity and pride in the minds of men.

Intended to maintain a warlike ſpirit in the people among whom it prevailed (§ 150.), it made great account of military proweſs; every one was honoured for his feats in the field; and civil accompliſhments were little valued. Thus the attention of every one was chiefly directed towards acquiring the uſe of arms; they thought not of employing their time on the culture of their minds; ignorance overwhelmed the high as well as the low; and all thoſe maxims, which it inſpires and pride cheriſhes, were encouraged by the feudal law and prevailed among thoſe who were governed by it.

Hence the military bravery, which it promoted and honoured and eſteemed, was not conducted and moderated by that humanity which diſtinguiſhes great minds; it was ruthleſs, ſavage, and unrelenting; and every one was valued for the *cruelty*, which he exerciſed towards his own foes and thoſe of his clan. Thus the chieftain lived in a ſtate of hereditary enmity with his neighbours.

But he had not always foes to engage in the field; ſhort truces were ſometimes made; and he lived during theſe ſequeſtered in his caſtle, from the ſociety of his fellows. Poſſeſſed of an independent fortune, he led an idle life; his mind was rude and uncultivated; he had no ideas of rational entertainments; and his amuſements could not miſs to partake of his own ſpirit, and of the roughneſs of the times. Thus, he was led to employ for his diverſion thoſe arms which he was handling continually; he acquired thereby dexterity in uſing them; and *rural ſports* became the principal occupation of a feudal lord.

Every one looks upwards to thoſe who he finds are thought his ſuperiors by others, and is fond, by imitating their manners, to raiſe himſelf to a level with them. A haughty lord deſpiſing induſtry, ignorant of arts, and ſpending his time in the purſuit of his game, would propagate his ſpirit among his dependents. They would think it beneath thoſe connected with his family to cultivate the ground, to work with their hands, or to be uſeful in the world. But obliged by neceſſity to do ſomething for their bread, and induced by pride to follow the example of their maſter, they would be led to purchaſe it with their arms. Thus a feudal nation becomes a nation of hunters, and every man's attention is fixed on his arms and his game.

But that pride, which diſtinguiſhes every action of a feudal lord, makes him anxious to maintain his ſuperiority in every reſpect; and he cannot think of allowing his inferiors to partake of the ſame diverſions with himſelf. His influence is great in the ſtate to which he belongs. The preſervation of the game becomes the principal object of his attention; and laws are enacted for reſerving to a few the power of deſtroying it.

In other countries the feudal ſyſtem had to contend in its progreſs with the light, the civility, and the manners which the Romans had ſpread over Europe; and though it found an able aſſiſtant in the propagation of its ſpirit, in the ignorance

norance which was at the time of introducing it beginning from other cauſes to prevail, it was late ere it triumphed abſolutely over theſe. But either Scotland was one of thoſe barren, wild, and mountainous ſoils, to which the feudal notions were therefore in ſome ſort indigenous; its mountains being fit for concealing depredators, the people having little communication with one another, and being obliged for their defence to unite and to divide themſelves into ſeparate tribes: or the feudal ſyſtem found it in a ſtate fitted in every reſpect for receiving it, ignorant, barbarous, and uncivilized. For it appears from the moſt authentic accounts to have arrived at maturity, and to have prevailed in the earlieſt times in this country. Scotland is ſituated at a diſtance from thoſe parts of Europe which were firſt civilized; it had little correſpondence with foreign nations; the feudal ſpirit prevailed long here in its genuine purity; and the preſervation of the game became a principal object of the attention of the legiſlature. One would have thought, that the light introduced with the reformation, and diffuſed by the art of printing, would have produced ſome alteration in this matter. But excluſive privileges add dignity to thoſe poſſeſſed of them; and the proprietors of land have not been willing to part with that one which they poſſeſs, in this country, of deſtroying the game. Beſides, the Scots have been ever diſtinguiſhed for that warmth of temper, which diſpoſes men to betake themſelves to forcible means for obtaining redreſs of their wrongs; and the legiſlature knowing that they were ſometimes not ſlow of reſolving to uſe them, was perhaps, for this among other reaſons, not fond of putting arms into their hands. After the reſtoration the minds of the people were thrown into a ferment by the attempts made and the means employed to alter the eccleſiaſtical eſtabliſhment of the nation; and they were by theſe rendered ripe for that grand revolution which ſoon followed. The utmoſt care therefore was taken to keep arms out of the hands of the people; all the antient laws made for preſerving the game were revived; and new ones added for extending the influence of the old. His dogs and his hawks are the idols of a ſportſman; we need not therefore be ſurpriſed that the legiſlature demeaned itſelf during the reign of King JAMES VII. by making laws for preſerving them to their owners. Hence it is enacted by 1685, *c.* 21. 1) that every one who finds a dog with a collar about its neck, or a hawk with varvels, provided the collar or varvel has the name or ſtyle of the owner on them, and takes the collar from the dog's neck, or the varvels from the hawk, ſhall be fined in the ſum of 500 marks; becauſe the law holds this to be a proof of his intention to ſteal the beaſt, and to be a ſpecies of theft *. But people ſometimes, in order to make a ſmall matter by them, diſpoſe of theſe creatures immediately on the beſt terms they can get; therefore it is enacted, 2) that every one who gives away or ſells *any* hawk or dog, *which is not his own*, ſhall be fined in the ſum of *L.* 100 *Scotch* †. And that thoſe who have loſt them may have a better chance to recover them, it is enacted 3) that every one, who takes into his poſſeſſion a dog that has ſtrayed with a collar about his neck, or a hawk that has got away with bells or varvels from its maſter, having the name of the owner on them, ſhall be obliged to cauſe it to be booked within 48 hours after he has taken it, in the books of the ſheriff-clerk of the ſhire where it is taken, the dog by its kind, collar, and marks, the hawk by its kind and varvels; that no more than 6 *s.* 8 *d. Scotch* (*i. e.* 6⅔ *d. Sterling*) ſhall be paid to the ſheriff-clerk for booking them; that the owner ſhall have a right to claim them at any time within ſix months after they are booked, and to get them back ‡; provided

* *Quæritur*, Is it neceſſary, that he, who finds them, take them into his poſſeſſion, and in that way alſo ſhew his *animus furandi*, in order to ſubject him to the penalty of the ſtatute? I fancy it is. But the caſes and the words of the act are not well diſtinguiſhed.

† This ſecond clauſe ſhews, that it is neceſſary, in order to make one liable on the preceding one, that he, who takes the collar from the dog's neck, or the varvels from the hawk, muſt take him into his poſſeſſion, and muſt keep him *animo furandi*. Elſe this abſurdity would follow, that it is made by the legiſlature a greater crime merely to take a collar from a dog's neck, or varvels from a hawk, than to ſell the dog or the hawk *lucri faciendi cauſa*.

‡ Therefore, if he claims them either by a letter or otherwiſe, tho' he ſhould not get them reſtored, within that time, he is entitled to get them back at any time, becauſe he has, by claiming them, done all which the law requires him to do for retaining his property.

he pays the perſon who has them, the expences which he laid out in booking and keeping them; that, if the owner does not claim them either by letter or otherwiſe, within that time, he ſhall not be heard to claim them afterwards, but that they ſhall become the irrevocable property of the poſſeſſor. And in order to oblige people to book them, it is enacted, 4) that if the taker or keeper of any ſuch hawk or dog ſhall neglect to cauſe it to be booked in the manner aforeſaid, he ſhall pay the ſum of *L.* 40 *Scotch* to the owner, if he ſue for it.

It may, perhaps, be thought unbecoming to criticize with ſeverity the acts of the legiſlature: but theſe ordinances, which have been contrived with great anxiety, ſeem not to be much leſs abſurd than thoſe made during the reign of our antient ſovereign DORNADILLA. He, who is recorded in the Scotch annals to have been the fourth king of this country, and to have reigned more than two hundred years before the birth of JESUS, may in ſome ſort be ſaid to have been the father of the game; he firſt enacted a ſyſtem of venatic laws; and thinking it not beneath the majeſty of legiſlation to regulate matters concerning the propagation and the breed of his hounds, he forbad, by ſtatute, every intercourſe of love between hunting dogs and their mothers * (§ 174.).

TITLE III.

Of Waif Moveables.

§ 631. THE caſe is preciſely the ſame with one who finds waif moveables of other kinds, which either have or are preſumed to have once been the property of ſome owner who has loſt them, no matter how, whether he has dropped them out of his pocket, out among his baggage, or any other way, *§ ult. J. de rer. div.* He, who finds them, is liable to the ſame duties, and to the ſame obligations of diſcovery, reſtitution, *&c.* to which, we have ſaid (§ 627. *ſeq.*), one who finds waif animals is liable. Moveables of the one as well as thoſe of the other ſort, if no owner appears to claim them, eſcheat to the crown, and muſt therefore belong to ſuch as claim them under the title of the crown. The only difference is, that cattle eſcheat abſolutely and irredeemably, in caſe no owner appears to claim within year and day from the time, at which they were proclaimed to be waif; whereas waif moveables of other ſorts are not irredeemably eſcheated, till the property of them is acquired by preſcription. The owner therefore of theſe may claim them at any time before the crown or its grantee has by preſcription acquired the property of them, and is entitled to get either themſelves or their value reſtored to him. But the owner of cattle is not entitled to get either themſelves or the value of them reſtored to him, if he does not appear and claim them before year and day paſs from the time at which they are proclaimed to be waif. The reaſon of the difference is this; cattle and all living creatures muſt have food; the expence of maintaining them amounts, in a very ſhort time, perhaps in leſs than a year, to the value of them. Therefore the law ordains them to become the irredeemable property of him who maintains them, as ſoon as the charges of their maintenance amount to ſo much that it preſumes the owner will not chuſe to pay them, becauſe they exceed the value of his cattle. Other moveables need no food; one is put to little charge in keeping them; and they are redeemable at every point of time, before the years of preſcription are run †. This rule is general, and takes place in all caſes, in which moveables of any ſort have become waif. It will not therefore be neceſſary

* BOET. *lib.* 2. *c.* 4.

† The reaſon, on which this opinion is founded, is this. Nobody loſes his property immediately on loſing the poſſeſſion of it (§ 625.). He does not loſe it till it is *preſcribed, i. e.* till a certain length of time is paſt, and another has acquired it. Therefore till this time is fully paſt, one cannot loſe it in any caſe, unleſs it is otherwiſe enacted by ſtatute.

ceſſary to repeat it on occaſion of every particular inſtance, which ſhall occur in this title; for it muſt be held to take place in all caſes, in which it is not ſpecially remarked, that a different rule is eſtabliſhed.

§ 632. Among waif moveables, hidden treaſures are not the leaſt remarkable. A hidden treaſure is 'a quantity of money or other moveables *, depoſited in 'ſome ſecret place.' No matter whether above or below ground; in ſome ſecret hole of a houſe, or in another place; on one occaſion or on another; at one time or at another. One, who happens to diſcover a treaſure, does not acquire the property of it. If the owner is known and claims it, it muſt be reſtored to him, *l.* 31. § 1. *ff. de acq. rer. dom. l.* 44. *p. ff. de acq. vel amit. poſſeſ. l.* 67. *ff. de rei vindic.* If the owner of it does not diſcover himſelf, it eſcheats to the crown, *Q. A. c.* 48. § 5.—*Mod. ten. cur. c.* 60.—*Fo.* 29. *Dec.* 1696, *Cleghorn.* becauſe every thing which appears once to have been *in dominio*, but wants a preſent owner, goes to the king (§ 140.).

Therefore one, who has lighted on a treaſure, is bound to reveal it to the ſheriff; and in caſe he conceals the diſcovery, he is guilty of a crime *occultationis theſauri fraudulosæ*, for which he is liable to be puniſhed. The puniſhment ſeems, in antient times, to have been ſevere; at preſent, it could not be other than an arbitrary one, and would be accommodated to circumſtances: for his fault is an inferior ſpecies of theft, and is not puniſhable capitally, *R. M. l.* 1. *c.* 1. § 6.

TITLE IV.

Of Wreck.

§ 633. GOODS may be loſt at ſea as well as on land (§ 626.).

Wreck ſignifies properly the ruins of a ſhip which has been wrecked, and of the goods contained in her. In England it is uſed in a limited ſenſe, and ſignifies 'ſuch goods alone as, after a ſhip-wreck, are both caſt and left 'upon the land by the ſea.' But in the Law of Scotland its ſignification is more extenſive, and it denotes 'all goods, which ſeem to have deſerted their own-'ners, or to have been abandoned by them, and are found either floating on 'the ſurface of the ſea, ſunk to the bottom of it, or caſt upon land;' for it ſignifies goods of all theſe different kinds.

Therefore, 1) a ſhip which has been either broken or abandoned by its mariners, as well as 2) its ruins, and 3) the goods which it contained, may be called *wreck;* provided they were once *in dominio.*

For ſuch goods alone, as have been brought from the land to the ſea, can properly be ſaid to be wreck; fiſhes, ſhells, and all other things, which are found in the ſea as in their natural element, fall not under this denomination, becauſe they are found in their natural ſtate, appear not to have been occupied by man, and have never been *in dominio.* Hence it is ſaid in the definition, that they muſt be ſuch as ſeem either to have deſerted their owners or to have been abandoned by them; and it is enacted, that a ſhip and the goods contained in her ſhall not be adjudged to be wreck, in caſe either a man, a dog, a cat, and for the ſame reaſon an ox, or any other animal is found in it alive; becauſe it is not in this caſe preſumed to have been abandoned, *ſt. A.* II. *c.* 25.—*Du.* 12th *Dec.* 1622, *Hamilton.*

All theſe, found either floating on the ſurface of the ſea, ſunk below it, or caſt upon land, are called wreck; for the law of Scotland attends not to the cauſe or

* I ſay 'money or other moveables,' in order to diſtinguiſh treaſures from mines of gold, ſilver, lead, marble, and other minerals, which have not been ſeparated from the bowels of the earth (§ 143.).

or accident, to which it is owing that they are found in this ſituation. The are called wreck whether the ſhip, which contained them, has or has not been actu ally wrecked; whether they have been thrown voluntarily over-board to lighten it or have been thrown into the water on any other occaſion: the law preſumes that every thing, which it finds in the ſituation deſcribed, has been ſeparated from its ſhip by ſome calamity which befel it at ſea.

Wreck may belong either to ſubjects of Great Britain or to foreigners, and may be found either without or within the limits of the Scotch ſeas. It is ne ceſſary to diſtinguiſh theſe different caſes, for the law of Scotland is not the ſam in them all.

§ 634. Mr. HUME in that curious *diſſertation*, which he calls *the natural hiſtor of religion*, obſerves, that the vulgar acquire their firſt ideas of ſuperior inviſibl powers from the irregularities remarkable in nature. The order of the univerſ makes a feeble impreſſion on their minds, and they think not of inquiring int the cauſes, from whence it proceeds; but its apparent irregularities intereſt, be cauſe they may afflict them. Hence every phænomenon, which exiſts not in on conſtant, uniform, regular manner, they believe, proceeds not from the opera tion of general eſtabliſhed laws, but is aſcribed to the immediate agency of th MOST HIGH, who is ſuppoſed to alter occaſionally the ordinary courſe of things in order to afflict, to puniſh, to protect, and to favour individuals among human kind. Thus every unexpected event, every ſignal calamity, every fortunate in cident becomes a mark of his peculiar regard, diſpleaſure, or wrath; the un fortunate are believed to be the immediate objects of the divine indignation; and the misfortunes, which befal them, the immediate effects of the vengeance of th ALMIGHTY.

'Tis in this manner that one may account for that barbarous uſage, which ſeems to have prevailed among almoſt all the nations of the earth, of robbing thoſe wrecked at ſea of the very ruins of their misfortunes. Providence hath ſen forth its ſtorms as the miniſters of its vengeance, hath overwhelmed theſe helpleſ mariners in the mighty waters, and ſeems to have intended to deprive them o their goods. Hence men, ſelfiſh ignorant and ſuperſtitious, have taken advantag of the diſtreſsful condition of their fellows, and erecting themſelves into execu tioners of divine wrath, have thought themſelves entitled to ſpoil the ſhipwreck ed of thoſe very wrecks, of which providence hath already in ſome ſort diſpoſ ſeſſed them.

This cruel uſage had the countenance of the ſuperſtition and of the antient law Scotland. The ſtatute of ALEXANDER II. (§ 633.) ſeems to take it to be fix ed law, that the owners have right to claim within year and day *ſuch goods alon* as *cannot properly* be called wreck; and that thoſe, which fall ſtrictly under thi denomination, eſcheat inſtantly and irrevocably to the Crown. And were i not inhuman to maintain it, I would ſay that the law of Scotland ſtands ſo at thi day: for it ſeems not to have been altered by ſtatute; and the rapacity o mankind has hindered a uſage, to which inveterate cuſtom had given its ſanction from being ever effectually aboliſhed.

But the ſight of misfortunes ſoftens the moſt obdurate hearts, and humani ty has prevailed by degrees over the barbarous principles inculcated of old both by the ſtatutory and by the cuſtomary law of Scotland. Hence the writers upon it by laying down maxims which, however conſonant to juſtice, are, i muſt be confeſſed, contrary to the rigor of the law of their country, have in truth effectuated a total alteration of it, and introduced other principles to govern the deciſions of its judges at this day.

§ 635. The property therefore of *wreck*, belonging to *natural-born* ſubjects o Britain, is determined by the ſame rules, which regulate that of waifs § 631.) The owner has year and day from the time, at which they are found, allowed him for claiming his goods. If he does not make his claim within that time, they eſcheat to the Crown, or to thoſe to whom it has made grants of them. The reaſon

reaſon is, that they are in this caſe held to be relinquiſhed by the owner, ſince one who has loſt his goods by ſhip-wreck, it may be preſumed, will ſoon diſcover that he has loſt them, and will immediately cauſe inquiry to be made after them: and it ſeems to be for this reaſon, that wreck needs not, like ſtrays or waifs (§ 629.631.), be proclaimed.

Were one to adhere to the ſtrict letter of the law of Scotland, he would be obliged to confeſs that the owner, in caſe he makes not his claim within year and day, is forever barred from recovering his goods afterwards; becauſe as ſoon as that period is fully paſt, the property of them is eſtabliſhed in the crown, *arg. ſt. A.* II. *c.* 25. But caſes may happen, in which an equitable judge may well be allowed, or rather ought to recede from it. The owner may be in a diſtant land; he may not hear of his misfortune; and it may be impoſſible for him to make his claim within year and day. Therefore in all caſes, in which his omiſſion is *excuſable*, he ought to be allowed to recover his property after that time; for it ought not to be a ſmall reaſon, for which one ſhould be ſtripped of it. One has ſurely almoſt at all times a better title to his own goods, than the crown or its grantee who may truly be ſaid here to be *in lucro captando*. *Quod enim jus habet fiſcus in aliena calamitate, ut de re tam luctuoſa compendium ſectetur? l.* 1. *C. de naufrag.* It ſeems not therefore to be going far to maintain, that the owner of wreck as well as of waifs (§ 631.) is, in *all* caſes, entitled to recover his goods at any time before he has loſt the property of them by the negative preſcription of forty years; for if we paſs the firſt boundary, we cannot well ſtop ſooner. This opinion appears to have been agreeable to Sir GEORGE MACKENZIE*, and is, in ſome ſort, ſupported by precedents quoted by Lord BANKTON †.

Thus ſtands the Law of Scotland at preſent with reſpect to wreck belonging to natural-born ſubjects of Britain.

§ 636. 'Tis otherwiſe, in caſe it belongs to *foreigners;* for the law ordains Scotchmen to do by foreign nations, whoſe ſhips are wrecked on the coaſt of Scotland, as thoſe foreign nations would do by them, were their ſhips wrecked on their coaſts. Indeed nothing can be more equitable than this maxim appears to be, *quod quiſque juris in alterum ſtatuerit, ut ipſe eodem jure utatur. Quis enim* aſpernabitur *idem jus ſibi dici*, quod ipſe aliis dixit vel dici effecit, *rub. l.* 1. *p. ff. h. t.* Of courſe ſhips belonging to foreigners, which happen to be wrecked on the coaſt of Scotland, either may or may not eſcheat to the crown together with the goods pertaining to them. They eſcheat immediately, if by the law of that country to which the owners of them belong, Scotchmen, whoſe ſhips had been wrecked on its coaſt, would have been ſpoiled of their property ‡, and their ſhips and goods have been ſeized by the people of that nation, and forfeited either to themſelves or to the public. So that neither the owners of the ſhips nor thoſe of the goods are, in this caſe, allowed to claim them at any time, either within or without year and day from that on which they were wrecked; they loſe the property of them, immediately on their being ſhip-wrecked; as ſoon as they loſe the property of them, the goods muſt, by the principles of our common as well as our ſtatutory law, eſcheat to the crown. They are not eſcheated, in caſe the ſhips of Scotchmen, which had happened to be wrecked on the coaſt of that country, would not have been ſeized by its inhabitants, and forfeited either to themſelves or to the public, but have been left or reſtored to the owners of them. So that foreigners would not, in this caſe, be deprived of their property, but would be allowed the ſame favour, which the law of their country ſhews to Scotchmen, 1429, *c.* 124. *St.* 20th *Jan.* 1674, *Jacobſon.*

* See Sir GEORGE MACKENZIE's obſervations on 1429. *c.* 124.

† 17th *Feb.* 1725, *Monteir*, cited by Mr. MACDOUALL in his *Inſtitute of the laws of Scotland*, book 1. title 8. § 6. But I have not been able to light on a report of the judgment itſelf.

‡ I ſay, *ſpoiled* of their property; for if the owners loſe it, 'tis no matter who gets it.

Foreigners being entitled to have the ſame favour ſhewn them which they ſhew to us, all queſtions concerning wrecks belonging to them muſt be determined not by the law of Scotland, but by the law of that country to which they belong. Therefore they muſt be allowed the ſame time, which the law of their country allows to Scotchmen, for claiming their goods. That time, whether it be leſs or more than year and day, muſt be the rule, without regard to the time allowed by the law of Scotland. Their ſhips and their goods will be adjudged to be wreck and to eſcheat in all thoſe caſes, in which the law of their country would have pronounced the ſame judgments upon Scotch veſſels found in the ſame condition.

The doctrine which has been taught, it muſt be owned, is agreeable to the ſtrict letter, and to the principles of the preſent law of Scotland: for the act of parliament 1429, *c.* 124. eſtabliſhes the *lex talionis* in the moſt preciſe manner; and in ſo far as it is contrary to the ſtatute of ALEXANDER II. it muſt be held to have derogated from it (§ 79.). But a humane and merciful judge will not chuſe to add affliction to the afflicted, and might well be allowed to think that there are principles in the Law of Scotland (§ 625.) to bear him out in adjudging, without regard to that of any other country, ſhips and goods, which belong to foreigners and have been wrecked on our coaſts, not to be eſcheated, but to be reſtored to the owners if not in all caſes, at leaſt in thoſe in which they cannot be ſaid to be wreck in the ſtrict terms of the ſtatute of ALEXANDER II. By that ſtatute, as it has been remarked (§ 633.), if a man, a dog, or a cat, or, *ex paritate rationis*, any other creature, an ox, for inſtance, *Du.* 12th *Dec.* 1622, *Hamilton*, is found alive in any veſſel driven on the coaſt of Scotland, neither the ſhip nor the cargo can be adjudged to be *wreck*. Therefore they ought not to eſcheat to the crown, tho they belong to the country, by whoſe law wreck is forfeited from its owners; becauſe they cannot, agreeably to the ſtrict letter of the law of Scotland, be defined to be wreck. Beſides, private perſons have frequently as little to ſay in the legiſlation of their country as any foreigner; and if its laws are cruel and ſevere, they are not to be blamed for it. But if they are not culpable, they ought not to be puniſhed by forfeiture of their goods; for humanity does not allow the innocent to be puniſhed for the ſake of the guilty.

TITLE V.

Of the Reſtitution of Things taken from Enemies.

§ 637. ONE loſes the poſſeſſion of his goods during war (§ 626.), when they are taken by the enemies of his country, that is, by thoſe againſt whom the King has made a public declaration of war, or who have made it againſt him, *l.* 24. *ff. de captiv. et poſtlim.* For the King being, by the conſtitution of Britain, veſted with the executive power of the ſtate, is the proper avenger of wrongs done to his people, and has of courſe right both of declaring war and of making peace. But goods taken by enemies may be retaken by us from them: in that caſe the queſtion is, Whether does the property of the goods retaken return to the original owners, and are the captors bound to make reſtitution to them; or being once acquired by enemies, do they, upon being retaken, become the abſolute property of the captors?

Were one to reſolve this queſtion by the rigid principles of law, the deciſion ſeems to be obvious. War is a forcible method of obtaining redreſs of wrongs done to a nation; in order to get ſatisfaction, it diſtreſſes its enemies as much as poſſible, and means thereby to conſtrain them to make reparation. Hence capture

ture has been held by all nations to be a lawful method of acquiring property. But thoſe, with whom we are at war, have as good a right as we to acquire it in this manner. Of courſe every thing taken by them becomes, as ſoon as the capture is made, their abſolute property, § 17. *J. de rer. divis.*—*l.* 5. § 7. *ff. de acquir. rer. dom.* for that moment they acquire all the powers, which property implies, ſince they may *deſtroy* their prize, *l.* 21. *ff. d. r. j.* and are not accountable for its value to thoſe, from whom they took it. But acquired by the enemy, it muſt immediately ceaſe to belong to the former owners. Therefore upon being retaken by us it muſt, like every other part of the property of the enemy, be transferred to the captors. So the original owners can have no claim to get it reſtored. Thus ſeem the ſtrict principles of the law to decide.

But the uſage of this and of other nations has much abated their rigour. We hold in all caſes our own cauſe to be juſt, and that of our enemies to be unjuſt. Therefore, however we may believe ourſelves to have a right to make captures from them, we imagine they have none to make them from us. Beſides, prizes inſtantly retaken from the firſt captors can hardly be ſaid to have ever become their property. But as long as the property remains untransferred, thoſe who retake them muſt be bound to reſtore; and by making war upon others, we mean not to diſtreſs individuals among ourſelves. Hence it ſeems to be held by the law of this country, and is uſually, upon the declaration of every war, enacted by ſtatute, that goods belonging to ſubjects of Britain, taken by enemies, ſhall, in caſe they are retaken from them, be reſtored to their original owners.

But the Britiſh dominions are ſurrounded by the ocean; and the loſſes we ſuſtain as well as the prizes we take uſually happen at ſea. 'Tis neceſſary therefore, in order to give ſpirits to thoſe employed to fight for their country on this boiſterous element, and to recompence them for the dangers to which they are expoſed, that they be allowed part of the prizes made by their valour. Hence it is uſual by ſtatute to give them a right to every thing, which belonged originally to their enemies, and which they take from them; and to allow them, upon retaking goods which the enemy had taken from us, a certain part of the value of theſe, different according to the different length of time during which the enemy had been in the poſſeſſion of them, 13*tio* G. II. *c.* 13.—17*mo* G. II. *c.* 34.

§ 638. Thoſe, who have become our enemies by a public declaration of war, have alone right to make captures of our property. Pirates, robbers, and others, who are held to be unjuſt depredators, may ſpoil us of our goods, but they cannot thereby acquire the property of them. Of courſe, every thing retaken from them muſt be reſtored to its proper owner; for the property remaining with him, he has a right to vindicate his goods from every one, in whoſe poſſeſſion he finds them; *l.* 31. § 1. *ff. depoſit.*

TITLE VI.

Of the Condictio cauſa data, cauſa non ſecuta.

§ 639. THE inſtances which have been given of the obligation of reſtitution in the preceding titles, relate to ſuch things alone as have happened by mere accident to come into one's poſſeſſion.

But one may happen to be bound to reſtore ſuch things alſo as have come into it not by chance, but have been voluntarily transferred to him by the owner, without an expreſs ſtipulation concerning reſtitution: for caſes may happen in which a ſtipulation concerning reſtitution is implied in the very nature and circumſtances of the tranſaction. In all thoſe caſes he who poſſeſſes ceaſes, upon

upon the exiſtence of the event implying reſtitution, to have any right to retain the thing poſſeſſed by him; and muſt therefore be bound to reſtore it to him who has a right to get it. The reaſon is plain; ſome individual, either he who holds the poſſeſſion or ſome other, muſt have the property of every thing which is poſſeſſed by man. If the poſſeſſor neither is himſelf the proprietor nor has right to keep the poſſeſſion, he muſt be bound to reſtore it to its true owner; for the owner, in caſe he ſhould bring his action, would recover the poſſeſſion from him, ſince *ex hypotheſi* the other who holds it has not any legal or juſt pretence, on which he could plead to retain it, *l.* 6. *ff. de cond. ob turp. cauſ.* *.

One, who has no right to keep a thing which he poſſeſſeth, is ſaid to poſſeſs it *ſine cauſa*, and is liable to be ſued in order to be compelled to reſtore it. The action, which lies againſt him, was by the Roman lawyers called *condictio ſine cauſa;* for this was a general appellation applicable to all thoſe caſes, in which one poſſeſſed *ſine cauſa;* no matter, whether any other action lay or did not lie againſt him, *tit. ff. et C. de condict. ſine cauſa.*

One may happen to poſſeſs *ſine cauſa*, or to have no right to poſſeſs in many caſes, in which he obtained poſſeſſion by lawful means; among theſe the three following are the moſt remarkable. The firſt is, when a thing was *given* in conſideration of ſomething which has not followed, *propter cauſam quæ non eſt ſecuta:* in this caſe, he to whom the thing was given poſſeſſes *ſine cauſa*, becauſe that, in conſideration of which it was given him, has not followed. The ſecond is, when the cauſe for which one gives a thing to another is lawful and honeſt at the ſame time that that, for which it is received, is unlawful and baſe: the receiver poſſeſſeth in this caſe *ſine cauſa*, becauſe he poſſeſſes *ob turpem vel injuſtam cauſam;* he acquired the poſſeſſion for a reaſon which muſt be ineffectual, becauſe its turpitude deprives it of validity. The laſt caſe in which one poſſeſſeth *ſine cauſa* is, when he receives payment of that which is not due to him: his poſſeſſion is in this caſe *ſine cauſa*, becauſe he had no right to get payment of that which was paid. Let us take a more particular view of each of theſe.

§ 640. Among the various covenants which men make with one another, it may frequently happen that one will agree to give ſomething to another, provided this other will either do or give ſomething to him. In an agreement of this kind, if the one who agreed to give performs his part of the contract, the conſideration for which he does it is the engagement, under which the other brings himſelf to perform it on his; he gives on the faith, that the other, who receives, will do that which he has agreed to do. If therefore this latter does not ſtand to his agreement, if he breaks his faith, and does not fulfil his part of the bargain, it would be iniquitous for him to be allowed to keep what he has got; for he got it, *becauſe* he agreed to do ſomething. Having no title to keep it, it is reaſonable that he ſhould, law therefore obliges him to reſtore what he received, to him who gave it; for it allows not any one to enrich himſelf iniquitouſly to the hurt of another. It preſumes therefore that at the very time, at which the principal agreement was made, the parties entered as it were into a contract, by which 'he who received bound himſelf to reſtore that which was 'given him, to him who gave it, in caſe he ſhould not do that which he engaged 'to do.' By conſequence he who gave has, upon the exiſtence of the event, a right to get back what he gave: having a right to get it back, he muſt of courſe have a legal remedy, by which he may compel the other to reſtore it; that is, he muſt have an action which he muſt be entitled to bring, in order to get him decreed to reſtore it. This action was in the Roman Law called *Condictio cauſa data, cauſa non ſecuta*, and has *ob æquitatem* been received into the Law of Scotland. Let us ſee the caſes in which one may ſue it, in order to get reſtitution of that which he gave.

On

* See the caſes reported in the *Dictionary* under the title *implied condition*, &c.

On this matter it is plain that one general rule may be laid down, which is, 'that one may sue it in all cases, in which he is entitled to get restitution *propter* 'causam datam, causam non secutam.'

In order to entitle one to restitution on this account, it is necessary, I. That he hath actually *given* something to another. II. That he hath given it for a consideration, about which the parties have agreed. III. That this consideration be something future, lawful, and possible, and which it concerns the utility of the giver that it be fulfilled. IV. That it hath not followed.

§ 641. I. It is necessary, that something be *given* by the one to the other; for if nothing has been given, nothing can be restored. Besides, the nature of the agreement implies that something be given; else it can never be said, that there is *causa data*. *Dare* is a word which has several different significations. Sometimes it signifies the same thing with *tradere*, *to deliver*; at others with *traditione in dominium accipientis transferre*, which seems to be its proper signification: and at others it is used for *alienare*, *to alien*, or for one to make something cease to be part of his estate *. It is in this place used in its most extensive sense, and is opposed to *facere*, to *work*, to *act*, or to *do*. For the word *dare* is in this case used to signify to *confer* or to *bestow*; and he is said to *give*, who confers on another a right, benefit, or advantage, which is capable of being restored, or of which he on whom it is conferred may be deprived. This is a very different thing from *facere*, *acting*, *working*, or *doing*; for the latter word properly denotes to do something which, being done, cannot be undone by restoring matters to the same condition in which they were before †.

Therefore this action lies not in those cases in which one *does*, *facit*, that another may either do or give him something. For the end of it is to obtain *restitution*, which is *ex hypothesi* impossible, since there is nothing transferred or given which can be restored, *l.* 5. § 3. *l.* 25. *ff. præscript. verb.* ‡. Thus one, who hath agreed to teach another a science, to labour in his service, or to play him some tunes for money, cannot, after having fulfilled the bargain on his part, bring this action against his scholar, his master, or his employer; because the learning which has been acquired, the work which has been performed, the tunes which have been played, cannot be restored. *Facti causæ infactæ nulla constitutione fieri possunt*, *l.* 12. § 2. *ff. de captiv. et de postlim. l.* 31. *ff. d. r. j.* The proper remedy in this case is to sue for the money promised.

In order therefore to make this action lie, it is necessary either 1) that some thing corporeal, money for instance, be *given* one; or 2) that some right, benefit, or advantage be conferred on him, which is capable of being taken from him; or 3) that something be bestowed on him, of which he can be deprived: for it lies in all these cases. Thus one who has paid a painter beforehand for a picture to be drawn may bring this action against him, in case he will not draw it, in order to get his money restored; one, who having concluded a treaty of marriage, makes settlements in favour of his bride in consideration of it, is entitled to get them set aside, and if it be necessary, restored to him, in case the marriage does not follow; one, who makes deeds in favour of another in consideration of an event which does not happen, is entitled to get them annulled and restored; in short, one, who *gives* another any thing pecuniary for a consideration which is never fulfilled, is entitled to sue this action in order to get restitution; because something *abest ex patrimonio*, which is capable of being taken from him to whom it was given, and of being restored to the giver. One, who has paid money, has brought himself under an obligation, has assigned a right, or has granted an acquittance of an obligation to another, may get restitution and be

* See Goeddæi *comment. ad l.* 53. 76. 28. *ff. de verb. significatione.*

† See Goeddæi *comment. ad l.* 19. 58. 175. *ff. de verb. signif.*

‡ Hence the civilians say, that this action has its rise on occasion of the contracts, *do ut des*, *do* ut facias, *do* ne facias, *l.* 3. *p.* § 1. *ff. de condict. caus. data. l.* 3. *C. de cond. ob caus. dat.* not of these, *facio* ut des, *facio* ut facias, *facio* ne facias.

placed *in ſtatu quo* by getting the money refunded, or the obligation, aſſignment, or acquittance cancelled, *l.* 4. 6. 7. 9. 10. 11. 13. *ff. de cond. cauſ. dat. l.* 1. *C. de cond. ob cauſ. dat. l.* 4. *C. de cond. ob cauſ. l.* 10. *ff. de condict. cauſa dat.*—*N.* 96.—*Fo.* 4th *June* 1697, *Deans.*

That which is given may ſometimes happen to be capable of being taken from him who receives it, without being capable of being reſtored to him who gave it. Thus one may be deprived of a title, of an office, or of a place conferred on him; one who has been admitted a member of a corporation may be deprived of his place in it; but theſe cannot properly be ſaid to be *reſtored* to thoſe, from whom they were derived. However, it ſeems not to be repugnant to the principles of law to ſay, that the action may lie even in ſome of theſe caſes, or rather that one may be deprived of the benefit beſtowed on him, on the principles on which this action is founded. This may be held to be true at leaſt in thoſe caſes, in which the benefit acquired is merely pecuniary, and is purchaſable by money; for it is then looked on as ſo much put into the pocket of him on whom it is conferred, and is like goods bought with it. But if it is ſomething *perſonal*, which is ſuppoſed to be beſtowed for merit, however one may for incapacity or for miſdemeanors be deprived, it ſeems not that he could for not doing that, in conſideration of which it was beſtowed on him; unleſs an expreſs proviſo were made to that purpoſe; in which caſe the obligation is not *implied.*

§ 642. II. 'Tis neceſſary, that that, which is given, be given for a *certain* conſideration, that is, one about which parties have agreed (§ 640. *ax.* 2.); for if it is given without any determinate cauſe, it will be preſumed to be a gift, *l.* 6. 7. *C. de cond. ob cauſ. dat. l.* 3. *p. ff. de cond. cauſ. dat. cauſ. non ſecut.* Beſides, it is plain from the nature of the action itſelf, that it cannot lie in this caſe: for he who has given can never ſay, that the cauſe for which he gave has not followed, *cauſam non eſſe ſecutam;* ſince he did not give for a determinat conſideration.

§ 643. III. This conſideration muſt be ſomething, that is 1) future, 2) lawful, 3) poſſible (§ 640. *ax.* 3.).

It muſt 1) be ſomething *future*, ſomething which can follow, *quæ poteſt* ſequi: for it is plain from the nature of the thing, that, unleſs the cauſe of giving be ſomething which is not *done already* but *to be done*, it cannot be ſaid, *cauſam non eſſe ſecutam.* The very word *ſecuta* ſhews the agreement to imply, that ſomething *is* given, becauſe ſomething is to *follow*, or to *be done after* the act of giving. If the cauſe of giving be ſomething that is paſt, ſome other action, *v. g.* the *condictio indebiti*, may lie, but this one cannot, *l.* 52. *ff. de cond. ind.*

It muſt 2) be ſomething which is lawful and honeſt, *R. M. l.* 1. *c.* 30. § 10. *l.* 1. *p. ff. de cond. cauſ. dat. l.* 4. 7. *C. de cond. ob cauſ. dat.* For if the cauſe of giving be ſomething unlawful, reſtitution will be obtained not by this action properly, but by the *condictio ob turpem cauſam.*

It muſt 3) be ſomething, which is poſſible or may actually be done: for one cannot be obliged to do any thing, that is either naturally, legally, or morally impoſſible, *l.* 31. *ff. d. obl. et ac. R. M. l.* 1. *c.* 30. § 7. 8. 9. 10.—*l.* 3. § 5. *ff. de condict. cauſ. dat. l.* 1. 5. 8. *C. de cond. ob cauſ. dat.*—*Impoſſibilium nulla obligatio eſt, l.* 185. *ff. d. r. j.* Therefore if one gives for a cauſe which he knows is impoſſible, no matter whether phyſically, legally or morally, he is not entitled to get reſtitution of what he gave: for he will be preſumed to have made a preſent of it. But if he did not know that it was impoſſible, he will be entitled to get reſtitution, provided his ignorance is not culpable; for culpable ignorance is diſfavoured by law. *Cujus per errorem dati repetitio eſt, ejus conſulto dati donatio eſt, l.* 53. *ff. d. r. j.* No matter whether it be ignorance of law, or ignorance of fact; for the law of Scotland does not attend much to that diſtinction. It attends to the *culpability* of the ignorance alone, and if it is not culpable, it excuſes it, *l.* 3. § 5. 6. 7. *ff. de cond. cauſ. dat. l.* 5. *C. eod.*

Laſtly;

Lastly; It must be something, which does not concern the utility of him who receives alone (§ 640. *ax.* 3.): for if it concerns his interest alone, there cannot be room either for asking restitution, or for suing this action, because it is in this case no matter to him who gave, whether the cause follows or not, whether that for which he gave be or be not done, since *ex hypothesi* he has no interest in it. Therefore he will in this case be presumed *donasse*, to have intended to make a present, *l.* 13. § 2. *ff. de don. int. vir. et uxor. l.* 71. *p. ff. de cond. et demon.*

But it may consist either in *dando* or in *faciendo*; for one may bind himself either to give or to do something, and may nevertheless not fulfil his bargain, *l.* 16. 3. § 2. *l.* 4. *l.* 5. *p. l.* 3. *p.* § 1. *ff. de cond. caus. dat. l.* 2. 4. 11. *C. de cond. ob caus. dat.*

§ 644. IV. It is necessary that the cause do not follow, *causam non esse secutam*, *i. e.* that that, which he who received agreed to do, be not done, *l.* 3. §. 2. 3. 5. *ff. de condict. caus. dat. l.* 1. *C. de cond. ob caus. dat. l.* 1. § 1. *ff. de con. ob turp. caus.* This may happen to be the case two ways; for either he who received will not, or it may not be possible for him to perform. If he will not perform, then the nature of the agreement and the circumstances of the case are such, that he either has or has not a right to repent and to be off with the bargain. In case the nature and the circumstances of the bargain are such, that the law of Scotland allows either party to be off with it, he who received must, if he *will* not stand to his agreement, be bound to restore that which he received: for neither law, nor equity allow him to keep it, and at the same time to refuse to fulfil his bargain. In this case therefore *condictio causa data causa non secuta* lies: nay, in some cases he will be bound not only to make restitution, but also to repair the loss he who gave sustains through his repentance, *l.* 3. *p. l.* 4. 5. § 3. *ff. de cond. caus. dat. l.* 11. *C. eod.* But if he has not the liberty of being free from his bargain, he must fulfil it. Therefore either this action or one for getting him decreed to fulfil must lie; for either restitution or performance can, in this case, be forced, *l.* 11. *ff. et C. eod.*

If it is impossible for him to fulfil it, then the *condictio causa data, causa non secuta* has not place, unless the impossibility is owing to the fault of him who received; for, if performance has happened either by mere accident or by the fault of the giver to become impossible, he will not be obliged to make restitution, *F.* 24th *July* 1707, *Rule.*—*Fo.* 19th *Dec.* 1684, *Lauderdale.*—24th *March* and 9th *Dec.* 1686, *Davidson.*—4th *June* 1697, *Deans. l.* 2. 3. § 3. *l.* 5. *p.* § 3. 4. *l.* 16. *ff. de cond. caus. dat.*—*l.* 10. *C. eod.* because nobody is answerable for accidents; *casum nemo præstat.* But if it has become impossible to fulfil it thro the fault, *culpa*, of him who received, action lies; for nobody ought to suffer thro the fault of another, *l.* 5. 10. *C. eod.*

§ 645. It remains to be remarked, that the action may be sued either 1) by the original giver himself, *l.* 3. *p. l.* 6. *p. l.* 7. *p. ff. de condict. caus. dat.* or 2) by his heir, *l.* 2. 3. *C. de condict. ob caus. dat.* or 3) by his assigns to whom he has made it over, *l.* 7. *p. l.* 9. *p. ff. de cond. ob. caus. dat.*

And it lies either against the original receiver himself, or against his representatives, *l.* 8. *C. de cond. ob caus. dat.*

TITLE VII.

Of condictio ob turpem causam.

§ 646. THE second case, in which one is bound to restore because he possesses *sine causa*, is when the cause or consideration, for which a thing is given by one to another, is lawful and honest on the part of the giver, but unlawful

unlawful and baſe, *turpis*, on that of the receiver (§ 639.). In this caſe the law entitles the giver to get reſtitution of that which he gave: for it would be wrong to ſuffer one who has got a thing in an unlawful manner, for an immoral, a diſhoneſt, or a *baſe* conſideration, to enrich himſelf by his own turpitude by keeping what he has received. The law therefore affords the giver an action, by means of which he may get reſtitution. This action was in the civil law called *condictio ob turpem cauſam.* In order to entitle one to ſue it, 'tis neceſſary, I. That ſomething be given by one to another. II. That the cauſe, reaſon, or conſideration, for which it is accepted, be baſe, immoral, or diſhoneſt, at the ſame time that there is no turpitude in giving it on the part of the giver.

It is plain, 1) that ſomething muſt be *given*; for the end of the action is reſtitution. Therefore every thing, which was ſaid on the firſt axiom concerning the *condictio cauſa data cauſa non ſecuta* (§ 641.), may be repeated on this one: for it is, every word of it, true of both of them.

But the action itſelf differs from the former one in this, that the cauſe, reaſon, or conſideration, for which the thing given is accepted, muſt be baſe, *turpis*, at the ſame time, that there is no turpitude in that for which it is given: for a thing may be given by one to another either for an honeſt or for a baſe cauſe. If it is given for a baſe one, the turpitude may be either in the giver alone, or in both the giver and the receiver, or in the receiver alone, *l.* 1. *p. ff. de cond. ob turp. vel inj. cauſ.* 'Tis in the laſt caſe in which the turpitude is in the receiver alone, that this action, *condictio ob turpem cauſam*, has place: for if the giver gave for a baſe immoral reaſon, he ought not to be allowed to aſk reſtitution, ought to ſuffer for his vice, and may well put up with the loſs which he has ſuſtained; ſince he gave voluntarily, and *ex hypotheſi* there is not any turpitude in him who received. He therefore, who in this caſe deſerves the favour of the law, is not the giver, but the receiver.

In the ſame manner, if the reaſon for which the one gave, and that for which the other received, are both of them baſe, the giver is not entitled to get reſtitution. For they are in this caſe equally unworthy of the favour of the law: therefore matters muſt be allowed to continue as they are, that is, every one muſt keep what he has; for no good reaſon can be aſſigned for preferring the one to the other; *in pari cauſa poſſeſſoris conditio melior habeatur*, *l.* 2. *C. de cond. ob turp. cauſ. l.* 3. *l.* 4. *p.* § 1. 2. 3. 4. *l.* 8. *ff. eod.* Hence one is not entitled to get reſtored to him any thing, which he may have given *meretrici*: for it is by the law of Scotland, and was no doubt by that of the Romans, held to be *contra bonos mores* either to give or to receive in this character.

One is not entitled to get reſtitution of preſents beſtowed on his miſtreſs; it would therefore ſeem to follow, that promiſes made, obligations granted, or deeds made by one in her favour, tho they are *præmia turpitudinis*, are obligatory and actionable: for ſhe to whom the promiſe, obligation, or deed is granted, it may be thought, acquires a *right* by poſſeſſing it; muſt be held *pro poſſeſſore*; muſt be entitled to the favour ſhewn the poſſeſſor, and therefore is not bound and cannot be compelled to reſtore it. But it is otherwiſe: for ſuch promiſes, obligations, or deeds, tho they cannot perhaps be taken from her who holds them, are not actionable, *l.* 5. *C. eod.* they are *ipſo jure* void, *l.* 26. 27. *p. l.* 123. *ff. de verb. oblig.* They give her no right; ſhe cannot avail herſelf of them; they are uſeleſs to her; all, which ſhe poſſeſſeth, is the paper itſelf; it ſhe may *keep*; but he, who poſſeſſeth the money or ſubſtantial conſideration, muſt keep it too. So it is uſeleſs to her, ſince ſhe can recover nothing by it. Beſides, it is a rule of law, that thoſe who defend are more favoured than thoſe who ſue; *favorabiliores rei potius quam actores habentur*, *l.* 125. *ff. d. r. j.* Therefore one is not allowed to avail herſelf of the turpitude of another, in order to make by an equal degree of turpitude in herſelf. ‘ Cum par delictum ‘ eſt duorum, ſemper oneratur petitor, et melior habetur poſſeſſoris cauſa, ſicut ‘ fit,

'fit, cum de dolo excipitur petitoris; neque enim datur talis replicatio petitori, 'aut *ſi rei quoque in ea re dolo actum ſit*,' *l.* 154. *ff. d. r. j.*—*l.* 8. *ff. de cond. ob turp.*

But in the laſt caſe in which the turpitude is ſuppoſed to be in the receiver alone, the giver is entitled to get reſtitution; whether that, for which the thing was given, does or does not follow: for it is the turpitude alone, to which the law attends, *l.* 1. § 2. *l.* 2. 4. § 2. 4. *l.* 5. *ff.*—*tot. tit. C. eod.*

'Tis needleſs to bring examples of particular caſes, in which this action lies. Only it may be remarked, that it is reckoned baſe in one to receive a hire, in order to induce him to do what it is his duty to do without it, *v. g.* for one to take a bribe to give a right judgment, to give his vote for one every way qualified for being elected into an office, or to reſtore a thing depoſited with him, *l.* 2. *l.* 9. *ff. eod.*

TITLE VIII.

De Condictione Indebiti.

§ 647. ERRORS frequently happen in buſineſs; men, the moſt attentive and the moſt careful, may fall into them; they may happen to make erroneous payments, which they were not bound by any natural obligation to make, becauſe that which was paid was either not at all, or more than was due by them. In this caſe thoſe, to whom payment is made, are bound in juſtice to reſtore what was paid to them: for they had no right to receive it, as payment was made when nothing was due to them. The law therefore, which does not in any caſe allow one to enrich himſelf iniquitouſly at the expence of another, preſumes 'an agreement, as it were, to have been made be-'tween him who pays, and him to whom payment is made, by which he to 'whom it is made binds himſelf to reſtore what is paid him to him who 'made it.'

But certain errors are ſo groſs, that the law holds them to be inexcuſable. Therefore one is not in every caſe entitled to get reſtored to him what he has paid by miſtake; the law allows one to ſuffer for inexcuſable errors, that his ſuffering may teach him to be more careful for the time to come. 'Tis therefore in thoſe caſes alone, in which payment is made out of an excuſable error, that he who paid is entitled to get reſtitution of that which he has paid, when it was not due by him; and it is in thoſe caſes that he has an action to recover reſtitution. This action was, in the Roman law, called *condictio indebiti*.

The caſes in which it has place and will be effectual, it will be eaſy to deduce from the following principles.

For it follows from what has been ſaid, that it is neceſſary in order to give place to it, I. that *payment* be *actually made*; II. that that, which is paid, *be not due*, III. even by any *natural* obligation; IV. that he, who pays it, *do not know*, that it is not due; V. that his ignorance be *excuſable*.

§ 648. *Firſt*; It is neceſſary that payment be actually made (§ 647. *ax.* 1.); for if it is not made, reſtitution is impoſſible, ſince if nothing is delivered, nothing can be reſtored.

Payment is in this place taken not in that limited and confined ſenſe, which it has when it is applied to money, but in one more extenſive: for by paying is in this place underſtood 'doing any thing, which one was antece-'dently bound to do.' So that payment may, in an extenſive ſenſe, be defined to be 'performance of an obligation.' One, for inſtance, who grants a deed which he was bound to grant, or delivers a farm which he was bound to deliver,

deliver, may be ſaid to pay, as well and as properly as one who pays a ſum of money which he was bound to pay. 'Tis true, obligations relate commonly to money; therefore payment is generally underſtood of 'the ſatisfaction or 'performance of a pecuniary obligation.' This does not however hinder it from having a more general meaning.

§ 649. *Secondly*, It is neceſſary, that that which is paid be not due (§ 647. *ax.* 2.); *i. e.* that he who pays be not, at the time at which he pays, bound to pay. This may happen to be the caſe many different ways.

Debts or obligations, for I ſhall uſe both words in the ſame ſenſe, are either pure, conditional, to a day, or from a day. If an obligation is granted either purely, or to a day, or from a day, a debt is legally conſtituted and is already due; for *dies ceſſit*, *l.* 213. *ff. de verb. ſig.*—§ 2. 3. *J. de verb. oblig. l.* 41. § 1. *ff. eod. l.* 44. § 1. *ff. de oblig. et act. l.* 5. § 1. *l.* 21. *p. ff. quan. dies legat.*—*R. M. l.* 3. *c.* 4. § 1. 2. and Sk. *n.* The debtor is bound, and has it not in his power to looſe himſelf from his obligation, otherwiſe than by fulfilling it.

Hence one who pays a debt, which he owes either purely or to a day or from a day, pays a debt which is really due by him. Therefore reſtitution cannot be demanded, even tho it ſhould be paid before the day from which it is granted; becauſe that which is paid is really due, *l.* 10. *ff. de condict. ind.* tho it is not demandable at the time at which it is paid. This is ſo true, that one who pays a debt, which he was obliged to pay under a condition or at a day that was ſurely to exiſt, before the exiſtence of the condition or arrival of the day, is not entitled to get reſtitution: for at the time at which he paid, a debt was truly due by him, becauſe it was certain that the condition was to exiſt or the day was to come at ſome time; tho the preciſe time, at which the one was to exiſt or the other was to come, was not certain, *l.* 17. 18. *ff. de condict. indeb.* In theſe caſes the obligation is become effectual, tho the *exaction* of that which is due is ſuſpended. *Præſens obligatio eſt, in diem autem dilata ſolutio, l.* 46. *p. de verb. oblig.*

But if a conditional obligation is fulfilled before the condition which ſuſpends it exiſts, reſtitution of that which was paid may be demanded; becauſe a debt was not truly due at the time, at which payment was made; *dies neque ceſſerat neque venerat, l.* 213. *p. ff. de verb. ſig. l.* 20. *ff. quando dies leg. l.* 41. *ff. de condit. et dem. l.* 5. *ff. de cond. inſt. l.* 45. *ff. de manum. teſtam. R. M. l.* 3. *c.* 4. Sk. *n. ad d.* § 4. It might happen, that the condition might never exiſt; but as ſoon as it became certain that it neither had exiſted nor could exiſt, it became certain, that no debt either was or would become due.

§ 650. 'Tis neceſſary in order to entitle one to get reſtitution, that that which he hath paid be not due by him (§ 647. *ax.* 2.); therefore if it is due, it cannot be ſought back, *F.* 12th *July* 1713, *Creditors of Muirhead.* For he, to whom payment was made, had a right to get it. Hence it follows, 1) that one is not entitled to get reſtored to him what he paid in conſequence of a tranſaction, even tho it ſhould appear that that which he has paid was not due by him; becauſe he is bound in this caſe by his own conſent; he tranſacted when it was uncertain, whether any thing or nothing was due by him; by his own agreement he choſe rather to compound his difference extrajudicially, and to pay a determinate ſum, than to go to law and to run the riſk of being decreed to pay, perhaps, more than his creditor has agreed to accept. Therefore in this caſe the doubtfulneſs of the matter and the tranſaction are cauſes of the exiſtence of a real debt: ſo what is paid cannot be ſaid to have been not due, *l.* 65. § 1. *ff. de con. indeb.* But one, who paid in conſequence, as he thought, of a tranſaction, either when none had ever in truth been made, or if one had been made, when parties had agreed to be off with it, or when it is liable to be ſet aſide for good reaſons, for inſtance, for compulſion or for fraud; is entitled to get reſtitution of that which has been paid, becauſe it was not truly due: for equity does not ſupport the payment in any of theſe caſes, *l.* 23. *ff. de condict. indeb.*

For

For the ſame reaſon, 2) one is not entitled to get back that which he has paid *ex cauſa jurisjurandi*, in conſequence of an agreement by which one refers to the oath of another the verity, the ſubſiſtence, or the quantity of a debt. For if he, to whoſe oath the reference is made, ſwears that a debt is due to him by the other, and gets payment of it accordingly, he cannot be obliged to refund it, even tho it ſhould afterwards appear, that a debt was not due; becauſe he, who made the reference, bound himſelf by his own conſent to reſt the iſſue of his cauſe on the oath of the other. The law therefore preſumes *præſumptione juris et de jure*, that he has bound himſelf not to make any farther enquiry concerning the debt, but to ſtand to the oath. As ſoon therefore as oath is made, it enquires not whether the debt *is* due, but whether it *is ſworn to be* due: for if it is ſworn to be due, the law holds that the oath makes full proof, *l.* 2. *l.* 5. § 2. *ff. de jurejurando*, *l.* 65. § 1. *ff. de condict. indeb.*

3) One is not entitled to get reſtitution of what he has paid in obedience to a judicial ſentence pronounced againſt him; becauſe *res judicata pro veritate habetur*. One who is condemned is preſumed *præſumptione juris et de jure*, to be bound to pay. Beſides, by conteſting the plea he is preſumed to have *agreed* to ſtand to the ſentence of the judge. So he cannot be entitled to get reſtitution, even tho it ſhould afterwards appear, that he was not bound to pay what he was decreed to pay: unleſs he gets the decree reverſed, *l.* 1. *C. de condict. ind. l.* 2. *C. de compenſat. l.* 36. *ff. fam. erciſc.* I ſay, unleſs he gets the decree reverſed: for in that caſe, the effects of it muſt ceaſe *hinc inde*; and parties muſt be reſtored by placing each of them *in ſtatu quo*.

§ 651. From the ſame principle it follows, that one, who has paid more than was due by him, is entitled to get reſtitution of that part of what he has paid, which was not due by him.

One may happen to owe either a *ſpecies* or a *quantity* *. One, who owes one ſpecies and pays another, is no doubt entitled to get back the one which he has paid, and remains bound to pay the other; for the one, which he has delivered, is not that which he was bound to deliver. Thus one, who is bound to give the horſe *Bucephalus*, and thinking it not *Bucephalus* but ſome other which he is bound to give, gives this other accordingly, is entitled to get back the one which he has given, and remains bound to give *Bucephalus*. The caſe is the ſame, if he gives money or any other thing inſtead of *Bucephalus*; for he, who gives one ſpecies inſtead of another, is entitled to get back the one which he has given, and remains bound to give the other which he was bound to give.

Nay one, who being bound to give a ſum of money or any determinate value, thinks himſelf bound to give, and gives *in ſolutum* ſome ſpecies of a greater value; for inſtance, one who owes *L.* 1000, but thinks he owes 2000, and gives to his creditor land worth 2000, is entitled to get back the whole land he has given: the

* Lawyers divide all things into three ſorts; *ſpecies*, *genera*, *et quantitates*; individuals, kinds, and quantities. They call a *ſpecies* 'any particular determinate thing;' for inſtance, the horſe 'Bucephalus' is a ſpecies; he who ſold Bucephalus to PHILIP, lawyers would ſay, ſold a *ſpecies*; before he delivered him, they would ſay, he owed a ſpecies or was *debitor ſpeciei*. In ſhort, it is the ſame thing which the philoſophers call an *individuum*, an *individual*; for inſtance, a certain parcel of land, a certain piece of money, a certain animal; theſe are ſpecies. A *genus* is the ſame thing with the ſpecies of philoſophers, and it is uſed to expreſs 'the ſum of 'all the individuals of the ſame kind.' Thus, all the horſes in the world make the *genus* or kind of horſes; all the men the *genus* of men, or human kind; all the four-footed beaſts the kind of quadrupeds; all the fiſhes the *genus* of fiſh; all the trees the *genus* of trees; all animals make the animal kind. Or it is uſed to ſignify 'an indeterminate individual of a determinate kind.' Thus, *a* horſe is called by lawyers a *genus*, if no particular horſe is ſpecified; for inſtance, if one obliges himſelf or his heir, to give another *a* horſe, without mentioning any particular horſe, the obligor is ſaid to owe a genus.—— A quantity is 'a determinate number of the indivi-'duals of a determinate kind.' Thus, four horſes make a quantity of horſes; four bolls of wheat make a quantity of wheat, &c. provided the individual four horſes, the individual bolls of wheat are not ſpecified: for if not only the number and the kind, but the individuals are particularized, tho in one ſenſe they may be ſaid to be a quantity, they are in reality a ſpecies. Thus, if the four horſes, *Bucephalus*, *Hamlet*, *Othello*, and *Cæſar*, are ſpecified, theſe no doubt in vulgar, and ſometimes in juridical language, are ſaid to be a quantity: they are however a ſpecies; becauſe they may be conſidered all together, as one determinate thing.

the creditor is not entitled to retain as much of it as is equivalent to *L.* 1000, *l.* 26. § 4. *ff. de condict. indeb. Cum amplius ſolutum eſt, quam debebatur, cujus pars non invenitur, quæ repeti poſſit, totum eſſe indebitum intelligitur, manente priſtina obligatione, l.* 84. *ff. d. r. j.* The reaſon is, becauſe nobody can be forced to enter into a community in order to be obliged to divide his property, and to hold an inſignificant inſtead of a large eſtate, Many people, who would chuſe to have a large landed eſtate, would not chuſe to have a ſmall one, but would like rather to have its value in money.

For the ſame reaſon one who owes not a ſpecies, but is bound by an alternative obligation to give for inſtance one of two or more things, either *Stichus* or *Pamphilus*, and gives them both, thinking he was bound to do ſo; is entitled to get back either of them which he pleaſes. He to whom they were given is entitled to keep only one of them, and the law gives the option to the giver; for it is reaſonable, that he who had it originally retain it ſtill, ſince his ignorance being excuſable, ought not to give any new right to him to whom payment was made, *l. penult. C. de condict. indeb. Ipſe habeat electionem recipiendi, qui et dandi habuit.* But one or both of them may periſh before they are ſought back, and nothing can in this caſe be reſtored or demanded; becauſe one of them is due, *l.* 32. *p. ff. de condict. indeb. l.* 34. § 6. *ff. de con. empt.*

Therefore one who owes not a ſpecies but a genus, for inſtance *a* horſe, and thinking he owes a ſpecies, *Bucephalus* for inſtance, gives him, is entitled to get that ſpecies back, and to pay with another; becauſe he had a right originally to have paid with another. *Bucephalus* may have been one of the moſt valuable horſes in the world; it would therefore be iniquitous that his owner ſhould loſe him, when he might have diſcharged his creditor with one far leſs valuable, *l.* 32. § 3. *ff. de condict. indeb.* *. But *Bucephalus* may die before he is ſought back; he, who paid him, is, in this event, releaſed from his obligation, for he has *in terminis* fulfilled it; and is not entitled to get the value from him to whom he paid him; becauſe the latter is not *locupletior factus*, and beſides, was no more than *debitor ſpeciei* to him who paid, and who would have had a right to have got him back if he had not died. Of courſe he cannot be forced to give him another.

One, who owes a *quantity* of any kind, and delivers a greater one than he owes, is entitled to get back as much of that which he has given, as is equal to the exceſs by which it exceeds the quantity he really owed. Thus one who owing only *L.* 100, pays 200, or being bound to give 100 acres gives 200, is entitled to get back 100. In theſe caſes, one becomes not by payment bound to enter into a community, into which he was not antecedently obliged to enter; for he was by his original obligation bound to part with as much of the ſame kind, as he is obliged to allow to remain with him whom he has overpaid. Reſtitution therefore, in caſes of this kind, does no more than reduce him to the ſame condition, in which he would have been, if he had not paid more than he was bound, *l.* 26. § 5 6. *ff. de condict. ind.*

§ 652. If two or more perſons are bound *jointly*, they muſt be bound to pay either a fungible or a thing which is not fungible (§ 144.). In caſe they are bound to pay a fungible, a ſum of money, for inſtance, or a quantity of corn, and they pay both of them together more than they were bound; for inſtance, if they owed 100, and pay 200 *pariter*, by contributing each of them 100 for inſtance to a common fund, and giving the whole ſum to the creditor, each of them is entitled to get back a ſhare of the exceſs proportional to his part of the common fund. Thus in the caſe which has been ſuppoſed, each of them is entitled to get back 50. Suppoſe one of them to have given 150, and the other 50, he who gave the 150 will get back 75, and he who gave 50 will get 25, *l.* 19.

* In all theſe caſes he, to whom payment has been unduly made, has a right to *retain* that which has been paid him, till payment of that which is due to him is made, *l.* 26. § 4. *ff. de cond. indeb.*

l. 19. § 4. *ff. de condict. ind.* In caſe they are bound to pay a thing which is not fungible, they are bound by an obligation that either is or is not alternative. If it is not alternative, and is fulfilled by either the one or the other, or both of them, 'tis plain that there cannot be room for demanding reſtitution of any thing; becauſe that which is paid was due. If the obligation is alternative, for inſtance to give either *Stichus* or *Pamphilus*, either *Bucephalus* or 1000 guineas, and they give by a joint or common act (*pariter*), not one but both of them, either both *Stichus* and *Pamphilus*, or both *Bucephalus* and 1000 guineas, they are entitled to get back one of them, becauſe both of them were not due; but the creditor, he to whom they paid, has the option of reſtoring either of them he pleaſes, *l.* 21. *ff. eod.* in caſe they cannot agree between themſelves which of them they will have reſtored: for if they agree, he ſeems not to have any more right either to find fault with their choice, or to the option, than he would have had, if there had been only one debtor.

But the payment may be made not *pariter*, by one joint act of them both, but ſeparately at different times, and by different acts; in this caſe he who paid firſt has no right to get any thing back from him to whom he paid, becauſe a debt was truly due by him. But he who paid laſt is entitled to get back what he paid, becauſe the obligation was fulfilled and diſcharged by the firſt payment: of courſe what he paid was not due; ſo it muſt be reſtored. 'Tis true, he who paid firſt muſt be, if he would *otherwiſe* have been, entitled to get reimburſement from him who paid laſt. For the laſt payment cannot alter or have any effect on the rights which the debtors have among themſelves; no matter whether they are all joint and principal debtors, or all joint acceſſory debtors, co-cautioners, or ſome of them principals and others of them cautioners, *l.* 20. 25. 59. *ff. de cond. ind.*

§ 653. *Thirdly;* That which is paid muſt not be due even by a *natural* obligation (§ 647. *ax.* 3.). For one who pays a thing, which he was bound by a natural obligation to pay, is not entitled to get reſtitution; becauſe he cannot be ſaid to have paid what was not due by him. Beſides, the obligation to make reſtitution, and the action which the law gives in order to get it, are founded on equity alone. By conſequence reſtitution cannot be demanded in any of thoſe caſes, in which it would be iniquitous to get it. But it would be iniquitous, law therefore does not allow one to get reſtitution of any thing which he has paid, when he was bound by a natural obligation to pay it; for a natural obligation is one, which is founded on equity. But this rule ſuffers one exception: for in all caſes in which poſitive ſtatute gives a right to get reſtitution, it may be demanded, even tho the payment may ſeem to be ſupported by a natural obligation. Indeed, this can hardly be ſaid to be an exception: for in all thoſe caſes law holds the obligation to be iniquitous. Thus one, who loſes at one ſitting either by gaming or by betting the value of *L.* 10, is entitled, if he ſhall pay it, to ſue the winner for it at any time within three months from the time, at which it was loſt, 9*no* An. *c.* 13. becauſe law reckons money won at game won unjuſtly.

If one who has paid a thing which he was bound by an obligation merely natural to pay is not, *a fortiori* one, who has paid what he was bound by a *mixed* obligation, *i. e.* both by a natural and by a civil obligation, to pay, cannot be entitled to get reſtitution: for inſtance, one who pays a ſum of money, which he had borrowed, and had bound himſelf by a formal deed to pay.

'Tis therefore in thoſe caſes alone, in which one pays what he was bound either by no ſort of obligation or by one *merely civil* to pay, that he is entitled to get reſtitution. If he was not bound by any ſort of obligation to pay, 'tis plain that he muſt be entitled to get it; becauſe he who got payment had no right to get it. Conſequently, he has no right to keep what he has got.

If he was bound by an obligation, which is merely civil, to pay, he is for the ſame reaſon entitled to get reſtitution; becauſe that ſame equity, which has intro-

duced this action, is contrary to obligations which are merely civil, and hinders them from being effectual.

§ 654. *Fourthly;* But to entitle one to get reſtitution of what he has paid, 'tis neceſſary not only that that which is paid be not due, but alſo that he who paid do not know it to be not due (§ 647. *ax.* 4.): law preſumes one, who pays what he knows was not due by him, what he knows he was not bound to pay, to have intended to make a preſent of it. Therefore it does not allow him to get reſtitution of it. *Cujus per errorem dati repetitio eſt, ejus conſulto dati donatio eſt, l.* 53. *ff. de r. j.* This is ſo true, that one is not entitled to get reſtored to him what he paid, when he knew it was not due by him, even tho he ſhould have paid with an intention to ſeek it back again, *l.* 1. 50. *ff. de cond. indeb.*

But if he either did not know that that which he paid was not due by him, or *doubted* upon the matter, he is entitled to get reſtitution, upon diſcovering afterwards certain evidence that it was in truth not due, *l. ult. C. de condict. indeb.* For one who doubts cannot be ſaid to *know* that it was not due (§ 647. *ax.* 4.).

§ 655. *Fifthly;* It is not enough that he who paid do not know, that that which he paid was not due by him; his ignorance muſt be *excuſable* (§ 647. *ax.* 5.): for there is a certain degree of ignorance, there are certain errors ſo groſs, that law holds them to be *inexcuſable.* One therefore, whoſe ignorance or error is inexcuſable, is not entitled to get reſtitution, *H.* 81.—*K.* 39. But if it is excuſable, he is entitled to it, no matter whether it be ignorance of law, or ignorance of fact *: for the one may happen to be as excuſable as the other. 'Tis true, ignorance of law is not ſo eaſily excuſable as ignorance of fact; 'In omni parte error in jure 'non eodem loco, quo facti ignorantia, haberi debebit: cum jus finitum et poſ-'ſit eſſe, et debeat; facti interpretatio plerumque etiam prudentiſſimos fallat,' *l.* 2. *ff. de jur. et fact. ignor.* One who is himſelf ignorant of the law, may conſult thoſe who are learned in it. But caſes may occur, in which ignorance of it ought to be excuſed; in theſe caſes therefore one who pays is entitled to get reſtitution, *D.* I. 187. 26th *July* 1733, *Stirling* †.

From hence this general rule may be deduced, that this action, *condictio indebiti*, may be effectually ſued by 'ſuch as have, through an excuſable ignorance, 'paid that which was not, but they did not know was not, due by them.'

That which is paid may happen either not to be due by any body, or to be due by ſomebody, but not by him who paid it. If it is not due by any body, he who received payment is bound to make reſtitution to ſomebody: for he cannot in juſtice be allowed to keep it. He is bound to reſtore to him, who has ſuſtained the loſs, out of whoſe eſtate the payment was made. He therefore may ſue this action.

One may ſue it not only when himſelf paid a debt he ſuppoſed to be due by him, but alſo 1) when another paid it by his order, or 2) when he ratifies payment which another took it upon him to make in his name. For in the firſt caſe in which he is ſuppoſed to have ordered the payment to be made, he is held to have made it himſelf. *Nam qui per alium facit, per ſe feciſſe videtur;* a procurator, factor, or commiſſioner, is held to be one and the ſame perſon with the mandant. In the ſecond caſe in which he is ſuppoſed not to have *ordered* the payment *before* it was made, but to have *ratified* it *after* it was made *without an order*, the ratification is equal to a mandate; *ratihabitio mandato æquiparatur.* So it muſt be held to have been made by himſelf in this one alſo. Thus a pupil has a right to ſue for reſtitution of money which his tutor has paid for him, but which was not due by him.

If he in whoſe name payment was made is entitled, he who paid it in name of the other cannot be entitled, for both of them cannot be entitled to ſue it. But he

* It ſeems to have been otherwiſe by the civil law: for errors in law were by it held, in moſt caſes, to be inexcuſable.

† It is impoſſible to determine, by any general rule, the caſes in which ignorance either muſt or muſt not be held to be excuſable; the variety of human affairs does not admit of ſuch preciſion. Therefore it muſt be determined by the judge according to the circumſtances of every caſe, and the characters of the perſons concerned in them.

he who paid in name of another may happen himſelf to be, and he in whoſe name payment was made not to be entitled to ſue it.

For one may not ratify the payment which has been made in his name, and the action muſt in this caſe lie to him who paid; becauſe he is entitled to be reimburſed by ſomebody. But if he is not reimburſed by him in whoſe name he paid, he muſt in equity have a right to be reimburſed by the perſon to whom he paid; ſince he paid what he was not bound to pay, and what it would be unjuſt in him to whom payment was made to keep. A tutor, for inſtance, who pays a debt which he thought to be due by his pupil, but which appears to have been not due by him, is himſelf entitled to ſue for reſtitution, either if he does not ſtate it to the accompt of his pupil, or if credit is not allowed him for it; becauſe he paid what he ought not to have paid: for the pupil does not, in this caſe, loſe any thing by the payment; his eſtate is not diminiſhed by it, ſince payment was not made out of it. But the tutor, out of whoſe pocket the fund of payment proceeded, muſt be entitled to reſtitution; becauſe he who received is bound, as it were, by a contract to reſtore.

If that which was paid was due by ſomebody, but not by him who paid it, then he who paid it, paid it in name either of the debtor or of himſelf. If he paid in name of him by whom the debt was due, neither he nor the debtor can be entitled to reſtitution; becauſe that which was paid was truly due, and was paid on purpoſe to diſcharge the debtor, *St.* 23d *Feb.* 1681, *Earl of Mar.*—*F.* 12th *June* 1713, *creditors of Muirhead.*—*K.* 39. By a payment therefore of this kind the debtor is diſcharged of his debt; and he who paid it either will or will not be entitled to be reimburſed by him, as he had or had not an *animus donandi*, *l.* 44. *ff. de condict. indeb. l.* 2. *C. eod.*

If he paid in name not of him by whom the debt was truly due, but of himſelf, then he either was or was not bound, he either was or was not ſurety, for the principal debtor. In caſe he paid in his own name, thinking he was himſelf the principal debtor, when he was only ſurety for him, neither he nor the principal debtor is entitled to reſtitution: not the principal debtor, 1) becauſe the payment was not made out of his eſtate; 2) becauſe tho it had, he would not have been entitled to reſtitution, ſince the debt which was paid was due by him; 3) becauſe the payment diſcharges him of his obligation: nor will he who paid be entitled to get reſtitution from him to whom he paid; for the latter *ſuum recepit.* Beſides, it is in caſes of this kind a maxim of the law, *ſolutionem non indebitæ quantitatis non debere revocari, l.* 49. § 1. *ff. fidej.*—*St.* 23d *Feb.* 1681, *Earl of Mar.*—*l.* 2. *C. de cond. ind.* He muſt therefore ſeek his reimburſement from him for whom he was ſurety, *K.* 39. In caſe he was not bound for the debtor, he is entitled to get reſtitution made by him to whom he paid; for a creditor has no right to get payment from one who is not indebted to him, *l.* 65. § 9. *ff. de condict. ind.*—*St.* 10th *Jan.* 1673, *Ramſay.*

Thus one who pays a debt, believing himſelf to be when he is not the heir of the original debtor, is entitled to be reimburſed by him, to whom he paid; and the debt is not diſcharged, but remains due by the true heir, *l.* 19. § 1. 2. *ff. eod.* In the ſame manner a cautioner, who pays after he has expreſsly ſtipulated with the creditor 'that payment ſhall not be demanded from him,' thinking that he continues ſtill to be liable to the debt, may ſue for reſtitution from him to whom he paid, *l.* 32. § 1. *l.* 59. *ff. de condict. indeb.*

§ 656. The perſon, to whom payment has been made, is he who is bound to reſtore, and is therefore liable to be ſued by this action, ſince it is he who is enriched *cum alterius detrimento.*

But payment may be made either to that perſon himſelf to whom the debt is ſuppoſed to be due, or to ſome other for him. If it is made to himſelf, he muſt be liable to make the reſtitution, and to be ſued by this action. If it is made not to himſelf but to ſome other for him, then this other either is or is not empowered by a ſpecial mandate to receive payment of the debt. If he has a ſpecial mandate

date to receive it, he who is ſuppoſed to be the creditor, and gave the mandate, is liable to reſtore; becauſe the payment was in effect made to him, ſince it was made to his procurator. If he is not empowered by a ſpecial mandate, the creditor, or rather he who is ſuppoſed to be the creditor, is not bound to make reſtitution or liable to be ſued, unleſs he ratifies the deed of his factor. The factor therefore muſt himſelf be liable; for he is the perſon who is preſumed to be *locupletatus*. This is ſo true, that one to whoſe factor payment has been made is not liable to be ſued by this action, in caſe the factor had no more than a general commiſſion to manage his affairs. Ratification, *ratihabitio*, is therefore neceſſary, in order to make the *maſter*, *dominus*, or mandator liable in this and all ſimilar caſes; *quoniam nihil de hoc nomine exigendo mandaſſe videretur*, *l.* 6. § 1. 2. *ff. l.* 8. *C. de condict. indeb.* Hence it is plain, that if the factor exceeds the power given him by his commiſſion, he muſt himſelf be liable, *quatenus fines mandati exceſſerit*; and he who employed him only *quatenus fines mandati ſervaverit*, *l.* 57. § 1. *ff. eod.*

§ 657. The end of the action is reſtitution of that which was paid, when it was not due, *cum omni cauſa*, *l.* 15. *p. ff. de cond. ind. l.* 38. § 2. *ff. de uſur.* but not with intereſt. But one may have *bona fide* alienated that which was paid him; and he is bound to reſtore no more than that by which he is *locupletior factus*, *l.* 3. *ff. de cond. ind.* Therefore if he diſpoſed of it for value, he muſt reſtore the value which he received; if by gift, he is not bound to reſtore any thing.

It muſt be remarked, before we leave this ſubject, that he who ſues this action is bound to prove two things, both that payment was actually made, and that that which was paid was not due; for theſe are the *media* on which his plea is founded. By the Roman law, if he who was ſued denied that he had received payment, and the purſuer proved that he had received it, he was not laid under the neceſſity of proving the other alternative; becauſe the law preſumed that one, who was convicted of a lie which might have been ſo promotive of his intereſt, lied about the other point alſo; therefore it obliged him to reſtore, unleſs *he proved* that that which was paid him was due, *l.* 25. *p. ff. de probat.* Something of this kind might have place in the law of Scotland; for it would be a ſtrong circumſtance againſt him, to whom the payment was made, if he put the iſſue of his cauſe on denying it to have been made; he might from thence be held to have owned, that, if it was made at all, it was not due *.

TITLE IX.

Containing ſome fugitive Obſervations.

§ 658. BEFORE we leave this matter of reſtitution, it may not be improper to make the following fugitive obſervations.

I ſaid (§ 625.) that one, who has happened to get poſſeſſion of the property of another, is bound to reſtore it to its right owner, without regard to the title on which he acquired it, whether it was an onerous or a gratuitous one. For the title, on which the acquiſition was made, has no influence on the rights of the owner. Therefore he is not entitled, in caſe he has bought it or purchaſed it for a valuable conſideration, either to demand to be reimburſed of the price by the owner, or to *retain* it till he gets his reimburſement. He muſt deliver it to the owner, and

* The juridical language of Scotland is penurious, and the writers upon its law have found themſelves obliged by neceſſity to make uſe of the very technical terms uſed by the Romans. But we are not from thence to imagine that either the names or the actions themſelves have been adopted into the law of Scotland; for it is the actions themſelves, ſuch as they were preciſely in the Roman law, 'tis the *principles* alone on which theſe actions are founded, that we have adopted. The *condictio* therefore *ſine cauſa*, when applied to the law of Scotland, ſignifies an action, in which the *medium concludendi* is poſſeſſion *ſine cauſa*, *&c.* and one, which is founded not on that principle alone, but on others alſo, cannot be called by this name. But this hinders not the principle *ſine cauſa*, *&c.* from being founded on by us, becauſe in every cauſe all the good arguments, which occur, may be brought in order to arrive at the concluſion.

and for his redreſs muſt have recourſe on him from whom he purchaſed, and who is bound to warrant his purchaſe to him. Indeed it would be hard to oblige one to *buy* a thing, which is already *pleno jure* his own, *l.* 23. *C. de rei vindic. l.* 2. *C. de furt.*

§ 659. One is bound to reſtore his property to its right owner, whether he acquired the poſſeſſion *bona* or *mala fide* (§ 625.): for the faith, on which he made his purchaſe, cannot detract from the rights of the owner. But this doctrine admits of one exception: the fruits (§ 152.) which a thing bears are acceſſories of it; the owner of it is *ſtrictiſſimo jure* owner of them; for he is alone entitled to *uſe* it, to make it produce fruits, and to reap them. But one, who poſſeſſes a thing which is fructiferous and belongs to another, is not in all caſes bound to reſtore them. The law diſtinguiſhes between the principal ſubſtance itſelf, and the fruits produced by it. One is in all caſes bound to reſtore the principal; *Fo.* 29th *Nov.* 1698, *Finlay*; but he is not bound to reſtore its fruits, in caſe he has *reaped* them *bona fide;* he is bound to reſtore thoſe alone, which he *reaped mala fide.* The rule therefore is, 'that one, who poſſeſſeth a fructiferous ſub-'ſtance *bona fide*, acquires the property of all the fruits which he reaps during the 'continuance of his *bona fides*, and is not accountable for them; but that one 'is accountable for all thoſe reaped by him from the time, at which he ceaſes to 'be *in bona* and begins to be *in mala fide.*' *Bonæ fidei poſſeſſor fructus rei alienæ perceptos irrevocabiliter ſuos facit; mala fide reſtituere tenetur, l.* 23. *p.* § 1. 2. *l.* 48. *p. ff. de acquir. rer. dom. l.* 4. § 2. *ff. fin. regun. l.* 22. *C. de rei vindic. l.* 25. *ff. de uſur.* § 35. *J. de rer. div.*

§ 660. *Bona fides* is an expreſſion uſed in the civil law, to ſignify 'a ſincere 'and honeſt belief of the goodneſs and validity of one's own right.' Thus one is ſaid to purchaſe *bona fide*, when he ſincerely believes that he purchaſes either from the real owner, or from one who has a right to convey the property to him, and that he acquires thereby a good title to it, *l.* 109. *ff. de verb. ſig.* ſuch is one, who purchaſes from a thief whom he believes to be the right owner. One is ſaid to *poſſeſs bona fide*, when he believes he has a good right to hold the poſſeſſion; for inſtance, one who poſſeſſeth a ſtolen horſe, which he believed belonged to him from whom he bought it. This is the moſt extenſive ſignification of the phraſe. But one cannot be ſaid properly to *poſſeſs bona fide* a thing, which is truly his own; for it is impoſſible for him to poſſeſs it *mala fide.* A *bonæ fidei* poſſeſſor therefore is 'one who poſſeſſeth a thing which belongs to another, believing 'ſincerely that it belongs to himſelf, and that he has a good right to poſſeſs it.'

Mala fides is contrary to *bona fides*, and implies 'a conſciouſneſs of the badneſs of 'one's own right.' Therefore one is ſaid to purchaſe *mala fide*, when he knows that he, from whom he purchaſes, has no right to convey to him; and a *malæ fidei* poſſeſſor is 'one who poſſeſſeth a thing which belongs to another, knowing that it does not belong to himſelf, and that he has not a good title to poſſeſs it *.

§ 661. A *bonæ fidei* poſſeſſor believes the thing which he poſſeſſeth to be his own, and either is or may be held by others to be the owner of it: he muſt therefore on a double account think himſelf entitled to uſe the fruits of it, and may be obliged to live at an expence ſuitable to the rank of one who is believed to be the proprietor of a large eſtate. The fruits which he has uſed, are no longer extant: it would be hard therefore to make him accountable for them, after they cannot be uſeful to him; eſpecially when they may amount to a ſum which he is not able to pay. He has been at pains to reap them, and the owner has been negligent about recovering his property. Hence the law holds a *bonæ fidei* poſſeſſor to be the proprietor of the fruits reaped by him during his *bona fides*, and makes him unaccountable to the right owner for them. *Bona fides tantundem poſſidenti præſtat, quantum veritas, quotiens lex impedimento non eſt, l.* 136. *ff. de reg. jur.*

* See GOEDDAEUS *ad l.* 109. *ff. de verb. ſig.*

But one, who knows that he is poſſeſſing a thing which belongs to another, not only has but knows that he has no right to reap the fruits of it. Therefore the law makes a *malæ fidei* poſſeſſor accountable for all which he has actually reaped after that point of time, at which he began to be *in mala fide*.

§ 662. In order therefore to make one unaccountable for the fruits of a thing poſſeſſed by him, it is neceſſary firſt that he have *reaped* them; *percepit* (§ 152.). *Bonæ fidei poſſeſſor fructus* perceptos percipiendo *irrevocabiliter ſuos facit*. For thoſe which he has not *reaped*, which he hath not ſeparated from the fructiferous body, and which are called *pendent*, accompany the body which bears them; they are conſidered as parts of it; *fructus pendentes pars fundi eſſe videntur*, *R. M. l.* 1. *c.* 13. § 5.—*l.* 44. *ff. de rei vindic.* Therefore they muſt go along with it, becauſe a part cannot be ſeparated from the whole, *l.* 76. *ff. de rei vind. l.* 113. *ff. de reg. jur.* But it is not neceſſary that they be *conſumed*, in order to make him who *reaped* them *bona fide* unaccountable for them. For in this point the law of Scotland is by ſome thought to differ from that of the Romans. By the civil law a *bonæ fidei* poſſeſſor did not acquire the property of fruits reaped by him *percipiendo* merely. In order to make him unaccountable, it is ſaid to have been neceſſary that he had *conſumed* them: *fructus perceptos non percipiendo, ſed conſumendo ſuos irrevocabiliter facit*; for the *ipſa corpora* of thoſe which he had not conſumed, or which were *extant*, he was bound to reſtore. But there ſeems not to be wanting authorities on which one may maintain, that the civil law ſays no ſuch thing, *l.* 13. *ff. quib. mod. uſusf. l.* 78. *ff. de rei vindic. l.* 4. § 19. *ff. de uſurp. et uſuc. l.* 25. *l.* 28. *p. ff. de uſur. l.* 48. *p. ff. de acq. rer. dom.*

It is neceſſary 2) that he hath reaped them *bona fide:* for he is accountable for all thoſe which he hath reaped *mala fide*. In this matter therefore *ſingula momenta ſunt computanda*. But belief is an act of the mind, and it is not eaſy to know the preciſe point of time at which one ceaſes to be *in bona fide* or begins to be *in mala*. The civil law laid down one general rule in this matter, and held every body to begin to be *in mala fide* at leaſt at the time of *litisconteſtation*, that is, at the time at which iſſue was joined by the parties, *l.* 10. *C. de acq. et retin. poſſ. Poſt litem conteſtatam omnes incipiunt malæ fidei poſſeſſores eſſe*, *l.* 25. § 7. *ff. de hered. petit.* But the law of Scotland has defined no preciſe time at which it holds people in all caſes to begin to be *in mala fide;* it leaves every caſe to reſt on its own circumſtances, and to be judged by them: ſo that there is in all caſes *locus veritati*. The law leaves it to the judge to diſcover from the circumſtances of every caſe the preciſe time, at which one began *actually* to be *in mala fide;* and to ſuit his deciſion to them, making the poſſeſſor accountable for the fruits reaped before that point, during the continuance of his *bona fides*, and accountable for thoſe reaped after it. Therefore, one may be found to be liable to account from different times. Sometimes one may be *in mala fide* perpetually and in every inſtant, during his poſſeſſion; ſometimes he may begin to be in it, before any legal ſtep is taken to make him yield poſſeſſion, *Du.* 22d *March* 1628, *Chiſholm.*—16th *Nov.* 1633. *Grant.*—*St.* 20th *Nov.* 1662, *children of Woolmet.*—*Fo.* 2d *Jan.* 1711, *Lady Cardroſs.*—*Fa.* I. 131. ſometimes he may begin to be in it at the time at which he is ſummoned by the right owner, *Du.* 19th *Feb.* 1635, *Cunningham.*—2d *Dec.* 1635, *Home.*—21ſt *March* 1637, *Lady Manderſon.*—*H.* 21.—*Fa.* 7th *Dec.* 1744, *creditors of Buchanan.* I. 240. ſometimes not till an interlocutory judgment is pronounced againſt him, 1758, *Gordon v. Maitland;* ſometimes not till a final ſentence is given by that ſupreme court from which there lies no appeal. For caſes may happen which are either ſo clear or ſo dubious, that it may be reaſonable to date the commencement of one's *mala fides* from all of them.

§ 663. The poſſeſſor is not accountable for any of the fruits which he hath reaped *bona fide*, no matter whether they be natural, raiſed by induſtry, or civil. 'Tis true, ſome lawyers do not extend this to *civil* fruits. But they are ſurely wrong; for every one knows, that a *bonæ fidei* poſſeſſor is not accountable either for rent of

of land, for that of houſes, for freight of ſhips, for hire of horſes, *&c.* which are all *civil* fruits (§ 152.). The utmoſt length therefore to which this matter can be carried is this, that they are accountable for the intereſt of money lent on perſonal ſecurity, which has been received by them, or been applied to their own uſe. The reaſon is, that the fruits are, in this caſe, of the ſame kind with that which bears them; money is always money, whether it be called principal or intereſt; there is no difference between them. Therefore there can be no reaſon why a poſſeſſor, who is obliged to reſtore the one, ſhould not alſo be obliged to reſtore the other. Beſides, money is the moſt barren of all things; it does not naturally bear any fruits; the only benefit, which can be reaped from it, is the uſe of it. But by being uſed, it is conſumed: therefore if one is obliged to reſtore the principal, even when he has conſumed it, *ex paritate rationis* he ought to be obliged to reſtore the intereſt. For there is in this reſpect a great difference between money and other fructiferous ſubſtances; other things may be uſed *ſalva ſubſtantia;* the fruits may be conſumed, and the fructiferous body remain the ſame, becauſe they are ſubſtances totally different from it. Beſides, other fruits require culture; but money bears its intereſt without it. So one ought to reſtore that, which it coſts him no trouble either to reap or to enjoy. But this opinion, which ſeems to be plauſible, can hardly be ſaid to be founded in law; for the ſame reaſons, which make a *bonæ fidei* poſſeſſor unaccountable for fruits of other ſorts, ought to free him from the hardſhip of accounting for the intereſt of money. 'Tis his *bona fides*, which relieves him from it in the one caſe; ought it not alſo to do it in the other? He lives in both caſes ſuitably to the fortune which he believes himſelf to have; he is not *locupletior factus* by the fruits which he has reaped; and it would be *cruel* to make him in this caſe liable for a ſum which he has not, and which he is not perhaps able to pay. Beſides, the civil law, which is in this matter the fountain of the law of Scotland, makes no diſtinction between *fructus civiles naturales* and *induſtriales*, between intereſt of money and other things; the lawyers, whom I mentioned, cite no authority for their opinion; and it ſeems not to have ever had the approbation of the ſupreme judges of the nation. It muſt therefore be held, that a *bonæ fidei* poſſeſſor is not, in *any* caſe, accountable for fruits, natural, raiſed by induſtry, or civil, which he hath reaped, *arg. l.* 62. *ff. de rei vindic. Fa.* I. 148. 240.

A

SYSTEM

OF THE

PRINCIPLES of the LAW of *SCOTLAND.*

PART I.

BOOK VIII.

TITLE I.

Of Donations.

§ 664. THE foregoing book treats of ſome of thoſe caſes, in which one is bound to *make reſtitution*, *becauſe* he *has no right* to keep that of which he hath got poſſeſſion. The next in order are thoſe, in which one is bound to *recompenſe* another for *good* done to him (§ 623.). But people frequently do *ſervice* to others without either expecting or intending to aſk to be recompenſed by them; and are moved by reſpect, by affection or by friendſhip, to exerciſe their liberality, and to make preſents to others. By means of theſe friendſhips are cultivated, connexions are maintained, and an intercourſe is preſerved among mankind at an inconſiderable expence. We ſhall therefore *firſt* conſider *donations*, or thoſe caſes in which one does good to another, meaning not to be recompenſed for it; and proceed next to thoſe in which he means to be reimburſed.

A gift, a preſent, or a donation, for I uſe all theſe words in the ſame ſenſe *, is 'a valuable or pecuniary bounty, given *gratis* by one who is not bound and

* I believe, the word *gift* is properly applied to ſuch things as are given *cum cauſa*, and anſwers to the word *munus* of the Romans, *l.* 194 214 *ff. de verb. ſignif.* Thus we ſay, *a new year's gift*, *a morning-gift*. A preſent is a general word, and is uſually applied to things of ſmall value, which are given *ſine cauſa* by one to another. Donation is a word uſed on more ſolemn occaſions to ſignify things of conſiderable value, given in a formal way, eſpecially ſuch, as are bequeathed to corporations, ſocieties, or bodies of men. Beſides, *donatio* is uſed in the law of Scotland for a conveyance, transference or alienation of property; and *donare* is a word uſed in general for *tranſferrre*, to convey, transfer, or make over, as is plain from many places of the old books of the law, *R. M. l.* 2. *c.* 24.—*c.* 29. § 5.

'cannot be forced to give it, and accepted by him to whom it is given,' Sx. *not. ad R. M. l.* 2. *c.* 24. He, by whom the gift is given, is called the *donor*; and he, to whom it is given, is called the *donee*. From the definition it follows, I. That a gift is a valuable or pecuniary bounty: II. That it is given *gratis*. III. That it must be *given* on the part of the donor, and *accepted* on that of the donee. From these axioms it will be easy to shew, 1) what is the proper idea or meaning of a gift; 2) what things may be gifted; 3) who can give gifts; 4) to whom they can be given; 5) in what manner gifts may be granted; 6) what is required in order to render the right of the donee complete; 7) what are the effects of a complete gift.

§ 665. A gift is a pecuniary or a valuable bounty (§ 664. *ax.* 1.): it must have a pecuniary value; it must be either money itself, or something which is capable of being bought and sold, or valued by it. For one may do another some service, which cannot be said properly to have a pecuniary value, and therefore cannot be called a gift. For instance, he may give him a good character, may recommend him to some man in power, may procure him a favour, and may do him other good offices. But none of these are gifts; it is essential to the idea of a gift, that it have a pecuniary value; and nothing, which has not a pecuniary value, can be called a gift.

II. It is essential to the idea of a donation, that it be given *gratis*, that is, for nothing. The donor must not receive, at least he must not bargain about receiving from the donee any pecuniary consideration for his present: for if he makes it on condition, that something be given him for it, it cannot be said to be a present, but is an onerous bargain, either a sale, or an exchange, or some other contract.

However, remuneratory donations are held to be donations. Remuneratory donations are 'such, as one gives out of mere good-will and favour, in return for 'presents made him.' These are donations, notwithstanding that they are remuneratory; because they are given out of mere good-will and favour, the donor could not be compelled to give them, and his gratitude detracts not from his liberality.

§ 666. Nothing can be said to have a pecuniary value, that is exempted from commerce, or is incapable of becoming the property of private men (§ 139.). Therefore nothing, that is exempted from commerce, can be gifted: such, for instance, are those things, which are said to be common, or public; *res communes*, or *res publicæ* (§ 140.); these are in some sort exempted from commerce, and as long as they continue to fall under the denomination of *res communes* or *res publicæ*, are incapable of becoming the property of private men.

But every thing, which is not exempted from commerce, which is *in commercio*, which may be bought, sold, and bequeathed, and which may become the property of private persons, may be gifted: 1) Things, that are incorporeal as well as such as are corporeal; for incorporeal things, such as servitudes, discharges from obligations, and other rights, admit of pecuniary values, and are in reality worth money, as well as things that are corporeal: 2) Things which are immoveable, such as lands, houses, as well as things which are moveable, such as money, jewels, pictures, cloaths, furniture: 3) Things that belong to others, as well as such as belong to the donor; not that one, who makes a present of any thing, that belongs to another, either does or can transfer the property of it; he can do no such thing: the right of the owner cannot be hurt, his property cannot be taken from him, without his own consent (§ 625.), *l.* 11. *ff. d. r. j.* Therefore he, to whom the present is made, does not immediately acquire the property of the thing presented to him, unless the present be made with the consent of the owner: for, in that case, it may be said to be made by the owner himself. So the property will be transferred in the same way, as if the donation had been made by him alone, and the donor had had no part in it. But if it is made without his consent, all that the donee acquires is a right to acquire by prescription, on the

the title *pro donato*, the property of the thing presented to him, to use it as his own, and to be unaccountable for the fruits it yields him during his *bona fides*. The rights of the owner remain, notwithstanding the donation, entire; he may lay claim to his property at any time, before the donee has prescribed it; and the donee, if the property is evicted from him, is not entitled to have recourse on the donor for the value of the present. For every thing, which is presented by one to another, is given and must be received such as it is, *talis qualis est*, Sk. *not. ad R. M. l.* 2. *c.* 24. But the donor may have been *in dolo;* he may have known the thing to be the property of another, and the hazard to which he exposed the donee; he must therefore in this case be bound to make up to the donee the damage which he sustains through his fraud, *l.* 18. § 3. *ff. de donat.* 4) Not only things of small but things of great value; not only single things, such as a watch or a book, but any part, nay the whole of an estate; not only all that does, but all that shall ever belong to one, *omnia bona tam futura quam præsentia*, may be given away by the owner. All these are obvious and necessary consequences of property, and therefore need not be proved by authorities. It must however be remarked, that one, who presents another with his whole estate, nay every donor is, by the law of Scotiand, entitled to the *beneficium competentiæ*, that is, to retain a competency for maintaining himself; provided his circumstances and his relation are such, as entitle him to be maintained by the donee. If his donation will render him so poor that he will not he able to maintain himself, he will not be obliged to give the donee all he promised to give him, but be entitled to retain as much of his estate, as is sufficient for supporting himself. This is called the *beneficium competentiæ;* to which by the Roman law all donors were entitled, but by the law of Scotland those have alone right, who are in such circumstances as would have entitled them to be maintained by the donee, even tho they had not made them any donation (§ 189.), 1725, *Executors of Mr Thomas Anderson* *.—*Fa.* 21st *Feb.* 1745, *Buntine.* Besides, we shall see in the title of *circumvention and fraud*, that one is not allowed to defraud his creditors by making donations.

The foregoing observations are general, and relate to donations *mortis causa* as well as to those *inter vivos*. But it is proper to consider these different kinds of them in separate titles, and it is of the latter alone that this one properly treats.

Donations *inter vivos* are those, which are made without any view of death; donations *mortis causa* are such as are made from the view of it.

§ 667. All donations being alienations made *gratis* (§ 664. *ax.* 3.); it is plain that those, and those alone, who have power to alienate for nothing, without a price or valuable consideration, have power to make donations. In order to understand, who have power to make alienations *gratis*, it will be necessary to distinguish between things belonging to private persons, *res singulorum* or *res privatas*, and things belonging to public societies, corporations, communities, or bodies politic, *res publicas* and *res universitatis*.

Property includes in it a power of disposing either for or without a valuable consideration. Hence every proprietor, who is not legally incapacitated, may make presents. One may be incapacitated, either because he has not the free disposal and management of his own affairs, or because he has not an absolute and unlimited right of property; either because of the condition of his person, or because of the nature of his rights.

For I. To make an alienation without a valuable consideration is to exercise one of the most notable rights, which property gives the proprietor; because it is to do that, which is mere loss, and brings no profit along with it. Hence those proprietors, who have the free, absolute, and unlimited disposal and management of their own affairs, are alone entitled to make presents. Therefore, 1) pupils, 2) minors, 3) ideots, 4) madmen, or others, who have curators, cannot make

* This case is cited by Lord Bankton, *vol.* I. *p.* 228.

make them: for pupils cannot, by any deed of their own, render their condition worſe than it is; and minors, ideots, madmen, or others who have curators, cannot do any thing without the conſent of their curators.

II. For the ſame reaſon, perſons convicted of crimes, which infer forfeiture either of all or of any part of their eſtates, have no power to make preſents after they have committed the crimes, *arg. ſ. ſt. R.* I. *c.* 22.—*l.* 15. *ff. de don.* For the forfeiture is a neceſſary conſequence of the commiſſion of them. Therefore the fiſc, the crown, the public, or any body, to whom the forfeiture is to accrue, acquires, at the time at which the crime is committed, an eventual right to the forfeited goods of the criminal. This right the criminal cannot defeat by any act of his. Conſequently, donations made by him after the time, at which it appears from his trial, he committed the crime, are void: for no body is held to be a criminal, unleſs he is convicted on a legal trial, *l.* 9. *l.* 13. § 2. *ff. qui teſt. fac.*

III. The Popiſh religion takes a firm hold of the minds of its votaries; it makes them zealous in converting thoſe, whom it calls heretics, to the Catholic faith; and ſuch as profeſs it may either diſinherit thoſe who are their heirs, or threaten to do it, in order to prevail effectually upon them. Hence the legiſlature, watchful for the ſecurity and the intereſt of the Proteſtant religion, 1) hath expreſsly, 1695, *c.* 26. prohibited, and hath declared it to be not in the power of Papiſts to make gratuitous deeds to the prejudice of their *apparent heirs*, that is, of the perſons, who are their heirs at law, or who would be their heirs in caſe they ſhould die without making ſettlements of their eſtates; 2) hath declared every ſuch deed to be null, *F.* 21ſt *July* 1710, *Creditors of Tarrauchty*: and 3) in order to diſcover the truth of the matter, hath declared it to be held *præſumptione juris et de jure* to be gratuitous, unleſs the perſon who granted it, as well as the writer who wrote it, and thoſe who were witneſſes to it, declare upon oath, and ſhew in a ſatisfactory manner, before the judge-ordinary within whoſe territory the grantor of it dwells*, that it was granted for true, onerous, and adequate cauſes. But it muſt be remarked, 1) that the legiſlature means to protect heritage alone, to limit its ſanction to deeds relating to it, and in order to ſecure it to the heir of the Papiſt, to declare that gratuitous deeds ſhall not, in anywiſe, be effectual againſt it, *F.* 21ſt *July* 1710, *Creditors of Tarrauchty* †; for it is ſpecially enacted by 1700, *c.* 3. that they may be, provided they are *ſua natura* capable of being, effectual either againſt his perſon or againſt his moveable eſtate: 2) that the deeds muſt be null, if either the grantor, the writer, or any of the witneſſes happen to die before he ſhall have declared, that they were not gratuitous, but granted for onerous cauſes; becauſe in this caſe the view, which the legiſlature had to the intereſt of the Proteſtant religion, muſt be regarded; the deeds being made by a Papiſt muſt be held to be made for the advancement of Popery; and the preſumption of the law muſt neceſſarily take place, ſince it becomes impoſſible to make that declaration which muſt, every title of it, be made in order to prove them to be onerous, and to hinder the *præſumptio juris et de jure* from taking place ‡.

IV. Adultery is a crime odious to the law, and hurtful to ſociety. In order therefore to reſtrain and to puniſh it, it is enacted, 1592, *c.* 119. 1) that it ſhall not be lawful to a woman, who hath been divorced for her adultery from her lawful huſband, and either marries or lives openly at bed and board with him with

* For that I ſuppoſe is meant by 'the judge-ordinary of the bounds.'

† From hence it muſt follow, that a judgment reported *Fo.* 22d *July* 1700, *Marquis of Annandale*, by which the Lords of Seſſion found that a Papiſt might convey heritable juriſdictions irredeemably to a Proteſtant, was wrong, if it was made to the prejudice of his apparent heir: for if the crown was the competitor with the grantee, it was right.

‡ Either the Lords of Seſſion have not attended to this; or they have confined the act to ſuch deeds alone, as it appears from their own nature, were intended to be permanent ſecurities; or they thought it did not extend to ſuch, as *ſua natura* are the ſecurities only of a day, and are not intended to be preſerved for a long time, ſuch for inſtance are bills; or at leaſt they would not underſtand the word *deeds* of ſuch writs, as are eſſential to commerce, and therefore enjoy various privileges; or their judgment *n.* 115.—is wrong; for by it they found, an adjudication, which proceeded upon bills granted by a Papiſt, not to be null.

with whom ſhe committed the crime, to convey, alienate, or make over, either in whole or in part, if ſhe has any, her *lands, heritage, tacks, rooms, or poſſeſſions*, in favour either of her pretended huſband (§ 180.) and adulterer, or of the iſſue of thoſe her unlawful embraces, or of any other perſon, to the prejudice either of the iſſue of her firſt and lawful marriage, or in default of ſuch iſſue, of her other lawful heirs whatſoever, or to do any deed which may either directly or indirectly hurt or prejudice them therein; 2) that her heirs and ſucceſſors, procreated of her lawful marriage, and, in default of them, her other lawful heirs whatſoever, ſhall ſucceed to her after her death in her lands, heritages, tacks, and poſſeſſions, notwithſtanding any deed, alienation, conveyance, diſpoſition, or ſettlement made by her to the contrary; 3) that all *ſuch* deeds, alienations, conveyances, diſpoſitions, or ſettlements, ſhall be held to be and ſhall be void; and 4) that it ſhall be competent to object nullity to them, and neceſſary to admit the objection when made, either before the Lords of Seſſion, or before inferior judges, either in the ſervice of briefs, or in any other cauſes, by way either of exception, or of replication, without any ſummons or action of reduction.

In all theſe caſes the donations are voidable; that is, the right of the donee is liable to be ſet aſide, and the things preſented to him may be claimed from him at any time, before he hath preſcribed a complete right to them. For he acquires not immediately the property of them, ſince he derives his right *a non habente poteſtatem*, from one who had not power to alienate them. All, which he acquires, is a title to preſcribe the property of them; for every donee, who receives a donation *rei alienæ*, acquires a right to acquire the property of it by poſſeſſing continually *pro donata*.

§ 668. One, who has the management of the affairs of others, has no power to give away their property in preſents; for he is bound to manage for the utility of thoſe, who have entruſted them to him. But to make preſents, to do a thing from which nothing but loſs reſults, is to manage to their hurt. *Donare eſt perdere.* Therefore 1) tutors, 2) curators, 3) procurators, 4) mandataries, 5) factors, 6) commiſſioners, 7) any, who have the management of the affairs of others, have no power to make preſents out of their eſtates.

But there is one exception to this rule; one, who has the management of the affairs of another, has power to make preſents, provided he of whoſe affairs he has the management has himſelf power, and gives his commiſſioner a *ſpecial* mandate or commiſſion to make them. For if the perſon, whoſe affairs are managed, has not himſelf power to make them, his factor or commiſſioner can never have it; becauſe one can never give to another a power, which himſelf has not. Therefore neither the tutors of pupils, of ideots, or of madmen, nor the curators of minors, can ever have power to make them: for pupils, ideots, and madmen, are wholly removed from the management of their own affairs (§ 466. 579.), becauſe they are incapable of it; and minors can make no alienation without the conſent of their curators (§ 512.). But curators ought not, indeed they have no power, to conſent to alienations made without a valuable conſideration (§ 509.). Therefore a minor, who makes a donation with the conſent of his curator, muſt be entitled to be reſtored againſt it (§ 553.); for it would not be *ipſo jure* void, unleſs it was made either by the minor alone, without the conſent of his curator, or by the curator alone.

But the factor of one who has himſelf the free diſpoſal of his own affairs, and the power of making gratuitous alienations of his property, has not power to make donations, unleſs he has a ſpecial mandate to make them. For one, who has no more than a general commiſſion to manage the affairs of another, has not power to make them; becauſe nobody can be *preſumed* to have given his factor power to make them. Therefore a ſpecial mandate is neceſſary to impower the factor to do it; and that ſo ſpecial, that one, whoſe commiſſion gives him expreſsly a general power to make preſents, ſeems not thereby to acquire power to make them of any other things than moveables of inconſiderable value. For his power can hardly extend to immoveables, to heritage, to things that are

incorporeal, or to precious moveables. In order to impower one to make preſents of theſe, a ſpecial mandate to make a preſent of the particular thing is neceſſary; becauſe the preſumption of law lies, in all caſes, againſt the power of making alienations for nothing, and muſt be regulated by the common courſe of human conduct.

§ 669. But one who lies not under any reſtriction, on account either of nonage, of imbecillity of mind, of his crimes, or of other perſonal incapacities, may, notwithſtanding, have no power to make gratuitous alienations of his property. For the powers of proprietors are very different. Some have all the rights which property can in any caſe give the proprietor, abſolute and unlimited: others have not them all, but want ſome of them; and the rights of theſe may be variouſly limited and reſtricted. Theſe limitations and reſtrictions may be impoſed on property either by law, by paction, or by the teſtator; that is, by him who ſettled it on its preſent owner. In all caſes, in which they are legally impoſed, the powers of the proprietor are reſtrained, ſo far as the reſtriction extends; he cannot do any thing contrary to thoſe limitations, becauſe he is expreſsly deprived of power to do it. For inſtance, one, who is proprietor of an eſtate entailed under ſtrict irritant reſolutive and prohibitory clauſes, and is expreſsly prohibited to make a gratuitous alienation of it, cannot alien it gratuitouſly; becauſe he is, in a legal way, deprived of the power of doing it. But a proprietor, who is in a legal and obligatory way prohibited to alien his property *gratis*, is incapacitated to make donations of it; for a donation is an alienation made for nothing.

But all limitations of property are odious to the law, and are disfavoured by it, becauſe they are hurtful to ſociety: they are therefore, in all caſes, ſtrictly interpreted, and are never extended by implication to caſes which fall not under the *preciſe* words of the prohibition. Thus one, who is prohibited to *charge his eſtate with debt*, and is not prohibited to alien it, hath power to diſpoſe of it, tho he hath not power to charge it with debt: and *vice verſa*, one who is prohibited to alien it, but is not prohibited to charge it with debt, has power to contract debt for which it may be attached; yet he has not power to make a voluntary conveyance of it, becauſe he is expreſsly deprived of that power, *Fa.* I. 116.—II. 92. But the disfavour ſhewn to limitations on property, and the abſurdity which they imply, ought not to hinder the juſt rules of interpretation from being applied to them. *Majori*, the law ſays, *ſemper ineſt minus*. Therefore one, who is prohibited to do one thing, *is held* to be prohibited to every thing of the ſame kind, that is plainly more contrary to the deſign for which the expreſs reſtriction was impoſed, than that which is expreſsly prohibited. Thus one, who is prohibited to ſell, muſt *a fortiori* be held to be prohibited to alien his eſtate by gift, *C. F.* 205. For it is a more ample exertion of the rights of property to make a gratuitous than to make an onerous alienation. I ſay *of the ſame kind:* for a limitation of one kind is never extended to one of a different kind; thus a prohibition *to ſell* is never extended to infer a prohibition to charge with debt; becauſe theſe are prohibitions of an entirely different kind, and an argument is not allowed to be brought from the one to the other. But limitations on property are held, every one of them, to be *whims:* the law gives effect to them in ſome caſes; but he, who impoſed them, being once ſuppoſed to have allowed himſelf to be governed by caprice, it is impoſſible to judge of his whimſies by the rules of right reaſon. It ſeems therefore that they ought in all caſes to be limited to the very words in which they are expreſſed.

§ 670. Such, as have the management of the affairs of private perſons, cannot, *a fortiori* ſuch, as have the management of the affairs of public ſocieties, communities, boroughs, corporations, hoſpitals, the poor, or any bodies-politic, have no power to make preſents either of the things, of the patrimony, of the public funds, or of the revenue, belonging to them; becauſe they are bound to manage to the utility of the ſociety, and, beſides, can ſeldom have a ſpecial mandate

mandate to make preſents of the property belonging to it. 'Tis true the property of a corporation is, in ſome caſes, thus that of the bank of Scotland is divided among a great number of individuals; the conſent of every one of theſe may be obtained; and the nature of a ſociety may be ſuch, that it can give the managers of its affairs a ſpecial mandate *donare*. In theſe caſes a ſpecial mandate, being formally given, muſt be effectual, and muſt give the mandatary power to make even a gratuitous alienation of the particular thing, directed to be alienated *gratis*: for every perſon, whether he be a ſingle or a political one, *eſt moderator et arbiter rei ſuæ*. It ſeems not however that one can be properly authoriſed to make a donation without the expreſs conſent of every individual member of the ſociety, whoſe property is to be alienated. For the ordinary managers of the affairs of public ſocieties are no more than *generali mandato inſtructi*; which empowers no adminiſtrator *donare*, *l.* 63. *ff. de procur.*

But all theſe propoſitions, concerning the management of the affairs either of private perſons or of communities, muſt not be ſo ſtrictly underſtood as if thoſe, who have the management of them, had, in *no* caſe, a diſcretionary power, and were never allowed to make preſents. Circumſtances may make it for the intereſt of thoſe, whoſe affairs are managed, that *ſmall* preſents be made out of their eſtates: in all thoſe caſes therefore, in which it is promotive of *their* intereſt that preſents be made, it is lawful to make ſmall ones. Thus the compliments of a town may be paid to ſuch as are worthy of being diſtinguiſhed by marks of public favour; and the managers will not be liable to be charged with mal-adminiſtration, provided they keep within reaſonable bounds. But it can never be for the intereſt of any ſociety to alienate *gratis* any part of its immoveable, or conſiderable matter of its moveable eſtate; and the managers cannot do this without the conſent of every individual intereſted. Indeed, to throw away the property of others for no good purpoſe, is a groſs breach of truſt; and thoſe who do it, are liable for their miſmanagement.

§ 671. Gifts may be given to all, who are not expreſsly incapacitated to receive them: for all theſe are capable of acquiring beneficial rights. Hence 1) women as well as men, 2) minors as well as perſons of age, 3) thoſe under as well as thoſe paſt pupilage, 4) ideots and mad men as well as perſons of ſound mind, 5) children as well as parents, 6) perſons unknown as well as perſons known, 7) public ſocieties as well as private men; all theſe may receive donations, becauſe they are not prohibited to receive them.

But the will of the law muſt be obeyed; and ſuch as are expreſsly prohibited by ſtatute, cannot receive them. Therefore preſents made to theſe are void, provided the law declares them to be ſo: for if it only forbids them to be given, and does not enact them to be void, they are valid; the ſimple prohibition of the law does not invalidate them; its authority muſt be maintained by any other ſanctions, which it has made. I. Hence it follows that preſents made either to the Lords of Seſſion or to other judges, are valid, tho all judges are expreſsly forbidden 1540, *c.* 104.—1579, *c.* 93. to take any from ſuch as have law-ſuits depending before them: for it is not enacted that they ſhall be void. But the other and more ſevere ſanctions of the law muſt take place againſt them: for it is ſpecially enacted, 1579, *c.* 93. that a Lord of Seſſion ſhall not either by himſelf, by his wife, or by his ſervants, take any *bud*, *bribe*, *goods*, or *gear* from any who have cauſes before them, under the pain 1) of confiſcation of all his moveable goods, one half of them to the King, the other to the *revealer and trier* of the offender, that is, to the perſon who diſcovers the commiſſion of the crime and gets the criminal tried; 2) of being *ſimpliciter* deprived of the office, which he bears in the college of juſtice; 3) of being declared infamous; and 4) of being puniſhed in his perſon at the will of the King. *Nihil iniquius eſt, quam munera accipere in judiciis; quia munera excæcant corda prudentum, et ſubvertunt verba juſtorum. ſt. W. c.* 25.—Exod. *c.* xxiii. *v.* 8. Deut. *c.* xvi. *v.* 19.—*p. ſt. R.* I. *c.* 22. *.

II.

* This act mentions the Lords of ſeſſion alone. But Sir George Mackenzie is of opinion, whether juſtly or unjuſtly I ſhall not determine, that it ought to be extended to all inferior judges; becauſe it ſeems to have been enacted

II. Popery is odious to the law; becauſe it is ſubverſive of the civil, the rational, and the religious liberties of mankind. Hence it is enacted by 1700, *c.* 3. 1) that no perſon, who ſhall refuſe to purge himſelf of Popery in the manner appointed by the act, ſhall be capable to purchaſe and enjoy, by virtue of any *voluntary diſpoſition*, conveyance, ſettlement, or deed, made in favour either of himſelf or of any perſon in truſt to his uſe, any lands, houſes, tenements, annualrents, or other real rights, or leaſes either of lands or of tithes; 2) that upon his refuſing to do ſo, the diſpoſition, conveyance, ſettlement, or deed, and all which follows upon it, ſhall *eo ipſo*, becauſe it is made in favour or to the uſe of one who refuſes to purge himſelf of Popery, become void and null to all intents and purpoſes. The conſequence is, that it muſt be held to have been never made: therefore 3) the rights intended to be conveyed by it muſt remain with the grantor, his heirs or aſſigns, juſt as if the conveyance had not been granted. But the purchaſer muſt be held to be proprietor, and cannot loſe his property, till he has actually been aſked and has refuſed to purge himſelf: therefore the fruits reaped by him before are his; he is not accountable; and it would have been more proper to have ſaid, that the grantor is, immediately upon the refuſal made by the Papiſt, *ipſo jure*, without any decree or re-conveyance, fully re-inveſted with every right which he had before he made the alienation. Beſides, it is enacted 4) that no action ſhall lie either to the Papiſt himſelf or to any perſon interpoſed for his behoof, either on the warranty, or for reſtitution of the price or other valuable conſideration given for the deed made in his favour.

III. The incapacities, which have been mentioned, relate to thoſe alone, who *purchaſe* or acquire *titulo ſingulari*. But it was the intention of the legiſlature, that heritage ſhould not, on *any* title, be enjoyed by Papiſts; and the ſubſequent parts of the ſtatute incapacitate them to take either by ſucceſſion or by *voluntary* conveyances the eſtates of thoſe to whom they are entitled to ſucceed as heirs. Hence it is enacted by the ſame act 1700, *c.* 3. 1) that no perſon, who profeſſeth the Popiſh religion, and is paſt the age of fifteen years, ſhall be capable either to *ſucceed as heir* to any perſon whatever, or to enjoy *any* eſtate by virtue of a conveyance flowing from one to whom he might ſucceed as heir any manner of way, till he ſhall purge himſelf of Popery in the manner appointed by the act: 2) that if any perſon, educated in the Popiſh religion, ſhall happen to ſucceed as heir to his predeceſſor, or any conveyance ſhall happen to be made in his favour by one to whom he might ſucceed as heir, before he ſhall have attained the age of fifteen years, then and in either of theſe caſes he ſhall be obliged to purge himſelf of Popery, *before* he ſhall have attained that age: 3) that if a Papiſt, to whom a ſucceſſion ſhall devolve, or a conveyance be made, either before or after he has attained the age of fifteen years, ſhall neglect to renounce Popery in the formal manner, the right and intereſt, which he has by virtue of the ſucceſſion or conveyance, ſhall become void and null, and ſhall devolve and belong to the next Proteſtant heir or heirs, who would ſucceed, in caſe he, and all the intervening Popiſh heirs, were naturally dead: 4) that by virtue of the act, and of the forfeiture incurred by the intervening Popiſh heirs, it ſhall be lawful to the next Proteſtant heir to get himſelf ſerved heir to the perſon deceaſed, to whom the intervening Papiſt might have ſucceeded. But people are uſually ſhy to take advantage of ſtatutes which may be thought rigorous, and ſeldom chuſe to deprive their relations, on account of their religious faith, of eſtates to which their birth is imagined to give them a title: therefore it is enacted 5) that if the *next* Proteſtant heir to whom the ſucceſſion devolves, ſhall not proſecute his right either by ſervice or by ſome other legal mean for affecting the ſucceſſion, and for completing his title to the eſtate, within the ſpace of two years after the irritancy is incurred by the Papiſt, there ſhall be acceſs to the Proteſtant heir next in order, to whom the ſame time is allowed to proſecute his right; and

enacted to ſupply the defects of 1540. *c.* 104. by which all judges are prohibited to take bribes, under the pain of loſing their honour, fame, and dignity upon being convicted of taking them.

and if he ſhall alſo neglect to do it, there ſhall be place for the remoter heirs, who, one after another, each in his proper order, ſhall be allowed the ſame time to effectuate their rights, until the right be effectually eſtabliſhed in the perſon of a Proteſtant: 6) that the Proteſtant, who ſhall complete his titles, ſhall have right to the eſtate, and to the rents profits and emoluments of it, from the time at which the irritancy is incurred, till either the perſon excluded himſelf, or his heirs purge themſelves of Popery; and ſhall therefore be burdened with the payment of the intereſt of the debts affecting the eſtate, or of the yearly charges payable out of it, during the continuance of his right. For people may abandon their errors; and it is enacted 7) that the Papiſts, who are excluded, ſhall have ten years after the irritancy is incurred, within which it ſhall be lawful competent and allowable for them to renounce Popery in the manner directed by the act: 8) that if they ſhall renounce it within that time, they ſhall be immediately reſtored to the right and the poſſeſſion of the eſtate from which they have been excluded: 9) that it ſhall return to them in the ſame condition, in which it was at the time at which they were excluded, and the ſucceſſion devolved to the Proteſtant heir: for it is enacted 10) that the proper debts and deeds of the Proteſtant heirs, who have made titles and entered upon poſſeſſion of it, ſhall nowiſe affect it: hence it is provided 11) that it ſhall return with the burden of the juſt and lawful debts, which affected it, and have been paid by the proteſtant heir or heirs, or, if ſecurities only have been granted by them for theſe debts, with the burden of thoſe ſecurities; for equity requires that the Proteſtant heir, who hath enjoyed no more than the rents of the eſtate, be burdened with no more than the annual charges upon it; and that, upon *loſing* the property, he be reimburſed of the principal debts, which affected it and which he hath paid. But the Papiſts, who have been excluded, may continue obſtinate in their folly; therefore it is enacted 12) that if they ſhall not, within the ſpace of ten years after the irritancy is incurred, renounce Popery, they and their heirs ſhall be for ever excluded; and that the eſtate ſhall be transferred to the Proteſtants, who have ſucceeded by virtue of the act, with and under the *tailzies*, *conditions*, *irritancies*, *and clauſes reſolutive*, contained in the titles of the eſtate, as it ſtood in the perſon of him to whom they ſucceeded.

IV. It is enacted that all *diſpoſitions*, conveyances, donations, legacies, or other deeds, made either directly in favour of cloiſters or any other Popiſh ſocieties, or indirectly to any perſon for their uſe, ſhall be void and null in ſo far as concerns the cloiſters or Popiſh ſocieties themſelves. Therefore they acquire no right from the deeds made in their favour; they can reap no benefit from them, cannot claim under them, or found upon them. For the ſtatute adds, that the deeds themſelves, and all benefit ariſing from them, ſhall fall, accrue and enure to that perſon, who ſhall happen to be the neareſt Proteſtant relation of the grantor of them at the time at which they are intended to become effectual.

§ 672. Donations may, like all other rights, be granted either ſimply, conditionally, to a day, from a day, or under a mode. The effects, which theſe different ways of granting them have on the donations themſelves, may be eaſily deduced, from the very nature of the manner of making them. But it is not improper to make two obſervations. It may be remarked, 1) that a conditional donation, granted *inter vivos*, deſcends to the heirs of the original donee, and may be accepted by them as well as by him, even tho the condition ſhould not exiſt till after his death; becauſe it veſts in him a right to accept, independent on the will of the donor. This right therefore, like every other which the donee had, muſt deſcend to his heirs. 'Tis otherwiſe with donations granted *mortis cauſa*.

The other obſervation is, that a mode, impoſed on the donee by the donation, muſt be fulfilled by him; that is, he muſt apply the *res donata* to the uſe for which it is intended. For *modus* ſignifies the manner in which it is to be uſed, or the uſe to which it is to be applied; and may be defined 'the final cauſe for 'which a deed is made.' If therefore the donee either refuſes or neglects to

fulfil it, his omiſſion muſt produce on his right that effect, which it is declared by the donor it ſhall have. If it is declared that his right ſhall become void, it muſt be liable to be ſet aſide for his neglect of the will of the donor. If the mode creates only a perſonal obligation on the donee, he may be ſued, may be decreed, and may be compelled to fulfil it: but his right will not be liable to be avoided; for he, in whoſe favour the mode is impoſed, becomes by virtue of it no more than a perſonal creditor of the donee, and is entitled to employ thoſe legal means, and thoſe alone, which perſonal creditors are entitled to employ, in order to make his right effectual.

§ 673. In order to render the right of the donee complete (§ 664.), it is neceſſary 1) that the donation be given by the donor, ſo as to deprive him of the faculty of repenting, of revoking it, and of preventing it, thereby, from becoming effectual by the acceptance of the donee; for 2) it muſt be accepted by the donee.

It muſt be 1) *given* by the donor: that, which is intended to be preſented, muſt be made over by him to the donee; for the owner of the *res donata* can alone diveſt himſelf of it, and convey it to another; an act done by him is neceſſary to convey the property of a thing belonging to him (§ 625.)

But 2) the right of the donee is not complete, it cannot be ſaid that a donation is made, till the donor is diveſted of the faculty of repentance, and the donee has it in his power to accept, whether the donor will or will not.

By every donation ſomething, which belonged to the donor, is intended to be conveyed from him to the donee. Therefore in order to diſcover the preciſe time at which the donor is deprived of the faculty of repenting and of revoking his donation, we muſt diſtinguiſh between thoſe things which cannot, and thoſe which may be conveyed without writ. In thoſe caſes in which it is neceſſary, in order to convey the *res donata*, the thing meant to be preſented, from the donor to the donee, that a conveyance be made in writ, the donation is not held to be complete, the donor is not deprived of the faculty of repentance, he has the power of revoking at any time, till the writs are ſigned and delivered; becauſe in all caſes, in which writ is a requiſite eſſential to the completion of an agreement, there is *locus pœnitentiæ*, either party may alter his mind, and may refuſe to ſtand by the bargain, till the neceſſary writs are ſigned and delivered, provided matters are, till that time, entire. It is ſo in the caſe of every onerous contract; *a fortiori*, it muſt be ſo in that of donations andof every other gratuitous agreement.

From hence it muſt follow that every one, who either intends to preſent, or has *per verba de præſenti* preſented another with any thing that is heritable or immoveable, is not bound to complete his donation, in caſe he has not ſigned and delivered the writs neceſſary either for making the conveyance or for obliging himſelf to make it. For at every point of time, before that is done, he may repent himſelf of his liberality, and may refuſe to complete it; no matter, what words or expreſſions he hath uſed, what promiſes or aſſurances he hath given, his faculty of repenting remains entire. Thus, ſuppoſe one to ſay to another in the moſt ſolemn manner and before a cloud of witneſſes, 'I make you 'a preſent of my landed eſtate,' the donee, the perſon to whom he directed his ſpeech, would acquire no right in conſequence of it. He would not be entitled to bring an action againſt the donor, in order to compel him to diveſt himſelf of his eſtate, to convey and to deliver it to him; becauſe the donor has a right to alter his reſolution, and to refuſe to make the neceſſary conveyances.

For the ſame reaſon one who intends to preſent another with any moveable written right which he has, with a bond for inſtance muſt grant and deliver a written aſſignment of it in favour of the donee, the perſon to whom he intends to preſent it; becauſe the donor is not diveſted, till an aſſignment is granted by him, and has always, till that time, power to change his mind, and

and to repent of his intention; for neither a bond nor any other deed, made in favour of one perſon, can be conveyed to another without writ; it muſt be made over by a written aſſignment granted in favour of the perſon, to whom it is intended to be conveyed.

In every caſe therefore, in which one intends to make a gift of a thing which muſt be conveyed by writ, the donor is never deprived of the faculty of repentance, a donation is never held to be made, the donee acquires not any right, till proper deeds are made and delivered *.

But things, to the conveyance of which writ is not neceſſary, may be *effectually* preſented without writ, that is, ſo as to deprive the donor of the right of repenting, and to give the donee a right to accept independent of the caprice of the donor. For inſtance, *corpora mobilia* may be conveyed, alienated, and made over, by one to another, without writ; agreements, gratuitous as well as onerous, may be made about them without it, which will be obligatory on parties, and will deprive them of the right of repentance.

But in all caſes of this kind in which writ is not neceſſary, the donation, as it has been already remarked, muſt be made *per verba de præſenti*: for a promiſe to make a donation is not a donation, and gives not any right to the donee. Thus one, who ſays, 'I'll make you a preſent of this horſe,' does not, *de præſenti*, make a preſent of it, nay is not bound in law to make it; becauſe in caſes of this kind the donor has the faculty of repenting always, till he has made his donation *per verba de præſenti*: for people do frequently, at unguarded moments, out of the fulneſs of their hearts, make ſuch promiſes, without the moſt diſtant intention of performing them. It would be hard therefore to bind them, till the preſent were deliberately made *per verba de præſenti*; ſuch as, 'I make you a 'preſent.' By words ſuch as theſe, the donor deprives himſelf of the faculty of repentance, and veſts in the donee an independent right to accept. 'Tis otherwiſe in caſes, in which writ muſt be adhibited; becauſe the delivery of the writs comes in place of the *verba de præſenti*. The import of them, and the rights they give to the perſon in whoſe favour they are granted, muſt depend on the words which they contain. If they import no more than an obligation to convey, they will be effectual for compelling the perſon, who is obliged, to fulfil his obligation by granting the conveyances; if they contain an actual and a preſent conveyance, no more is neceſſary than to carry that conveyance into execution.

From hence it is plain that, in order to render a donation complete, or to deprive the donor of the faculty of repenting, it may in ſome caſes happen not to be neceſſary, that the thing, intended to be preſented, ſhould be delivered to the donee. This holds in all thoſe caſes, in which writ is not neceſſary for completing the donation; for inſtance, in preſents of *corpora mobilia*. No doubt delivery is neceſſary, in order to veſt *the property* of the *res donata* in the donee, to give him *jus in re*, or to convey to him *all* the rights of the donor. But it is not neceſſary in order to give him *jus ad rem*, to give him a right to ſue for delivery, and thereby to acquire the property: all which is neceſſary for this purpoſe is, that the donor make the donation ſo as to deprive himſelf of the faculty of repentance, and that the donee acquire a right to accept of it.

For 3) the donee muſt *accept* of the donation; he muſt not refuſe the preſent made him; he muſt agree that the benefit conferred upon him become his. For one cannot be compelled to allow a thing to become his; he may reject it; *invito beneficium non datur*, *l.* 69. *ff. de reg. jur.*

Donations are lucrative acquiſitions; and every one is preſumed to be willing to accept of that, which is profitable to him. For mankind uſe not to take time to deliberate about accepting, but to graſp at every thing which is promotive of their

* In antient times a donation of land was not held to be complete, till ſeiſin had followed upon it; and if ſeiſin was neglected to be taken during the life of the donor, the donation was ineffectual; nothing could be demanded from the heir. But this was in days when written conveyances were not common, *R. M. l.* 2. *c.* 18. §4. 5. 6. 7. *c.* 20. § 2. 3. 4.

their intereſt, or adds to their eſtate. Hence the law holds the right, which is given the donee to *accept* of a preſent, and is become independent on the will of the donor, to veſt *ipſo jure* in his perſon, the *very firſt moment* at which it is made him. For it preſumes every one to be willing to accept of a benefit conferred upon him; and it can never be hurtful to one to acquire a *right to accept* of a donation.

But property is not acquired *ſine animo ſibi habendi*; one cannot be forced to acquire it; it is not therefore acquired till one actually declares his *animus* of acquiring it. *Non poteſt liberalitas nolenti acquiri, l.* 19. § 2. *ff. de don.* Of courſe it is neceſſary to diſtinguiſh *the right* which the donee acquires *to accept* of a donation from actual *acceptance* of it. 'Tis the former, the right to accept, which alone veſts *ipſo jure* in his perſon: but the donation itſelf does not veſt till it is actually *accepted.* All therefore which the donee acquires or veſts in him before he *accepts*, is *the right* to accept; this veſts in him *ipſo jure, etiam ignoranti, abſenti, et invito*; in infants, minors, perſons unborn, ideots, madmen, *&c.* as well as perſons of age and of ſound mind; and being once veſted in him, he never loſes it till he makes his option, and refuſes either expreſsly or tacitly *the donation.* Of courſe it deſcends to his heirs, and is attachable by his creditors. But the donation itſelf is a very different matter; it veſts not in the donee till he actually *accepts* of it. By conſequence all the rights intended to be conveyed remain with the donor till that time. So that upon the repudiation of the donee he is fully reinveſted in them *ipſo jure*, and needs not either written deeds or other formalities to re-eſtabliſh him in the poſſeſſion of them. For all, which was ever acquired by the donee, was the *right to accept*; and one can never, by making deeds or a donation to another, bring him under an obligation to make other deeds in order to re-inveſt the donor in his rights. It muſt not therefore be neceſſary for the donor to get re-conveyances; he having never been diveſted, every deed made in order to complete the titles of the donee muſt be held to be void; and he returns *ipſo jure* to his rights, juſt as if it had never exiſted. Thus aſſignments, conveyances, deeds, are held to have been never made; and ſeiſins to have been never taken.

Actual acceptance of the donation being required to veſt all the rights intended to be conveyed by it in the donee, and to put it in his power to make complete titles, in his own perſon, to the *res donata*, one cannot be *preſumed* to have accepted; for it may not be for his intereſt to accept of it, and one acquires not property without ſome *act* done by *himſelf* to acquire it. Proof therefore muſt be brought by others who found upon his right, that he hath *actually accepted:* for proof cannot be demanded from himſelf or from his heirs, ſince he hath it always in his power to accept till he hath *actually repudiated.*

One may accept either by words, by writ, or by acts which mark his intention. But few people declare their acceptance in a formal manner: the reaſon is, that they imagine men will not doubt of their willingneſs to accept of a thing which is for their intereſt. Therefore both acceptance and repudiation muſt, in moſt caſes, be inferred from the actions of the donee. One, *qui ſe gerit pro accipiente*, who does things which imply his acceptance, thus one who takes poſſeſſion of the *res donata*, completes his titles to it in a formal manner, levies the rents of it, obtains payment of intereſt, or diſpoſes of it, *&c.* muſt be held to have accepted. One, who does things which imply repudiation, muſt be held to have rejected the preſent: and one, who has done nothing from which either acceptance or repudiation can be inferred, muſt be held to retain no more than his *right to make* his option, provided he has not loſt it either *lapſu temporis* or otherwiſe.

One, who has once accepted of a donation, cannot alter his mind, and repudiate it: for his acceptance diveſts the donor of the right which he had, and which he meant to convey, and veſts it in the perſon of the donee *. A ſimple repudiation

* We muſt carefully diſtinguiſh between the right given by the completion of the donation, and that conveyed by proper deeds, granted in order to veſt the *jus* in re *donata*, or the *res donata* itſelf, in the perſon of the donee.

repudiation therefore can never diveſt the donee, *after* the donation is fully veſted in him by his acceptance. 'Tis true, he may convey his right to the donor, or may relinquiſh the *res donata*; but his dereliction will not give the donor a better right to it than any other perſon. In order to re-eſtabliſh the donor in the rights which he had, it is abſolutely neceſſary, that they be ſpecially reconveyed to him, either by way of donation or otherwiſe *.

In the ſame manner one, who has once repudiated a donation, is not entitled afterwards to alter his mind and to accept of it; his repudiation deprives him of the right, which he had to acquire it by accepting: for a donation, which has been once repudiated, returns *pleno jure* to the donor. Therefore without the will of the donor, it cannot again return to the donee; he may make the donation a-new, and may give the donee power to accept of it; but unleſs he does ſomething of this kind, the donee loſes his right for ever.

From what has been ſaid it is plain, that regard is not had to the time at which the donee either accepts or repudiates the donation, whether it be during the life of the donor, or after his death; for he has power to accept always till he repudiates, and power to repudiate always till he accepts. The life or the death of the donor can have no influence on the matter, as he has it not in his power to deprive the donee of the faculty which he has *acquired*, either to accept or to repudiate. Nay his own death has no influence on it: for it is a right, which he has, and which therefore deſcends to his heirs †. They ſucceed to every right which their predeceſſor, the original donee, had, and have therefore the ſame power which he had either to accept, if neither he nor they have repudiated, or to repudiate, if neither he nor they have accepted.

§ 674. After the donation is completed, that is, after the donor hath deprived himſelf of the faculty of repenting, and the donee hath accepted of the gift, it belongs properly to the doctrine of conveyances to teach how it may be made effectual, *i. e.*. how the thing, meant to be conveyed, may be fully eſtabliſhed in the perſon of the donee. In general it is plain, that it muſt be by a proper deed of conveyance. Therefore, if it is a moveable *corpus*, he muſt bring an action, in order to get the donor decreed to deliver it to him. If it is a right which the donor has *bound* himſelf to make over to the donee, the donee muſt bring his action againſt the donor, in order to compel him to fulfil this obligation by granting a proper conveyance; for inſtance, to grant an aſſignment, if the right intended to be conveyed is transferable by a ſimple aſſignment; or a diſpoſition,

* 'Tis hardly neceſſary, indeed it does not properly belong to this place, it will fall under the doctrine of conveyances, to remark, that the way of re eſtabliſhing the donor in the full right which he had before he made the donation, muſt vary according to the nature of the *res donata*, and to the effect which the donation has had. If a moveable *corpus* has been delivered to the donee, the donor will be re-eſtabliſhed in his full right, as ſoon as it is re-conveyed and re-delivered to him: if a bond was aſſigned, the bond and the aſſignment muſt be re-delivered to the donor, that he may cancel the aſſignment: if the aſſignment has been notified to the debtor, the inſtrument of the notification ought alſo to be delivered, and it is neceſſary that the bond be re-aſſigned to the donor, or, as the phraſe is in Scotland, that he be *retroceſſed*, in order to make it lawful to the debtor to pay; for after the aſſignment is duly notified to him, it becomes unlawful for him to pay either to the aſſignor, the original creditor, or to any other than the aſſignee. This impediment ought therefore to be removed out of the way, and the aſſignor, the donor, be, by a *retroceſſion* [a], re-eſtabliſhed in the full right which he had before he granted the aſſignment; and this retroceſſion ought, like the aſſignment, to be notified formally to the debtor. If land is conveyed to the donor, infeftment either has or has not followed on the conveyance. If it has not followed on it, the donor will be effectually re-inveſted with his right by getting the principal conveyance redelivered to him, in order to be cancelled; for no veſtige of the right of the donee can remain, after the conveyance made in his favour is deſtroyed. It is however, even in this caſe, ſafeſt to get a re-conveyance from the donee to the donor. If infeftment has followed on the conveyance, the feudal right is veſted in the donee, provided he hath accepted of it. Therefore, in order to reinveſt the donor in his right, a proper conveyance containing a procuratory of reſignation and precept of ſeiſin muſt be made by the donee in his favour, unleſs he can prove not only that the donee never accepted, but that he repudiated the donation, conveyance and inſeſtment: for in that caſe the right returns, as has been ſaid, *ipſo jure*, without reconveyances, to him from whom it flowed.

† It was otherwiſe by the Roman law: for the right of acceptance was perſonal to the original donee, and did not deſcend to his heirs; unleſs either a ſpecial proviſo was made, or the nature of the donation required that it ſhould deſcend to them.

[a] A retroceſſion is 'an aſſignment made by an aſſignee, of the thing aſſigned over to him in favour of the original *aſſignor*.'

that is, a conveyance containing a procuratory of reſignation and a precept of ſeiſin, if the nature of the *res donata*, and of the right of the donor, is ſuch, as to be incapable of being transferred without a conveyance of that kind, the title of the donor being completed by infeftment, and that of the donee being incapable of being completed without it.

§ 675. As ſoon as the donation is made and is accepted, it is irrevocably veſted in the donee, and cannot be taken from him by the donor. For it may well be doubted whether the law of Scotland allows donations to be revoked in any caſe. 'Tis true, the Civil law hath declared them to be revocable in many caſes; and one of theſe ſeems to have been introduced into the law of Scotland, *ſt.* R. III. *c.* 17. But the cuſtom of Scotland and the practice of the courts of juſtice, as well as the nature of the thing, would lead one to think, that it is not ſo by the law of this country: for no inſtance has occurred, in which a donation *inter vivos* has been revoked for any reaſon but one. Indeed one who attends to the common principles of law, muſt imagine all donations *inter vivos* irrevocable. For one, who conveys a thing to another, diveſts himſelf of it; and the property is veſted in the donee. By conſequence the donor has no right, which he has not expreſsly reſerved to himſelf: for one, who makes an abſolute conveyance with his eyes open, when he muſt be preſumed to have attended to all the events, accidents, and contingencies which might happen, when he might have provided for them, and might have reſerved proper faculties to himſelf, muſt be preſumed, *præſumptione juris et de jure*, to be willing to loſe all his intereſt in the thing which he conveys. He might have known it to be poſſible, that children might be born, or the donee prove ungrateful to him; and might have reſerved to himſelf a power to revoke: he can therefore, in no caſe, have any thing but his own raſhneſs to blame for his want of it. In fact every body, who makes a conveyance in favour of another, and means to reſerve to himſelf a power to revoke his donation, takes care to have it reſerved to him by the expreſs words of his conveyance, and does not truſt that the ingenuity of lawyers will be able to prove the reſervation to be *implied* in the nature of the deed. Every one therefore who makes a donation, and means that he ſhall in any caſe have power to revoke, ought to make a ſpecial proviſo for that purpoſe.

Having premiſed this general principle, it ſeems to be hardly worth while to go into the detail, and to apply it to particular caſes.

The two reaſons, for which it is uſually ſaid that donations are revocable, are *ſupervenientia liberorum*, and *inſignis ingratitudo:* but neither of them ſeem to be good.

A young man in health and in vigour makes a preſent, and happens afterwards to get children; would it not be abſurd to ſay, that he ought therefore to have power to revoke his donation? He knew very well, it was poſſible he might have children; and ought either to have been leſs haſty in making his preſents, or to have reſerved reaſonable powers to himſelf. No doubt, the children may ſuffer by this liberality: ſo do they by every extravagant or fooliſh act of their father. For the ſame reaſon it appears, that donations are not revocable on account of the ingratitude of the donee *, becauſe every donor muſt be preſumed to know the world. If therefore he has not reſerved to himſelf a faculty of revocation, in caſe the donee ſhall prove ungrateful to him, he ought not to be allowed to have it. 'Tis true, the revocation may, in this caſe, be held to be a puniſhment of the delinquency of the donee. But the law has appointed puniſhments for every crime, which, it has thought, deſerves to be puniſhed; and it is abſurd to ſuppoſe it to be left to the caprice of the donor, who is a private perſon, unknown to the law, whether it ſhall, or ſhall not be inflicted. The power

* In a caſe put in *L. B. c.* 11. the power of revoking ſeems to be allowed to the father on account of the *unnatural impiety* of the ſon. This caſe is ſtrong; it ſeems however to be inconſiſtent with the common principles of law, to give the father a power to revoke even in it.

power therefore of revoking muſt be held to be unknown to the law of Scotland, and ought, in no caſe, to be *implied.*

For it muſt be remarked that this faculty of revocation, it is agreed on all hands, is competent to the donor alone, and is not deſcendible to his heirs; becauſe he is held to have relinquiſhed it, or rather to have conveyed it to the donee, if he has not exerted it himſelf. Beſides, in all caſes, in which a donation is ſuppoſed to be revocable from the donee *in pœnam* of ſomething done by him, it is not revocable from his heirs; for revenge is, in all theſe, held to be the motive of the revocation, which, having been omitted to be taken of the original offender, is not by law allowed to be taken of his heir.

§ 676. It may not be improper to conclude this title with making ſome obſervations, for which a convenient place could not eaſily be found before.

Every one knows, that a donee is no more than a ſingular ſucceſſor; therefore he is not, becauſe no ſingular ſucceſſor is, liable to the debts of the donor, the perſon to whom he ſucceeds. For ſingular ſucceſſors ſucceed to no more than the right, which their author has in *a particular* thing; they ſucceed not to all his inheritance, or to any of his obligations. But univerſal ſucceſſors are alone liable to the debts of him, to whom they ſucceed; becauſe they alone ſucceed to all his eſtate, to his property, his rights, and his obligations, *per univerſitatem.* A donee, therefore, is not in any caſe liable to any of the debts of the donor, *l.* 15. *C. de donat.*

But 1) one, who has bound himſelf to do it, is liable to the debts of the donor; and one is held to have bound himſelf to pay them who has accepted of the donation with the burden of them, or under condition of paying them, *l.* 9. 22. *C. de donat.* 'Tis true, he is liable in this caſe not as donee or lucrative ſucceſſor, but becauſe he has bound himſelf by his own voluntary obligation; he is bound by virtue of it, and of it alone. 2) The donee is in effect liable to pay them in ſo far as the *res donata* extends, in caſe his right is liable to be ſet aſide at the ſuit of the creditors of the donor; for the *res donata* may thereby be revoked from him, and is liable to be attached by thoſe creditors who have a right to revoke it, *l.* 17. § 1. *ff. quæ in fraud. cred.* Thus one, who makes a donation *omnium bonorum*, becomes thereby inſolvent, and defrauds his creditors by making himſelf become ſo: therefore the donation is liable to be ſet aſide. Of courſe the donee muſt neceſſarily either pay the debts of the donor, or be deprived of the *res donata.* 3) One, who *accepts* of a donation from another to whom he is apparent heir, of heritage which would have by the ordinary courſe of ſucceſſion deſcended to him, becomes, by his acceptance, liable to all the debts due by the donor before making the donation.

§ 677. Donations being alienations made for nothing, it follows, that the law never *preſumes* them to be made. For every preſumption is a conjecture formed concerning the truth from the ordinary tenor of the actions of men; and the law never *preſumes* that which is ſeldom or never done, that which ſeldom or never happens, either to be done or to happen. But people are ſeldom found to give preſents, or to make donations of things of any value. The law, therefore, *preſumes* not that one, who gives a thing to another, means to give it for nothing, but that he intends to get value for it. By conſequence it muſt, in all caſes in which this preſumption takes place, be *proved by the donee*, by him who is intereſted in proving it, that they were actually made. The ſimple denial of the donor, of him who is intereſted in denying it, is preſumptive evidence, that they were never made, and will be held to make full proof, unleſs it is redargued either by a clear contrary proof, or by other preſumptions that afford ſtronger evidence than it.

One therefore, who is maintained by another in his family, muſt be preſumed to have been intended to be maintained either *gratis* or not *gratis*, according to circumſtances: for the preſumption muſt always be formed *ſecundum id, quod plerumque fit.*

The

The perſon, who is maintained, may be ſuppoſed to be either above or below pupilage. In caſe he is paſt it, it will be preſumed he was maintained *gratis*: for people uſe ſeldom to exact board from thoſe, whom they entertain in their houſes. Therefore one, who maintains in his family a perſon, that is not a pupil, and is capable of making a bargain about his own board, is not entitled to demand any allowance for it, *St.* 2d *Feb.* 1672, *Guthry*; unleſs 1) he has expreſsly ſtipulated payment of board, *Di.* 350.—*Go.* 6th *June* 1676, *Rig.*; or 2) he uſes to make a trade of entertaining perſons for hire, *Da.* 147. In the firſt caſe, the expreſs bargain makes it impoſſible for the preſumption to have place: In the ſecond the general preſumption muſt yield to the force of that, which the particular circumſtances of the perſon who maintains makes ſtronger than it.

Hence a debtor, who has maintained his creditor who is paſt the years of pupilage, is not entitled to inſiſt that the board of his creditor be rated at a certain ſum, and to have this rated allowance imputed *pro tanto* in ſatisfaction of the debt due to him. For he might, if he had meant to take board from him, have made a bargain about it; and having neglected to do ſo, he muſt be preſumed to have meant to entertain him as his acquaintance *gratis*, and ought therefore not to be allowed to refuſe, on that account, payment of any part of his debt. If the perſon, whom he maintained, was of age, a bargain might have been made with himſelf: if he was a minor, paſt pupilage, then he either had, or had not curators; if he had curators, an agreement might have been made both with him and with them; if he had not curators, he had the power of managing his own affairs, and a bargain might have been made with himſelf alone.

In caſe the perſon who is maintained is a pupil (§ 404.), the law, ſtill preſuming according to that *quod plerumque fit*, makes a preſumption directly contrary to the former: for it preſumes that the perſon who maintained the pupil, meant to exact money for his board, *St.* 25th *June* 1664, *Melvill.*—2d *Feb.* 1672, *Guthry*; becauſe it preſumes he would have made an expreſs bargain about it, if he could have found any perſon with whom he could have made it. But he ought not to be allowed to ſuffer, becauſe he has done a generous action, and has been at the expence of maintaining the pupil, when he could not find any body, with whom he could make an agreement in his name.

From hence it follows that this preſumption muſt ceaſe, in caſe the pupil has either a father or tutors; for with them a bargain might have been made. But having been neglected to be made, when it might have been made; law preſumes the entertainer intended to maintain the pupil *gratis*.

The law is conſtant in preſuming *ſecundum id quod plerumque fit*; ſtronger preſumptions muſt therefore get the better of weaker ones; and the law will preſume one, who entertains even a pupil, to mean to do it *gratis*, if the relation which they have to one another makes it preſumable, it was done *ex pietate*. For piety or affection always implies *termini habiles*; and the relation the connexion and the circumſtances of parties muſt be ſuch as to admit of it. In many caſes it happens that one chuſes to maintain, to educate, and to keep with him thoſe, for whom he has an affection; thus people are commonly fond of the company of their grand-children, whom they conſider as being, as it were, the continuation and the repreſentatives of themſelves. In all caſes of this kind, the preſumption ariſing from the affection which he, who maintains, has to him who is maintained, is ſtronger than that general one ariſing from the ordinary conduct of mankind; for it is founded on an exception to a general rule, and is conformable to the conduct of perſons who ſtand in ſuch relations to one another, *St.* 21ſt *July* 1665, *L. Ludquhairn.*—11th *June* 1680, *Gordon.*—*Fo.* 15th *Jan.* 1703, *Chiſholm.*—*D.* II. 141. 30th *July* 1734, *Counteſs of Weems.*— *Feb.* 1731, *Creditors of Kinmerghame.*

However

However even this rule admits of an exception; for a pupil, who is *in facultatibus* able to maintain himself, is liable to pay, and he who maintains him is entitled in some cases to demand money for his maintenance, Sp. *minor*, 3d *Feb.* 1624, *L. Montgrecnan.—Di.* 165.—*G.* 75.—*St.* 7th *July* 1675, *Wilkie.—Fo.* 17th *Nov.* 1697, *Gourlay*. Nothing is more common than the exaction of board from infants, children, or pupils, who are *in facultatibus*. Thus, fathers use to get board from those of their own children, who have separate, independent estates belonging to themselves. Therefore if a pupil is *in facultatibus*, nothing more reasonable than that he pay for his board: unless the person, who maintained him, did voluntarily, *ex mera pietate*, out of affection alone, without any necessity, take him into his family, and keep him in it; for the law will presume in this case, that the person who maintained did it *animo donandi*. In order to understand who will be presumed to maintain him without any necessity, out of affection alone, and who will be presumed to do it *ex necessitate*, it is necessary to distinguish between those who are, and those who are not entitled to have the custody of his person. Those, who are not entitled to have the custody of the person of a pupil, must, if they take him into their family, be presumed to do it voluntarily, *ex mera pietate*, out of affection, without any necessity; and cannot therefore be entitled to demand any allowance for board; because *se ingerunt*, they intrude, they offer themselves to do what no necessity obliged them to do. Those who are entitled to have the custody of his person, cannot be presumed to mean to maintain him *gratis*, *ex mera pietate*, out of affection alone; for the right, which they had to the custody of his person, laid a sort of necessity upon them, for the law gave them that right, because it thought it their duty and thought them the most proper persons, to keep him; so they must be entitled to demand an allowance for his board.

The law presumes donations to have been made not only in those cases, in which it presumes one to have maintained another *gratis*, *sine animo repetendi*, but also in every other case in which one, who lays out money to the utility of another or is at expence in doing any thing promotive of his interest, is presumed to do it *pietatis causa*, *sine animo repetendi*; because in all those cases he, who lays out the money, has no action for getting himself reimbursed, neither the *actio negotiorum gestorum*, nor any other. For it may be laid down as a general rule, that donation is presumed in all those cases in which the donor, he who has given, paid, or disbursed, has not a right to sue either the *actio negotiorum gestorum* or any other, for getting himself reimbursed.

§ 678. If donations are not in ordinary cases presumed, much less can it be presumed, that a debtor, who gives any thing to his creditor, means to make a present of it to him. *Debitor non præsumitur donare*; he is presumed to mean to discharge the debt due by him. Therefore every thing, which he gives his creditor, must be held to be given in satisfaction of it, money, grain, cattle, or any other *corpus*; and must therefore be imputed *pro tanto* in payment of it: unless the *creditor proves*, that it was given him *gratis*.

But a debt constituted by an obligatory deed, is not *presumed* to discharge or to be granted in satisfaction of any other anterior debt due by him who grants the deed, to him in whose favour it is granted; no matter, whether the antecedent one be constituted by writ or without it: for *novatio non præsumitur*. He, who granted the writ to his creditor, ought to have got the former debt either cancelled or discharged, and the deeds by which it was constituted restored to him, before he delivered the posterior one. By neglecting to get it discharged, and allowing the deeds which prove it to remain in the possession of the creditor, he allows him to continue creditor, and must be held to be willing to owe both debts. Besides, in case he meant otherwise, he ought to have said expressly, that he granted the posterior deed in satisfaction of the prior obligation, and that he meant not both debts to subsist. If the latter bears no relation to the former one, both debts remain due; unless the grantor of the last proves in a satisfacto-

ry manner, that it was granted by him in ſatisfaction of the firſt. Indeed people are ſeldom ſo ſilly as to grant formal obligations, without expreſſing the cauſes for which they are granted, as well as the effects which they are intended to have. If one neglects to declare theſe, law cannot help holding him not only to have obliged himſelf, but alſo to have intended to oblige himſelf.

But there is one exception to this rule: for a *tocher* portion or proviſion, given by a father with his daughter in marriage to her huſband, is preſumed to be given in ſatisfaction, and to be an effectual diſcharge of all antecedent obligations under which the father had voluntarily brought himſelf to her; even tho neither the daughter, nor her huſband ſhould have granted him an acquittance of them. For one, who gives his daughter in marriage, uſes at the time of the marriage to give her huſband all which he is ever to expect; and the huſband is held to underſtand, and to accept of it as all which he is to get with her. I ſay, *antecedent* and *voluntary* obligations; for a father may no doubt grant effectual obligations in favour of his daughter after her marriage as well as before it; and the obligations which the *law* impoſes on him, or rather the rights which his daughter has *virtute legis*, ſhe will not be held to have renounced, unleſs ſhe has granted an expreſs diſcharge of them. Thus her right to her *legitim* is not held to be renounced, unleſs it is renounced expreſsly; becauſe it is never perfect till the death of her father; before that time it is no more than an eventual intereſt in his effects, which may become unprofitable to her by ſeveral accidents, and may be defeated in various ways by him. Of courſe a deed granted by a child before the death of his father can never be *preſumed* to import a diſcharge of his right to a legitim, becauſe that right is not properly veſted in his perſon at the time of the granting of the deed, and cannot therefore be diſcharged without making expreſs mention of it.

TITLE II.

Of Donations mortis cauſa.

§ 679. DONATIONS *mortis cauſa* are mentioned both by the writers on the law of Scotland, and in the reports of the caſes adjudged by the Court of Seſſion: but it ſeems to be doubtful whether they are known to the law itſelf, or were ever introduced into it. We have deeds executed *mortis cauſa;* we have revocable deeds; but we ſeem not to have any thing that anſwers preciſely to the idea, which the Romans had of donations *mortis cauſa.* Writ, which our law makes eſſential to the conveyance of ſo many things, has made it impoſſible to apply many of the principles of the civil law in the law of Scotland. Deeds therefore done in Scotland muſt have thoſe effects, which the genius and the principles of the law of this country give them. It may not however be improper to make a few obſervations concerning donations *mortis cauſa;* and to ſhew how far they have place, and what effects they have in the law of Scotland.

Donations *mortis cauſa* are 'ſuch as are made by one from the view of his 'death, and are revocable by him at any time during his life.' Two things therefore are eſſential to the idea of a donation *mortis cauſa;* I. That it be made by the donor from the view of death: whereas donations *inter vivos* are uſually made without any view of it. 'Tis true theſe *may* alſo be made by the donor, when he has the view of death before his eyes. But one, who makes a donation, is not properly ſaid to make it *mortis cauſa,* unleſs he alſo reſerves to himſelf the power of revoking it at any time during his life. For II. It is eſſential to the idea of a donation *mortis cauſa,* that it be revocable by the donor at any time, during his life. One which is irrevocable by him is a donation *inter vivos,* even tho

tho it ſhould be made by him in his laſt moments, when he has the moſt immediate proſpect of dying. 'Tis true, it is in this caſe made by a dying perſon; but that is not ſufficient to make it a donation *mortis cauſa*; its irrevocability makes it retain the character of a donation *inter vivos*, *l.* 42. § 1. *ff. de mort. cauſ. don.*

Theſe are the two eſſential characteriſtics of donations *mortis cauſa*. Every donation in which they are both found, is a donation *mortis cauſa*; every one, in which they are not both found to concur, is a donation *inter vivos*. Therefore a donation is not held to be made *mortis cauſa*, merely by being revocable; for deeds *inter vivos* are frequently ſo. In order to entitle it to the appellation of a donation *mortis cauſa*, it muſt alſo be made *from the view of death*. In the ſame manner a donation, which is made from the view of death, cannot be called a *donatio mortis cauſa*, unleſs it is alſo revocable, *Du.* 8th *March* 1626, *Traquair.*—18th *March* 1636, *Bells.*—15th *Feb.* 1637, *Lauders.*—*St.* 25th *July* 1662, *Naſmith.*—8th *Dec.* 1675, *Thomſon.*—10th *Jan.* 1679, *Grant.*—*Fo.* 16th *Feb.* 1686, *Creditors of Cunnochie.*—17th *Feb.* 1699, *Leſlie**.

From what has been ſaid it will be eaſy to deduce the differences between donations *inter vivos* and thoſe *mortis cauſa*. For it is needleſs to explain the particulars, in which they agree, ſince that would be to repeat moſt things which have been ſaid in the foregoing title; for they agree in many things. 1) They may both be made of the ſame things; 2) they may both be granted by the ſame perſons; 3) they may both be made to the ſame perſons; 4) they may both be made in the ſame manner, under the ſame conditions, and for the ſame ends; 5) the ſame deeds are in both caſes neceſſary, in order to convey a right to the donee; they differ only in the dependence, the revocability, and the effects of his right.

§ 680. Donations *mortis cauſa* are, *ex hypotheſi*, revocable at any time during the life of the donor; the right of the donee muſt therefore ever be dependent during the life of the donor, and it does not become certain till the donor is dead: for he has it in his power to revoke his donation. If therefore he makes an actual revocation of it, the donee loſes his right, and may be forced either to reſtore the *res donata*, or to do any thing which may be neceſſary for re-conveying it to the donor, and for re-eſtabliſhing him in his property.

A donation *mortis cauſa* may be revoked either expreſsly or tacitly: expreſsly, by making a formal revocation of it, either verbally, or by writ. But a revocation, which is only verbal, muſt be completed either by an actual recovery of the poſſeſſion of the *res donata*, or by diligence done in order to recover it. For if the donor dies without having either recovered the poſſeſſion, or done diligence in order to recover it, a verbal revocation will not be ſufficient for revoking the property; it will be preſumed to have been made without a ſerious intention of carrying it into execution, and to have been afterwards relinquiſhed by the donor. Every donation, that may be effectually conſtituted without writ, may be revoked verbally. In the ſame manner the revocation is made in writ, when the donor makes a formal revocation of it; for he ſhews his *animus revocandi*, in the ſtrongeſt manner, by doing this. A written revocation is neceſſary in all thoſe caſes, in which the donation or the right of the donee muſt be conſtituted by writ. *Nihil tam naturale eſt, quam eo genere quidque diſſolvere, quo colligatum eſt*, *l.* 35. *ff. d. r. j.* Rights, which cannot be effectually conſtituted without writ, are defeaſible by writ alone.

Donations are revoked tacitly, 'by ſuch deeds as are made by the donor after 'the making of the donation, and are inconſiſtent with their ſubſiſtence;' for theſe are his laſt will, and muſt be effectual, ſince the donations are revocable by

* Donations *mortis cauſa* muſt not be confounded with thoſe made on death-bed. A deed is ſaid to be made on death-bed, when it is made by one during that ſickneſs which ends in his death. But a deed is ſaid to be made *mortis cauſa* when it is made *out of the view of death*. Therefore it may fall under this denomination tho it be made by a man who is in full health and vigour: for one, who is in health, may have thoughts of death and may make a deed out of the proſpect of it, as well as one who is ſick.

by him, and both cannot ſubſiſt. Therefore the deed, from which the revocation is inferred, muſt relate to the particular *res donata:* for revocation is never preſumed from general deeds, becauſe general deeds are very conſiſtent with ſpecial ones. *In toto jure generi per ſpeciem derogatur, et illud potiſſimum habetur, quod ad ſpeciem directum eſt, l.* 80. *ff. d. r. j.* Thus one who has made a donation will not, becauſe he has made a ſettlement of his affairs, or granted a general *diſpoſition* of all his eſtate, without making particular mention of that donation, be therefore held to have revoked: for the ſettlement or general diſpoſition and the donation may both ſubſiſt and be both effectual at one and the ſame time; the diſpoſition will not derogate from the donation, becauſe it will be preſumed not to include the *res donata*, but to diſpoſe of thoſe things alone, which belong to the grantor beſides it, *C.*
1586, *Seton.*—*Du.* 8th *March* 1626, *Traquair.*—*F.* 16th *Dec.* 1712, *Monro.* It would be otherwiſe, if the general diſpoſition contained a ſpecial conveyance of the *res donata;* becauſe it is impoſſible, that both the donation and the poſterior ſpecial conveyance of it can ſubſiſt. If the donation ſubſiſts, the ſpecial conveyance muſt be ineffectual; if the conveyance is effectual, the donation cannot ſubſiſt. Therefore the donation muſt be ineffectual, and the conveyance muſt be effectual; for the conveyance cannot be ineffectual, ſince the donor had power to make it, and to revoke the donation. In the ſame manner, if the donor ſells the *res donata*, the donation muſt be held to have been revoked. In ſhort in all caſes, in which a deed done by the donor is abſolutely inconſiſtent with the ſubſiſtence of the donation, it muſt be held to be revoked; and in all caſes in which a deed that is conſiſtent with the donation is done by the donor, it muſt be held not to be revoked; ſince they may ſubſiſt together.

§ 681. Donations *mortis cauſa* are revocable at any time during the life of the donor, and may be revoked tacitly; therefore they cannot, if he contracts more debt than his eſtate is able to diſcharge, be entitled to enter into competition with his creditors. For the law will preſume *præſumptione juris et de jure*, that he made an expreſs and ſpecial revocation of them by contracting debt, and will never allow thoſe who have only a dependent, a revocable and a gratuitous right, to enrich themſelves at the expence of lawful and onerous creditors. Conſequently, theſe muſt be entitled to adjudge the faculty, which the donor has to revoke the donation, and to uſe every lawful mean for recovering the *res donata*, and for converting it into a fund of payment of the debts due to them. Indeed donations *mortis cauſa* do, in this as well as in many other reſpects, reſemble legacies and other teſtamentary bequeſts: neither of them can be effectual, unleſs the debts of the donor are cleared. *Illud generaliter meminiſſe oportebit, donationes mortis cauſa factas, legatis comparatas; quodcumque igitur in legatis juris eſt, id in mortis cauſa donationibus erit accipiendum, l.* 37. *p. ff. de mort. cauſ. donat.*

§ 682. Donations *mortis cauſa* are not void; they are only revocable at any time during the life of the donor. Therefore they muſt be effectual, unleſs they are actually revoked by him. For it ſeems not to be agreeable to the genius and the principles of the Law of Scotland to ſay, that they become immediately ineffectual without any revocation, in caſe the donee happens to die before the donor. 'Tis true, legacies become void, if the legatee dies before the teſtator. But there is a mighty difference between legacies and donations *mortis cauſa*. Legacies are deeds granted merely *mortis cauſa;* whereas donations *mortis cauſa* are of a mixt nature, and fluctuate between deeds *inter vivos* and deeds *mortis cauſa*. The *res donata* is made over and is uſually delivered to the donee during the life of the donor; but legacies are not demandable till the death of the teſtator. Beſides, it appears from what has been ſaid concerning the neceſſity of reſerving an expreſs power to revoke (§ 675.), that they participate of the nature of the former more than of that of the latter. For the genius of the Law of Scotland does not admit either of powers to revoke, unleſs they are reſerved, or of revocations,

cations, unleſs they are made. Every donor has it in his power to revoke a donation *mortis cauſa*, as well after as before the death of the donee; therefore if he dies without revoking it, it muſt ſubſiſt whether he dies before or after the donee. For he may revoke it from the heirs of the donee as well as from the original donee himſelf.

'Tis true, a diſtinction ought to be made between donations completed by delivery either of the *res donata* or of an obligatory writ concerning it, and thoſe made *retenta poſſeſſione*. A donation is ſaid to be made *retenta poſſeſſione*, 1) when the *corpus* or *res donata* is retained by the donor, if the donation be completed without writ; or 2) when the writ, neceſſary for completing the right of the donee, is not delivered to him. In all thoſe caſes therefore, in which a donation is made *retenta poſſeſſione*, it muſt, according to the common principles of law, become void, in caſe the donee happens to die before the donor; becauſe he had never acquired any right, not even a revocable one, as long as the *res donata*, or that which was neceſſary for giving him a right, was not delivered to him. For the donor had the power of repenting as well as of revoking, as long as he retained the poſſeſſion. He might make the donation become ineffectual by repentance alone, by doing nothing to complete it, without revoking. Conſequently the donee, and *a fortiori* his heirs, had no right to demand completion of it *.

But if the donation was completed by delivery, a right was veſted in the donee. 'Tis true, it was not an independent and an abſolute, but a dependent and a revocable one. However it was ſtill a right, of which the donor could not deprive him without revoking. Therefore if it is not revoked from him, it muſt deſcend to his heirs; for every right which one has deſcends, ſuch as it is, to his heirs. If it deſcends to them, and is once veſted in them, it muſt remain with them, till it is revoked, and is thereby taken from them.

Having thus treated of thoſe benefits which one beſtows without intending to be reimburſed for them, I ſhall, in the following titles, conſider ſome of thoſe caſes in which one means to be re-imburſed of the charges, laid out by him on the affairs of others (§ 664.).

TITLE III.

De negotiis geſtis.

§ 683. THINGS, which require immediate attention, happen frequently to occur in the courſe of human life, while thoſe whom they concern are abſent from home, or at a diſtance from their affairs. People would, in ſuch caſes, be expoſed to great loſſes, did not the law invite men to attend to the concerns of their abſent friends, by aſſuring them that their goodneſs ſhall not be hurtful to their intereſt, and that they ſhall not ſuffer for having taken it upon them to do a good office. The law therefore, as it impoſeth obligations on one who undertakes to manage the affairs of another, who is abſent, hath alſo impoſed obligations on him whoſe affairs have been profitably managed during his abſence, and hath declared him to be bound to indemnify the friend who hath taken care of them. Thus mutual obligations being introduced by it, it preſumes that a contract, as it were, hath intervened between the abſent perſon, whoſe af-

* It muſt be remarked, that every writ, found among the papers of one who is dead, muſt, tho it is not delivered to that perſon in whoſe favour it is made, produce thoſe effects, which, according to the common principles of law, a writ of its nature produces. For writs, that are found among the papers of one dead every body knows, may be effectual in very many different ways. So what is here ſaid muſt be underſtood agreeably to the general principles of law.

fairs have been prudently managed, and him who hath managed them; and that from this contract thoſe mutual obligations ariſe.

The foundation, on which it builds this preſumption, is laid on the common maxims of human conduct. Mankind are uſually obſerved to be thankful to thoſe, who do them ſervice, and promote their intereſt. From hence the law preſumes every one to conſent to that, which is promotive of his utility. But it would be iniquitous to allow one, who has been at charge in promoting it, to ſuffer by his goodneſs; it preſumes therefore every one to bind himſelf to indemnify him, who has done any thing promotive of it. On theſe preſumptions the foundation of this contract is laid; and from them thoſe mutual obligations, which it infers, deſcend, *l. 5. p. ff. de oblig. et act.*—§ 1. *J. de oblig. quæ quaſi ex cont.*

The contract itſelf hath, in the Roman law, a proper name, by which it is diſtinguiſhed from every other: it is called *negotiorum geſtio;* he, who manages the affairs of his abſent friend, is called *negotiorum geſtor;* and he, whoſe affairs are managed, is called *dominus*. The language of the law of Scotland is ſo penurious, that it wants technical terms for many things; it may therefore be neceſſary to uſe thoſe of the Roman law in the courſe of this argument, as I have been obliged to do frequently on other occaſions.

§ 684. *Negotiorum geſtio* may be defined to be, as it were, 'a contract by 'which one, who has of his own accord, without any mandate, undertaken to 'manage *gratis* affairs of another that is abſent, brings himſelf under obligations 'to manage them with fidelity, and to render an account of his management, and 'lays him, whoſe affairs he managed, under obligations to indemnify and to re-'imburſe him in ſo far as he manages well, *utiliter*.' This definition may be analyzed into the following axioms. I. *Negotiorum geſtio* is, as it were, a contract. II. The *negotiorum geſtor*, he who manages, takes the management on himſelf of his own accord, without any mandate. III. He is bound to manage with fidelity, for the intereſt of him whoſe affairs he is managing, and to render an account of his management. IV. He is entitled to be indemnified and to be reimburſed *in quantum utiliter geſſit*. But V. His office is not either mercenary or lucrative. From theſe axioms it will be eaſy to ſhew, 1) who can manage the affairs of others, *qui negotia gerere poſſunt*, ſo as to bring both themſelves and thoſe whoſe affairs they manage, under the obligations of this contract; 2) whoſe affairs may be negotiated, *quorum negotia geri poſſunt*, *i. e.* who may be brought under the obligations, which this contract therefore infers, becauſe their affairs have been managed; 3) what are the obligations of the *negotiorum geſtor;* 4) what are the obligations of the *dominus*, him whoſe affairs are negotiated; 5) what is required in order to impoſe thoſe obligations, and in what caſes they have place; 6) what actions ariſe from this negotiation; and 7) in what caſes theſe actions have or have not place.

§ 685. A negotiator has not a mandate to intermeddle in the affairs of his friend, but undertakes the management of them of his own accord (§ 684. *ex.* 2.). If he had a mandate, he would not be a *negotiorum geſtor*, and would not either be bound himſelf or have the other bound *ex quaſi contractu;* but would be a mandatary, would both be himſelf and have his mandant bound *ex vero contractu*, and would be liable to thoſe obligations, which the contract of mandate infers, *l. 5. p. ff. de oblig. et act.*

Therefore every body, who is capable of negotiating the affairs of another, may negotiate them, or ſubject both himſelf, and him whoſe affairs he negotiates, to thoſe obligations under which they are reſpectively brought by the law. For the obligations ariſe, in this caſe, from the act of uſeful negotiation alone. If the affairs are negotiated *utiliter*, it matters not by whom: becauſe all which the law requires to be done, in order to induce the obligations, is fulfilled; ſince the utility of him, whoſe affairs are negotiated, has been promoted by the negotiation. Therefore 1) women as well as men, 2) minors as well as perſons of age, 3) thoſe

below

below as well as thoſe paſt pupilage, may be *negotiorum geſtores*. But it muſt be remarked, that minors are liable only *in quantum locupletiores facti ſunt*: for they cannot oblige themſelves ſo as to render their condition worſe than it was. Therefore they are not bound to finiſh a negotiation which they have begun, any more than to begin one with which they never meddled; becauſe they loſe their time, and may hurt themſelves by intermeddling with affairs, which do not concern them. The law, however, tho it does not allow them to hurt, will not allow them to enrich themſelves at the expence of others, or to retain what belongs to another. Therefore 1) it makes them accountable *in quantum locupletiores facti ſunt*, and obliges them to reſtore that which they have no right to keep. 2) It declares them to be obliged by their delinquencies, and to be liable to make *full* reparation of that damage which they do *delinquendo;* provided they are *doli capaces*, capable of committing crimes. If, therefore, they either have done, or have omitted to do any thing, or have diſcontinued altogether to act, and either their omiſſions, their commiſſions, or their diſcontinuance, have been fraudulent and criminal, it makes them liable *in ſolidum* on account of them *. *l.* 3. *p.* § 1. 4. *ff. de neg. geſt.*

§ 686. The affairs of every one, who has affairs to be managed, may be negotiated, without diſtinction of ſex, of age, or of condition: the affairs 1) of women as well as of men, *l.* 3. § 3. *ff. de neg. geſt.* 2) of ſuch as are of age as well as of ſuch as are minor; 3) of thoſe who have not, as well as of thoſe who have attained the age of puberty, *l.* 6. *p. ff. l.* 2. *C. eod.* 4) of perſons who are deprived of the uſe of their reaſon, as well as of thoſe who have it, *l.* 3. § 5. *ff. eod.* †; 5) of perſons who are not, as well as of thoſe who are born; for inſtance, of an eſtate belonging to one who is *in utero*, *l.* 29. *ff. eod.* 6) of the dead as well as of the living, *l.* 3. *p. l.* 21. § 1. *ff. eod.* ‡; 7) of the unknown as well as of the known; 8) of thoſe whoſe affairs one did not intend, as well as of thoſe whoſe affairs he did intend to manage, *l.* 5. § 1. *ff. eod.* for it is not from the intention of the negotiator, but from the uſeful negotiation alone, that the obligations ariſe. One, whoſe affairs have been uſefully managed, is bound, whether he who managed them intended to manage *his* affairs, or thoſe of any other. Nay, not only may the affairs of private perſons, but 9) thoſe of political ones or lawful ſocieties; and not only thoſe of perſons, but 10) thoſe of eſtates; for inſtance, of an *hereditas jacens*, an inheritance on which nobody has entered, may be managed. The nature of the contract makes this evident; becauſe the intereſt of all theſe may be promoted by negotiation of their concerns.

§ 687. I. Every *negotiorum geſtor* is bound to negotiate with fidelity, to the utility of him, whoſe affairs he has taken it upon himſelf to manage (§ 684. *ax.* 3.). This obligation, it is plain from the nature of the contract, he brings upon himſelf: for he voluntarily intermeddles in the affairs of his friend, and *undertakes* to manage them. Therefore that, which it was originally optional to him either to have or not to have done, it becomes neceſſary for him to do; and the law obliges him to do it. *Voluntatis eſt enim ſuſcipere, neceſſitatis conſummare.* So he is bound to do that, which he has undertaken to do; and no more.

It muſt depend on the circumſtances of every caſe to determine what one is bound and has undertaken to do. Sometimes it will be no more than one particular

* It muſt be remarked, that they are not in this caſe liable *ex quaſi contractu negotiorum geſtionis:* for they are *ex hypotheſi* liable *ex delicto.*

† 'Tis true in theſe caſes the negotiator negotiates the concerns as well of the tutors and curators of thoſe minors or phrenetical perſons, as of the minors and demented perſons themſelves; and hath therefore action againſt them both, *l.* 6. *p. l.* 37. *p. ff. de neg. geſt.* Only it muſt be remembered, that the minors, *&c.* are obliged and are liable no farther than *in quantum locupletiores facti ſunt.*

‡ The chief caſes in which one is held to negotiate the concerns of the dead, is, when he takes care of their burial: for decency requires, that every dead body be buried; and it would make one uneaſy to think that the uſual reſpect was not to be ſhewn his remains. Hence one, who is at the trouble of taking care of their interment, is held *negotia gerere* of the deceaſed, as well as of their repreſentatives, *l.* 1. *ff. de relig.*

cular affair. Thus one, who undertakes to do a thing which is not at all connected with any other, diſcharges his duty by doing that thing well; and is not bound to meddle with any other; for it was originally optional to him to meddle even with that. But another thing may be ſo connected with that which he has undertaken, as to make it the duty of him, who took upon him the care of the one, to take care of the other alſo; he muſt therefore in this caſe be bound to manage them both. Indeed their connexion makes them be conſidered not as different affairs, but as one indiviſible *negotium*, *l.* 6. § 12. *ff. de neg. geſt.* and he muſt be held to be bound to do the one as well as the other.

One who has undertaken to do *ſeveral* things, muſt do them all, tho they ſhould not have any connexion with one another: and one who has undertaken to manage all the concerns of his friend, muſt take care of them all. 'Tis true this can hardly be the caſe; for there is no formal contract ever entered into by the *negotiorum geſtor*, and him whoſe affairs are managed; *negotiorum geſtio* is no more than *quaſi contractus*. The obligations therefore, under which it brings the *negotiorum geſtor*, muſt be inferred from the particulars of his conduct, and from the duty of one who has done ſo much as he has done; for he is obliged to do juſt ſo much as one, who has done what he has done, ought to do. From hence it is plain that the law knows little, I might ſay nothing, of general *negotiorum geſtores:* for nobody is bound to manage all the concerns of any one. Beſides, a *negotiorum geſtor* can hardly be bound to do more than a mandatary: but a mandatary may renounce his mandate at any time; provided he does it not *intempeſtivè: a fortiori*, a *negotiorum geſtor* muſt have the ſame right. But he muſt be held to have renounced, if he ceaſes to act: his ceaſing is ſufficient to free him from the obligation of continuing to manage; provided he does not ceaſe, when he was bound to continue to manage, becauſe in that caſe his omiſſion is culpable; for he neglects to do that, which he was bound to do. So that no body is bound to manage either all or any of the concerns of his friend; unleſs he has hindered from doing it another who would have done it, if he had not been made by the *negotiorum geſtor* to believe, that he would take care of them. For in this caſe he does a real hurt to him, whoſe concerns he is pretending to manage; ſince he not only neglects them himſelf, but induces to neglect them another who was willing to have taken care of them. This loſs therefore he muſt be bound to repair to him, whoſe affairs he manages; ſince it is owing to his fault, that it is ſuſtained.

II. Every one, who takes it upon him to manage the affairs of another, is bound to manage them to the utility of him whom they concern: for the title which the law gives him to be indemnified and reimburſed, depends entirely on the prudence and the utility of his management. If he manages prudently, for the intereſt of him whoſe affairs he is managing, he will be entitled to be reimburſed: if he manages imprudently, and not to the utility of his friend, he will not be entitled to be reimburſed, tho he will himſelf be bound and be anſwerable for his conduct.

III. For every *negotiorum geſtor ex hypotheſi* (§ 684. *ax.* 2.) takes it upon himſelf to manage the affairs of another, ſpontaneouſly, without any mandate. Therefore he muſt be bound and muſt be liable to do moſt exact diligence in managing them; for the law counts it a culpable officiouſneſs to intrude into the affairs of others, regards with ſuſpicious eyes thoſe who intermeddle with matters, that do not concern them; *l.* 36. *d. r. j.* and for that reaſon obliges them to be more than any others, careful of the affairs which they have taken in hand. Regularly therefore *negotiorum geſtores* are liable *præſtare non ſolum dolum, culpam latam, et culpam levem, ſed et culpam leviſſimam;* they are bound to make up to him, whoſe affairs they manage, all the loſs which they either by fraud, by groſs negligence, or by the ſmalleſt neglect, cauſe him to ſuſtain.

I ſay *regularly præſtant culpam leviſſimam:* for they do not always do it. Indeed it muſt in all caſes be left to the judge to determine the preciſe diligence

gence which a *negotiorum geſtor* ought to do, according to the circumſtances of every caſe; ſuch as the degree of officiouſneſs ſhewn by him, the neceſſity there was either for him or for ſome other to intermeddle, and any others which may have weight in the matter.

IV. But he is not liable for accidents; *nam nemo caſum præſtat.* Therefore he is not bound to make up any accidental loſs, which hath ariſen from chance. Indeed chance can have no effect on the obligations either of the negotiator, or of him whoſe affairs are negotiated. Hence it follows that the *negotiorum geſtor* is entitled to be indemnified, tho the utility he propoſed to promote ſhould be prevented by accident, provided he has ſo far as he has intermeddled done his part, and managed *utiliter;* for he is not anſwerable for events, which do not depend on himſelf; he is anſwerable for his own conduct alone. If it has been prudent, and tended to promote the intereſt of him whoſe affairs he managed, it muſt be obligatory on him, and muſt entitle the *negotiorum geſtor* to be indemnified. Thus one who lays out money on the cure of a child, that is at a diſtance from his parents and is ſeiſed by ſome ſudden diſeaſe, is entitled to be reimburſed, even tho the child ſhould happen to die; becauſe by taking care of the child he *negotium geſſit* of the parent, who was bound to maintain him. He acted not only a prudent but a humane part in intereſting himſelf in one, who was at a diſtance from his relations; he could not be certain, that the child would recover: neither could the parent, the phyſician, or any other; but it would be cruel to neglect altogether the cure of thoſe who are ſick, becauſe it is uncertain whether the means uſed to cure them will be attended with ſucceſs. The *negotiorum geſtor* therefore did well in uſing the proper means for procuring the recovery of the child. If it died, he was in no ſort blameable; and he was not anſwerable for its death.

Indeed in all caſes of this kind he, whoſe affairs are managed, becomes obliged at that very moment at which they are managed *utiliter*. But having been once managed *utiliter*, it is impoſſible for them to be *retro* managed *inutiliter*. Conſequently it is impoſſible for him, who was once obliged, to ceaſe to be obliged by the paſt management of the *negotiorum geſtor;* his future conduct can have no effect on his paſt; what he does afterwards, can have no influence on what he did before; his poſterior negotiations muſt be productive of their own conſequences; his paſt conduct, as it remains unalterable, muſt produce the conſequences proper to itſelf, *l.* 10. § 1. *l.* 22. *ff. l.* 10. *C. de neg. geſt.*

V. A *negotiorum geſtor* manages the affairs of another. Of courſe he muſt be bound to account for his adminiſtration: for every one, who manages the affairs of another, is, § 1. *J. de oblig. quæ quaſi ex con. l.* 2. *ff. de neg. geſt.* Conſequently he muſt reſtore every thing which he has recovered, that belongs to him whoſe affairs he has managed, *l.* 11. 23. *ff. eod.* and if he has got money into his hands, and employed it to his own uſe, he muſt pay intereſt for it. Nay he ought to pay intereſt for it in all caſes, in which he has had it in his hands ſo long that he ought, and muſt therefore be preſumed, becauſe it was his duty, to have laid it out on intereſt; for *præſtat culpam leviſſimam, l.* 19. § 4. *l.* 38. *ff. de neg. geſt.*

VI. It muſt be remarked, that *negotiorum geſtores* are liable *ſinguli in ſolidum;* that is, if more perſons than one have managed one and the ſame affair, *unum negotium*, they are each of them liable *in ſolidum;* for it is held by law to be culpable for one to intrude himſelf into matters, that do not concern him. Conſequently every one, who is guilty of ſuch an intruſion, is liable *ex delicto*. But delinquents are in all caſes liable *ſinguli in ſolidum:* therefore *negotiorum geſtores* muſt be liable in the ſame manner; for they are intruders, and are of courſe liable *ex delicto*. Beſides, they are bound *præſtare culpam leviſſimam;* they ought not to truſt that, which they have undertaken to do, to the care of others; they ought to look to it themſelves; and muſt therefore, if they have been ſo careleſs as to neglect it themſelves and to truſt it entirely to others, be liable for their careleſſneſs. He, whoſe affairs were managed, had no opportunity of making a contract with them: it is probable that, if he had had one, he would have taken each

of them bound *in ſolidum;* law will therefore preſume in his favour, that the *negotiorum geſtores* bound themſelves each *in ſolidum*, eſpecially as public utility requires that thoſe, who intermeddle officiouſly with matters, that do not concern them, be made moſt ſtrictly liable. Indeed the nature of the *negotium geſtum* is in moſt caſes ſuch, that it is indiviſible, and muſt therefore infer indiviſible obligations, *arg. D.* II. 385.— *Feb.* 1726, *Anderſon.*— *Feb.* 1730, *Chalmers.*—21ſt *Nov.* 1730, *French.*

§ 688. The utility of him, whoſe affairs are negotiated, is thereby promoted: therefore he muſt be bound to indemnify or to reimburſe the *negotiorum geſtor, quatenus utiliter geſſit;* for it would be iniquitous for him to let the *negotiorum geſtor* be out of pocket. One ought not to be allowed to loſe by his goodneſs. Therefore he, to whom the good is done, muſt be bound to indemnify him who does it, *quatenus utiliter geſſit. Nam hoc natura æquum eſt, neminem cum alterius detrimento fieri locupletiorem, l.* 14. *ff. de condict. indeb.* and one who has not managed *utiliter*, does not oblige him whoſe affairs he managed, *l.* 10. § 1. *ff. de neg. geſt.*

But the *negotiorum geſtor* is not entitled to get a farthing more than indemnifies him; for his office is not either lucrative or mercenary; *gratuitam, certe integram, et abſtinentem omni lucro præſtare fidem debet, l.* 38. *ff. de neg. geſt.* Therefore he is not entitled to demand any thing for the time, the pains, or the thought he ſpent on the affairs of his friend. Theſe, however valuable they have been, he is preſumed to employ out of friendſhip alone. All, he is entitled to demand, is ſimple indemnity.

Nay he is not entitled to demand ſo much, 1) if he has intermeddled with the affairs of another, after he was expreſsly forbidden by him whom they concerned, to intermeddle with them, *l. uli. C. l.* 8. § 3. *ff. de neg. geſt.* even tho he hath managed them *never ſo well;* for he will be preſumed, ſince he intermeddled after he was expreſsly forbidden to do it, to have renounced any right he had to demand to be reimburſed, and to have laid out his money *animo donandi.* And 2) a *negotiorum geſtor* is not, in any caſe in which he negotiated *animo donandi*, or *pietatis cauſa, ſine animo repetendi*, entitled to demand to be reimburſed; becauſe he does not, in theſe caſes, mean to aſk it, *l.* 27. § 1. 34. 44. *ff. l.* 11. 13. 15. *C. de neg. geſt.*

§ 689. Such are the obligations and the rights both of him whoſe affairs are negotiated, and of him who negotiates them. Theſe rights and obligations, it is plain from the common principles of law, muſt be reſpectively effectual to them. Therefore each of them muſt have his action for getting them made effectual to him. That, which he whoſe affairs are negotiated has, is in the Roman law called *actio negotiorum geſtorum directa.* It is an action which he, whoſe affairs have been negotiated, or his repreſentative, is entitled to bring againſt the *negotiorum geſtor* or his heir, in order to get him decreed and compelled to fulfil all the obligations, under which he brought himſelf by his negotiation (§ 687.). That, which the *negotiorum geſtor* has, is called *actio negotiorum geſtorum contraria.* It is an action, which the *negotiorum geſtor*, or his heir, is entitled to ſue againſt him whoſe affairs he *utiliter geſſit*, or his heir, in order to get him decreed and forced to indemnify or to reimburſe him.

TITLE IV.

Of the Rhodian Law de jactu.

§ 690. THE Rhodians were in antient times a trading people, had an extenſive commerce, and were for ſome time poſſeſſed of the empire of the ſea. Hence they were, like other commercial nations, obliged by neceſſity as well as

as by intereſt to give particular attention to their nautical law; and founding it on principles, which were at the ſame time agreeable to equity and proved by experience to be promotive of the intereſt of trade, brought it thereby to conſiderable perfection. Thus the Rhodian laws became famous; thoſe nations, who have applied themſelves to trade, have made them the meaſures by which they determine many of their diſputes about maritime affairs; and not the Romans alone who were late of applying themſelves to it, but the moderns, who have carried commerce to an extent ſo prodigious that the antients ſeem not to have ever dreamed of it, have adopted them into their ſyſtems. The one *de jactu*, of which this title treats, is particularly remarkable among them.

Ships are at ſea expoſed to many dangers, ariſing from ſtorms and from other cauſes. In order to avoid them, it is neceſſary, on many occaſions, to part with a part of the cargo rather than loſe both the ſhip and all the goods contained in her. One caſe, in which this muſt be done, is when a ſhip that is overloaded, happens to meet with a ſtorm and is in danger of being caſt away, becauſe ſhe is overloaded. In that caſe common prudence dictates that part of the cargo ought to be thrown overboard, in order to lighten her, if there are hopes of ſaving by this means both her and the remainder of it. For it is better to loſe a part than to loſe all; of two evils, one of which muſt neceſſarily be borne, the leaſt ought always to be choſen. Hence the goods of ſome particular perſons muſt in this caſe be made a ſacrifice, and muſt be thrown overboard in order to preſerve thoſe of others. But it would be iniquitous to let the loſs fall on the owners of theſe goods alone: for they are ſingled out becauſe it is more convenient to part with them than with any others in the ſhip; are thrown overboard in order to preſerve the reſt; and if they had not been ſacrificed, all, both the ſhip and the cargo, might have periſhed. For theſe reaſons the Rhodians enacted their celebrated law *de jactu;* by which they declared, that in all caſes, in which goods belonging to any particular perſons ſhould be thrown overboard for the common ſafety, in order to lighten a ſhip and to preſerve it and the remainder of the cargo, the loſs ſhould not be borne by thoſe individuals alone, but ſhould be made up to them by a general contribution made ſo as to cauſe the loſs to fall proportionally on all thoſe who gain by the ejection, *l.* 1. *ff. de leg. Rhod. æquiſſimum enim eſt, commune detrimentum fieri eorum, qui propter amiſſas res aliorum, conſecuti ſunt, ut merces ſuas ſalvas haberent, l.* 2. *p. ff. de leg. Rhod.*

From hence it is evident, that, in order to make room for this contribution, it is neceſſary, I. That goods be thrown overboard, and a loſs be ſuſtained. II. That they be thrown overboard, and the loſs ſuſtained for the common ſafety, in order to ſave both the ſhip and the reſt of the cargo from a danger that threatens to be fatal to both. III. That they eſcape this danger, and be ſaved. IV. That the contribution itſelf muſt be made ſo as to fall proportionably on all thoſe whoſe goods are ſaved by the ejection, and to repair the damage ſuſtained by the owners of the goods thrown overboard. From which axioms it will be eaſy to ſhew 1) the caſes in which this contribution is made; 2) the perſons who do, and who do not contribute to it; 3) its amount; 4) the manner of proportioning it among all the contributors.

§ 691. In order to make room for the contribution, it is neceſſary, 1) that goods be thrown overboard and a loſs be ſuſtained (§ 690. *ax.* 1.): for the intention of this law is to repair loſs. Therefore a loſs muſt be ſuſtained by ſomebody; for if none is ſuſtained by any body, there is none which can be repaired.

Hence if the goods, which were thrown overboard, are afterwards recovered either by accident or by labour, the contribution ceaſes either totally, or partially, *l.* 2. § 7. *ff. de leg. Rhod.* It ceaſes altogether, if no loſs is ſuſtained, if the goods are not made worſe; particularly, if they are not made uſeleſs, but are rendered only leſs valuable than they were; for the damage, which is done them, is the loſs ſuſtained, and is that which muſt be repaired.

Therefore

Therefore there is no place for demanding a contribution to be made, if the goods were not thrown into the ſea, but put into a boat, and came ſafe to land; becauſe the owners of them cannot, in this caſe, ſay they have ſuſtained any loſs.

Nay, tho the goods have been thrown into the ſea, there are no pretenſions for making it, in caſe they either are recovered by divers, or come by any other means ſafe to land; becauſe neither in this caſe can the owners of the goods thrown over board ſay, they have ſuſtained any loſs. Indeed in all caſes, in which either the goods have been damaged by the water, or the owners of them have been put to any extraordinary expence in recovering them, or have ſuffered any extraordinary loſs, *v. g.* by loſing the opportunity of a good market, a contribution, proportionable to the loſs ſuſtained by them, muſt be made; for *every* loſs ſuſtained for the common ſafety, and ſuch muſt every loſs that ariſes from dangers, to which the goods were expoſed for the common ſafety, be eſteemed to be, ought to be taken into account, and repaired to thoſe who have ſuſtained it.

If loſs is ſuſtained, it is no matter, in what manner, in what place, or at what time it be ſuſtained; whether the goods have been thrown overboard in the open ſea, near land, or about the entrance of the harbour; whether they were thrown into the ſea and were thereby loſt, or were put aboard a boat in order to be carried to land, and were loſt along with it; whether they were thrown overboard during a ſtorm or at any other time; whether they were loſt immediately, or only ſome time after they parted from the ſhip. In ſhort, it is no matter how, where, or when the loſs is ſuſtained, *l.* 4. *p. ff. eod.* provided it be ſuſtained for the common ſafety.

This principle is ſo juſt that the law hath extended it to all caſes, in which a loſs is ſuſtained for the common ſafety, tho it ſhould not be by an ejection; for inſtance if certain goods, by being expoſed in order to make the ejection, have been damaged either by the water or otherwiſe, this damage muſt be made up to the owners of them, provided they were neceſſarily expoſed to ſuffer the damage for the common ſafety, *l.* 4. § *ult. ff. de leg. Rhod.* In the ſame manner if it has been neceſſary to cut a maſt, cable, or part of the tackle of the ſhip in order to preſerve her, this loſs muſt alſo be repaired to her owner; for it was ſuſtained for the common ſafety, *l.* 3. *ff. eod.*

The end which the Rhodian law has in view, and the principles which reign in it, are ſo equitable, and ſo applicable to every caſe ſimilar to thoſe which fall directly under the words of it, that it is not confined to loſſes borne for the common ſafety, in order to preſerve the ſhip from dangers ariſing from ſtorms or from ſtreſs of weather, but extended to every loſs ſuſtained in order to preſerve the ſhip and her cargo to the owners of them from any ſort of danger, which threatens them at ſea. For the diſpoſition of the law ought to be the ſame in all caſes, in which it is reaſonable it ſhould be the ſame. *Ubi eadem eſt ratio, ibi eandem oportet eſſe juris diſpoſitionem.* Hence if the danger ariſes not from a ſtorm, but from ſome other cauſe, and, in order to extricate the ſhip and the cargo from it, a loſs is ſuſtained by ſome perſons, who either belong to the ſhip or have goods in her; this loſs, ſince it is ſuſtained for the common ſafety, muſt be made up to thoſe who have ſuſtained it. Suppoſe, for inſtance, the part of the cargo, that belongs to one, to be given to pirates in order to redeem the ſhip, and the remainder of the cargo from them; ſuppoſe one to have paid money for the ranſom of the ſhip; or to be carried away priſoner, to be detained a hoſtage for the payment of the ranſom-money, and to be obliged to pay it; in all theſe caſes, a loſs is ſuſtained by a particular perſon for the general ſafety. Therefore it muſt be borne not by him alone, but by all thoſe who would have ſuffered, if he had not, *l.* 2. § 3. *ff. de leg. Rhod.* Fo. 29th *June* 1710, *Richie.* In general, it may be affirmed to be a general principle, that every loſs ſuſtained by particular perſons muſt be made up to thoſe individuals, on whom it has immediately fallen; provided they ſuſtained it for the general ſafety.

§ 692.

§ 692. For in order to make room for a general contribution, it is not enough that one hath met with loſs; he muſt 2) have ſuſtained it for the common ſafety, in order to ſave both the ſhip and her cargo from a danger, that threatens to be fatal to them both. For the obligation, which lies on thoſe whoſe goods are ſaved, to pay a ſhare of the contribution, ariſes from hence, that they are profited at the expence of thoſe whoſe goods are thrown overboard, or who have ſuſtained a loſs; *propter amiſſas res aliorum conſecuti ſunt, ut ſuas ſalvas haberent, l.* 2. § 1. *ff. de leg. Rhod.* If therefore theſe not only do not, but it is not even intended that they ſhould receive any benefit by the ejection, no claim can be made by the others to reparation of their loſs; becauſe the reaſon of the obligation ceaſes.

Hence a contribution needs not be made on account either of loſſes that are merely accidental, and proceed not at all from deſign, or of ſuch as proceed from another than that of acting for the common ſafety.

In thoſe caſes, in which one happens to meet with an accidental loſs, nobody can be bound to make it up to him; for nobody reaps any benefit from it. *Nemo caſum præſtat.* Every body is expoſed to accidental loſſes; nobody can be liable to make theſe up to him who meets with them; becauſe he, who has met with them, cannot point out any particular perſon, who hath cauſed him to meet with them. Every body therefore is equally guilty and equally innocent with every other. So the obligation cannot be ſaid to lie on any particular perſon: therefore it lies on nobody; for an obligation, which lies not on ſome particular perſon, lies in reality on nobody. The loſs muſt therefore be borne by thoſe to whom the goods, that are damaged, belong.

Hence if the ſhip has ſuffered through ſtreſs of weather, if it has loſt any of its maſts, ſails, cables, or anchors, if it has ſprung a leak; this loſs needs not be repaired by a general contribution, becauſe it was merely accidental. The owner of the ſhip cannot ſay, that it was ſuſtained *removendi communis periculi cauſa.* Beſides, the owners of the cargo reap no benefit from it. A ſmith, who had happened to break his hammer, might as well, the law ſays, inſiſt to have the loſs of it made up to him by the perſon who employed him, *l.* 2. § 1. *l.* 5. *p. l.* 6. 7. *ff. eod.* In the ſame manner, if any part of the cargo happens to be damaged either by the ſea-water or in any other accidental way, for inſtance, by the badneſs of the veſſels that contain it, he, to whoſe goods this loſs happens, is not entitled to get it made up by a general contribution, *l.* 2. § 3. 5. *l.* 4. § 2. *l. ult.* § 1. *ff. eod.*

In thoſe caſes, in which the loſs is ſuppoſed not to be merely accidental, but to proceed from deſign, there is no cauſe for making a general contribution, provided the loſs proceeds from another deſign than that of acting for the general ſafety. For it is loſs ariſing from this deſign alone, that falls under the Rhodian law, and is meant to be repaired by it. Loſs, proceeding from other views than that of the general ſafety, may be got repaired otherwiſe by thoſe particular perſons, from whoſe deſign it proceeded. For inſtance, if it proceeded either from the fraud or from the careleſsneſs of thoſe employed to navigate the ſhip, whether maſter or ſailors, reparation of it may be had either from the maſter; for he is anſwerable not only for himſelf, but for thoſe employed by him; or from thoſe, who have done the damage, for they muſt be anſwerable for themſelves. If it proceeded from paſſengers, or others who were not employed about the ſhip, the maſter was by the Rhodian law made liable *ex quaſi contractu*, on the edict *Nautæ, caupones, ſtabularii ut recepta reſtituant;* but it is doubtful whether he would by the Scotch be held to be bound to repair it.

Upon the whole it is ſuch loſs alone, as is ſuſtained for the common ſafety, in order to preſerve the ſhip and cargo from a danger, that threatens to be fatal to them both, which muſt be made up by a general contribution.

It is plain, that it is a queſtion of fact, whether the ſhip was or was not threatened by a danger of this kind. Therefore, like all facts, it muſt be proved. The perſons, moſt proper for proving it, are thoſe who were aboard at the time,

at which the ejection was made or thing done, on account of which the contribution is demanded, and were ſkilled in naval affairs. Theſe are the maſter of the ſhip, the ſailors belonging to her, and any other ſea-faring men that happened to be aboard. But others may have ſeen the ſhip from the ſhore, may have been near her on ſea, may depoſe to the ſtate of the weather and to her diſtreſsful condition. The Law therefore will not reject their evidence, but will allow every one to be examined who can give light to the controverſy: for all which the law minds, is the credibility of the witneſſes and of their teſtimonies; and it will believe any credible evidences, who depoſe, that the ſhip was in danger, and that the ejection was a prudent meaſure. But it may appear that it was an imprudent, a raſh, or a needleſs one, and that it was done wantonly: in this caſe thoſe, from whoſe wantonneſs it proceeded, muſt be alone liable to repair the loſs; eſpecially if the reſt, who were aboard, remonſtrated againſt it. For, if they did not remonſtrate againſt it, but allowed it to be made, they ſhould be preſumed to have acquieſced in the meaſure, and to have bound themſelves to contribute to make up the loſs.

§ 693. It is neceſſary 3) in order to make way for a general contribution, that the ejection anſwer the end for which it was intended, *i. e.* that the ſhip eſcape the danger threatned her, and come ſafe to land. For if it does not eſcape, but happens to periſh or to be caſt away, a contribution cannot be demanded; becauſe thoſe whoſe goods were thrown overboard, or who ſuſtained the loſs *removendi communis periculi cauſa*, and thoſe whoſe goods were left in the ſhip, are now *in pari cauſa:* and if the goods of the former had not been thrown overboard, but remained in the ſhip, they would have periſhed as well as the reſt. Therefore no contribution can be demanded, unleſs the ſhip comes ſafe to land.

Hence goods which were not thrown into the ſea, but being put into a boat, in order to lighten the ſhip and to have ſome chance of being brought ſafe to land, have happened to be ſo lucky as to get to ſhore, are not bound, tho the ſhip ſhould happen to periſh, to contribute for thoſe whoſe goods were loſt in her; becauſe they cannot be ſaid to have been put aboard the boat, in order to ſave a ſhip, which is loſt. Beſides, the ſhip did not run any riſk for them; but they for it. They were put aboard the boat, and were committed to the mercy of the waves, when there was perhaps little proſpect of their ſafe arrival on land; the ſhip had ſome chance of being able to ſtand it out, but there could be but faint expectations of the ſafety of the boat. So thoſe, who were expoſed to the leaſt riſk, ought not to demand a contribution from thoſe, who were expoſed to almoſt certain deſtruction. 'Tis otherwiſe, if both the ſhip and the boat happen to periſh, and ſome of the goods belonging to the ſhip happen either to be ſaved or to be recovered. In this caſe thoſe, whoſe goods are ſaved, muſt contribute for thoſe, whoſe goods were thrown over board, as much as they would have been obliged to contribute, if all, both ſhip and cargo, had been ſaved, and they had never had aboard more goods than they have recovered. For equity will not allow them to contribute for goods, which they have loſt *, *l.* 4. *p.* § 1. *ff. de leg. Rhod.*

§ 694. All thoſe who gain by the ejection, *qui propter amiſſas res aliorum conſecuti ſunt, ut merces ſuas ſalvas haberent*, are bound to contribute to make up the loſs ſuſtained by thoſe, whoſe goods were thrown overboard, *l.* 1. *l.* 2. *p.* § 2. *ff. de leg. Rhod.* So that we have nothing to do but to enquire who are thoſe that gain, in order to diſcover who are thoſe that contribute.

Hence it follows 1) that the owner of the ſhip itſelf muſt contribute: for he is, in an eſpecial manner, profited by the ejection, ſince it is to be preſumed *præſumptione juris et de jure* to have been owing to it, that the ſhip did not periſh, but got

* It muſt be remarked, that if part of the goods thrown overboard is recovered, they muſt be taken into the account; for they cannot be ſaid to be loſt. Therefore the loſs ſuſtained muſt be eſtimated by deducting the value of them from that of thoſe, which have not been recovered.

got ſafe to land, *l.* 2. § 2. *ff. de leg. Rhod.* 2) that the owners of the goods, which are contained in the ſhip, and have been brought ſafe into port, muſt contribute, *l.* 2. § 2. *ff. eod.* For it is evident, they are profited by the ejection; ſince, if it had not been made, the ſhip would have probably ſunk, and they periſhed along with it. I ſay *the owners of thoſe goods which have been brought ſafe into port:* for thoſe whoſe goods have not, notwithſtanding the ejection, come ſafe into the harbour, may be exempted from the contribution either altogether or in part; or it may happen, that a contribution muſt be made for them. They are exempted from it altogether, in caſe they loſe all their part of the cargo; for inſtance, if it is accidentally deſtroyed or rendered worth nothing: they are exempted from a part of it, if their goods are damaged; for they muſt contribute according to the value of thoſe goods which they bring into port *: and a contribution is made for themſelves, in caſe the damage ſuſtained by them was occaſioned by the meaſures taken for the common ſafety; for that loſs muſt be made up to them. 3) Thoſe, whoſe goods were thrown overboard, and were loſt *removendi communis periculi cauſa*, in order to prevent the common danger which threatned them, muſt themſelves alſo contribute. Not that they are bound to pay any thing out of their pockets, but that they are not entitled to be fully reimburſed for the loſs which they have ſuſtained, or to receive from thoſe, whoſe goods are ſaved, the full value of the goods they have loſt. That would be iniquitous; for it would be to make thoſe, whoſe goods were thrown overboard, ſuffer *no* loſs, and thoſe, whoſe goods were ſaved, ſuffer *all* of it. Therefore thoſe, whoſe goods were thrown overboard, are entitled to demand as much leſs than that value, as would have been equal to the difference between it, and the ſhare which it would have been obliged to pay of a contribution amounting to the full value of the goods thrown overboard. For the value of the goods thrown overboard muſt be taken into the computation; and by deducting from it that part of a contribution equal to itſelf, which it would have fallen to its ſhare to pay, the remainder is the amount of the contribution which muſt actually be made, and of the ſum which thoſe, who have ſuſtained the loſs, are entitled to receive. Call the value of the whole ſhip and cargo *a;* the amount of the loſs ſuſtained for the common ſafety *b;* the proportion, which it would have fallen to the ſhare of thoſe who have ſuſtained the loſs *b*, to have paid of a contribution equal to *b*, *x;* then *b*—*x* is the true ſum which thoſe, who have ſuſtained the loſs, are entitled to draw.

§ 695. From hence it is evident, who are not bound to contribute; to wit, thoſe alone, who gain nothing by the ejection, *i. e.* thoſe whoſe goods happen to periſh before they come to port: for they cannot be ſaid to have gained by the ejection; their goods might have periſhed, ſuppoſe no ejection had been made. But it is plain from what has been ſaid, that thoſe, whoſe goods have been thrown overboard, cannot be counted among thoſe who do not gain by it: for they gain this by it, that they are entitled to get a general contribution made for them, in order to repair the damage ſuſtained by them *removendi communis periculi cauſa*, *l.* 2. § 2. *ff. de leg. Rhod.*

§ 696. The amount therefore of the ſum to be contributed is not the total value of the loſs ſuſtained, but a ſum leſs than that by a quantity equal to the ſhare, which it would have fallen to thoſe, who have ſuſtained the loſs, to pay of a contribution equal to the total amount of the loſs ſuſtained.

Any one, who has the ſmalleſt knowledge of the principles of common equity and common arithmetic, will eaſily ſee, how this amount may be inveſtigated, and how it muſt be proportioned among all thoſe who are bound to contribute, according to the rules which have been explained.

For

* When I ſpeak of bringing them into port, I mean not *any* port, into which they may happen to be put either by accident or by ſtreſs of weather, but that at which they are deſigned to be landed; becauſe then, and not till then, can they be ſaid to be *in loco tuto*, or to have been ſaved.

For, in the firſt place, the amount of the loſs ſuſtained, or the value of the goods thrown overboard, muſt be aſcertained. That is done by eſtimating them not at the price at which they were bought, *l.* 2. § 4. *ff. eod.* but at that which they would have given in the market in which they were intended to be ſold. The reaſon for which they are eſtimated at that rate is, becauſe that price is the true amount of the loſs ſuſtained by the owners of them: for they are deprived of the advantage of ſelling them; the want of the profit, which they would have made in this way, is loſs ſuſtained by them; the others, whoſe goods were ſaved, have the benefit of ſelling their part of the cargo. Therefore in order to preſerve equality between them, the goods thrown overboard muſt be valued at the price at which they could be ſold. For it is intended by the law, that thoſe, whoſe goods have been thrown overboard, make not either profit or loſs by the contribution made for them, but that they be put on an equality with thoſe whoſe goods are ſaved, *l.* 2. § 4. *ff. de leg. Rhod.*

Then the amount of the ſhip, and of all the goods ſaved in her, muſt be aſcertained. Theſe muſt alſo be valued at the price, at which they can be ſold; becauſe they are of ſo much value to their owners. Into this computation are brought not only the ſhip, but all the goods ſaved in her; no matter of what ſort they be, provided they admit of a pecuniary value. Hence the very remainder of the proviſions muſt be valued, if any overplus remains after the completion of the voyage; for theſe as well as the other things ſaved in her are capable of being ſold for a price, and muſt therefore be held to be gain made by the ejection. For the ſame reaſon the clothes of thoſe in the ſhip, not thoſe alone which are not, but thoſe which are worn by them, muſt be valued; for theſe alſo admit of a pecuniary value. But the men in the ſhip are not taken into the account; for they admit not of a pecuniary value. Beſides, the loſs ſuſtained is not of lives, but of goods; thoſe, who remain alive, are all *in pari caſu* in this reſpect; juſtice and the Rhodian law allow not of throwing men overboard, in order to prevent the greateſt loſs; and thoſe who die are always held to loſe their lives in the ordinary courſe of nature. Indeed, if it was conſiſtent with the principles of the law of Scotland to ſuppoſe that there were any ſlaves ſaved in it, they would fall alſo to be valued: and the owners of them would be obliged to contribute for them; for they are capable of being valued by money. In this manner, the total amount of the value of the ſhip, and of all the goods ſaved in her, muſt be inveſtigated.

This ſum muſt next be added to the amount of the loſs ſuſtained, or of the value of the goods thrown overboard, that amount which was firſt aſcertained: the ſum of theſe is equal to what I ſhall call the original value of the ſhip and of all the cargo.

Laſtly, the ſhare of the contribution, which would fall on the owners of the goods thrown overboard, ſuppoſing all the loſs ſuſtained by them was to be fully made up to them, or, ſuppoſing what comes to the ſame thing, the ſum to be contributed to be equal to the ſum of the loſs, muſt be inveſtigated. This is done by a ſimple operation founded on the rule of three. For it is only ſtating the queſtion thus, If the original value of the ſhip and of *all* the cargo (which I ſhall ſuppoſe to be 100, or ſhall call x) gives the ſum to be contributed, *i. e.* the whole loſs ſuſtained (which ſuppoſe to be 10, or call y); then what will the value of the goods thrown overboard (which *ex hypotheſi* is 10, and is equal to y) give? the anſwer of the queſtion is plain. It gives the quotient that is inveſtigated, when the product found by multiplying the amount of the loſs into the amount of the contribution, or by ſquaring the amount of the loſs ſuſtained, is divided by the original value of the ſhip and of all the cargo; that is, on the foregoing *data*, preciſely 1: for 10 multiplied by 10 gives 100 for the product, and this product divided by 100 gives unit for the quotient. So that the ſhare of the the contribution, that would fall to be paid by the owners of the goods thrown overboard, may be repreſented generally in Algebraic characters thus to be $\frac{yy}{x}$.

In

In order to diſcover the true ſum, that muſt be paid to thoſe who ſuſtained the loſs, this proportion, which would fall to be paid by the loſers themſelves, and is expreſſed by $\frac{yy}{x}$, muſt be ſubſtracted from y, the total amount of the loſs. For thoſe, whoſe goods were thrown overboard, it is not reaſonable, ſhould bear no part of it; they ought to loſe ſomething as well as all the reſt. But they bear their proportionable ſhare of the loſs, when they draw a ſum leſs than the total amount of it, by a quantity equal to the ſhare, which it would have fallen to themſelves to have paid, of a contribution equal to the total amount of the loſs ſuſtained (§ 694.), that is, if they receive 10—1, or 9; or generally, if they receive $y-\frac{yy}{x}$. This ſum therefore, expreſſed by $y-\frac{yy}{x}$, is the contribution which muſt be made and muſt be paid to them.

It muſt be proportioned among all thoſe whoſe goods were ſaved by the ejection, according to the value of the goods each of them has got ſafe into port. So the ſhare, which each of them is bound to pay, may be inveſtigated by a very ſimple operation. The queſtion may be ſtated generally thus, If the amount of the value of the ſhip and of all the goods *ſaved in her* (call it a) gives the contribution to be made (which is expreſſed by $y-\frac{yy}{x}$), what will the value of that part of the cargo *ſaved*, which belongs to any one of the owners of it (call it b), give? The anſwer is plain; It will give,

$$\frac{b \times \overline{y-\frac{yy}{x}}}{a} = \frac{b \times \frac{yx-yy}{x}}{a} = \frac{\frac{byx-byy}{x}}{a} = \frac{byx-byy}{ax}$$

In this way the proportion which falls to be paid by every individual owner of any part of the cargo ſaved, may be eaſily inveſtigated, and may be expreſſed in general terms.

§ 697. Each of theſe being bound to pay his proportionable ſhare; therefore thoſe, who have ſuſtained the loſs *removendi communis periculi cauſa*, muſt have a perſonal action againſt each of thoſe whoſe goods have been ſaved, in order to get him decreed and forced to pay his ſhare of the contribution. For they are not liable *ſinguli in ſolidum;* each of them is liable to his own ſhare alone; becauſe they ought all to be on an equal footing, which they would not be, in caſe each of thoſe whoſe goods are ſaved was liable *in ſolidum* to him whoſe goods were thrown overboard; he would thereby be in a better ſituation than they; for he would be inſured of ſuſtaining no more than his own ſhare of the loſs. Beſides, the principles, on which each of them would be made liable to him, muſt make him in his turn liable *in ſolidum* to the one, from whom he has recovered his full loſs, for his reimburſement, *l.* 2. § 6. *ff. eod.* And I call it a perſonal action; becauſe the loſers have not either a hypothec on the goods ſaved, or a right of retaining them till the contribution is paid, or a right to oblige the maſter of the ſhip to retain them, or to make him liable if he has not retained them, till it is paid. The law of Scotland knows no ſuch hypothec, no ſuch right of retention, no ſuch right of making the maſter liable for neglecting to retain. The intereſt of commerce makes it neceſſary the goods be, as ſoon as poſſibly they can be, landed; and the property remains with the owners of them. So that the loſers can have no more than a perſonal action againſt each of the owners and his heirs, for their proportionable ſhares of the contribution.

BOOK IX

PART I

PRINCIPLES of the LAW of SCOTLAND

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PRINCIPLES of the LAW of *SCOTLAND*.

PART I.

BOOK IX.

TITLE I.

Of Delinquencies.

§ 698. THIS book treats of that reparation, which one is bound to make to another, becauſe he has done *ill* to him (§ 623.). 'Tis therefore neceſſary to begin it by explaining the nature of delinquencies, the obligations under which they bring the delinquents, and the rights which thoſe acquire who are hurt by them.

A delinquency is 'a voluntary and unlawful action, by which one either offends 'againſt the public, or hurts ſome private perſon, or does ill to both, and is there-'fore bound not only to repair the damage done by him, but alſo to undergo 'a puniſhment adequate to his offence.' From hence it is plain, I. That in order to conſtitute one a delinquent, it is neceſſary that he do an *action*. II. That this action be done *voluntarily*. III. That it be an *unlawful* one. IV. That by it ſome ill be done either to the public, or to ſome private perſon, or to both. V. That every delinquency implies an obligation on the delinquent 1) to repair the damage done by him, 2) to undergo upniſhment.

§ 699. By an *action* I mean ſomething, that is different from thought, and produces an external viſible effect. The thoughts of the heart being known to the Searcher of hearts alone, men cannot be called to account for them *in foro humano;* becauſe no human tribunal can have evidence of them. *Cogitationis pœnam nemo patitur, l.* 18. *ff. de pœnis* (§ 76.). In order therefore to conſtitute one a delinquent, he muſt have done ſomething which produces an external effect, and falls under the obſervation of mankind.

But

But every action, which one may happen to do, does not conſtitute him who does it a delinquent. In order to do this, it muſt be a *voluntary* action: for men are not either anſwerable or culpable for their involuntary ones; becauſe involuntary actions are held to proceed not from moral agents, but from neceſſary cauſes (§ 14. 76.).

Nay, it is not enough that the action be voluntary; it muſt be alſo an *unlawful* one, that is, one which the law forbids to be done: for actions, which are not forbidden by any law, either natural or civil, it is lawful to do. By conſequence, one who does them cannot be ſaid to be a delinquent; becauſe he is not in any ſort culpable, ſince he is entitled to do them.

§ 700. The law forbids actions to be done, becauſe they are hurtful either to the public, or to private perſons, or to both; therefore in order to conſtitute a delinquency, it is neceſſary, that ſome hurt be done either to the public, or to ſome private perſon, or to both. For ſome actions tend to the hurt of the public more immediately than to that of private perſons: for inſtance, treaſon againſt the ſtate, rebellion againſt the government, or conſpiracies for overturning the liberty of one's country; theſe are crimes which are directed immediately not againſt any individuals, but againſt the public, and by which hurt is not ſo immediately done to the former as to the latter. No doubt, every crime tends either immediately or mediately to the hurt of both; becauſe the intereſt of private perſons is intimately connected with that of the public, and the intereſt of the public with that of private perſons. But there are crimes or actions, which are directed immediately againſt the public, and by which individuals are hurt only conſequentially; there are others which are directed immediately againſt private perſons, and by which the public is hurt only conſequentially. I may inſtance in theft: it is a crime, by which the eſtate of a private perſon is diminiſhed, and his property is taken from him: ſo it tends immediately to the hurt of that private perſon, from whom the goods are ſtolen. But ſociety could hardly ſubſiſt, unleſs his property was ſecured to every man; it may therefore be ſaid to tend alſo to the hurt of the public. Indeed in this ſenſe all crimes tend, either mediately or immediately, to the hurt of the public; for it is the intereſt of the public or of ſociety that crimes be not committed.

§ 701. But the law does not forbid to be done any action, which one has a right to do: for an action which one has a right to do, can never be ſaid to be an unlawful one. Every one, who has a right, muſt ſurely be entitled to exerciſe it; he exerciſes it by doing that, which he has a right to do. If he has a right to do it, it muſt be lawful for him to do it. But it can be no delinquency in one to do that, which it is lawful for him to do (§ 148.). Therefore, ſuppoſe one to have hurt either the public or a private perſon, he will not, if he had a right to hurt them, be held to be a delinquent; becauſe one, who does a thing he has a right to do, is in no ſort culpable. I may inſtance in ſelf-defence: one who defends himſelf againſt unjuſt force, is not culpable, provided he does not go beyond thoſe limits, within which the circumſtances of the caſe ſhew he ought to keep; becauſe every one, who is unjuſtly attacked by another, has a right to defend himſelf againſt a danger, which immediately threatens him. *Vim enim vi defendere omnes leges, omniaque jura permittunt, l.* 45. § 4. *l.* 4. *ff. ad leg. aquil. l.* 3. *ff. de juſt. et jure.* Indeed if he exceeds that, which the law calls *moderamen inculpatæ tutelæ*, he is guilty of a delinquency, he does wrong; becauſe he has no right to exceed it, *l.* 5. *p. ff. ad leg. aquil.*

§ 702. From hence it is eaſy to ſee who are and who are not capable of committing delinquencies; for every delinquency requires a capacity of diſtinguiſhing right from wrong. Therefore thoſe alone, who are capable of making this diſtinction, are capable of committing delinquencies. By conſequence, delinquents muſt have a ſtrength of underſtanding, ſufficient for enabling them to ſee that that, which they have done, is wrong; that they had no right to do it; and that they ought not to have done it. Hence ideots, madmen, and perſons deprived

prived of the uſe of reaſon cannot be guilty of delinquencies, *ſ. ſt. R.* I. *c.* 24. § 1. 2. 3. 4. they may do actions by which others are hurt; but they cannot be culpable for doing them, becauſe they have not ſenſe to know, that they are doing wrong. For the ſame reaſon children, who have not maturity of judgment, muſt alſo be held to be incapable of committing crimes. It is impoſſible to determine the preciſe age, at which young people muſt, in all caſes, be preſumed *præſumptione juris et de jure* to be either capable or incapable of committing them. Much muſt depend on the character of the perſon and on the nature of the crime. Some children come to maturity of underſtanding ſooner than others; and ſome crimes are ſo atrocious, and ſo ſhocking to humanity, that it is impoſſible to believe one, who has any underſtanding at all, not to know that he ought not to have committed them: in theſe caſes therefore a great age is not neceſſary for conſtituting one a delinquent. Other offences are ſo ſmall, that one of tender years may well be preſumed to have not known them to be offences. Hence the law of Scotland hath not defined any preciſe age, before which one is preſumed *præſumptione juris et de jure* to be incapable of committing delinquencies; but hath left it to be determined by the judge according to the circumſtances of every caſe, whether he, who is accuſed, ought or ought not to be held to be capable of committing the crime laid to his charge *. And in this it ſeems to have done well: for it would be dangerous to ſociety, to preſume innocence in all caſes, in which an action is done by one under a certain age. 'Tis true youth may, in many caſes, be a good reaſon for *mitigating* the puniſhment of a delinquent, or for condemning him to one leſs ſevere than that *ordinary* one, by which the law ordains his delinquency to be puniſhed †.

§ 703. Delinquencies are divided into *delicta vera et quaſi delicta*. *Delicta vera*, proper delinquencies, are 'ſuch as are committed on deſign, with a malignant intention and a determined purpoſe,' or, as the Civilians expreſs it, *ex dolo malo*. By *dolus* again they underſtand '*propoſitum delinquendi*.' *Quaſi delicta*, as it were delinquencies, are 'thoſe, for which, tho they are committed without a malignant intention and a determined purpoſe, he, who commits them, is however 'in ſome degree culpable.' The Civilians ſay 'they are '*facta illicita, ſola* 'culpa, *ſine dolo admiſſa*.'

Delicta vera, or proper delinquencies, are divided into *delicta et crimina*. Delinquencies ſtrictly ſo called are 'thoſe ſmall offences, which are conſidered as 'tending to the hurt of private perſons alone, and are therefore puniſhed by gentle 'puniſhments.' Crimes are 'thoſe atrocious offences, which are ſubverſive of 'the peace of ſociety, and are therefore ſeverely puniſhed.' It is impoſſible to diſtinguiſh them otherwiſe: for crimes and delinquencies are words uſed promiſcuouſly in the law of Scotland; they differ only as *majus* and *minus*; the word crime is applied to that which is more, and the word *delinquency* to that which is leſs atrocious. So a delinquency may be called a ſmall *crime*, and a crime may be called an atrocious delinquency.

§ 704. Every delinquent, whether he hurts by his delinquency the public or a private perſon, offends againſt the laws of his country; for he does an action which it is unlawful to do. He muſt therefore be bound both to repair the damage done by him, and to ſuffer a puniſhment adequate to his offence. He is bound to repair the damage done by him, becauſe he had no right to do it; and it is more reaſonable that he ſhould bear it than the other to whoſe property it is done. But he bears it by making reparation, *or* by paying out of his own pocket as much as is equivalent to the loſs ſuſtained by him to whom the damage is done. He is obliged to undergo the puniſhment, which the law appoints for his delinquency: for having offended againſt the laws of his country, he muſt be bound to make ſatisfaction to thoſe laws againſt which he has offended. Beſides,

* See MACKENZIE's crim. *p.* 1. tit. 1 § 5 and MATTHÆUS *de crim. prolegom. c.* 2. § 2. 3. 4.

† By the antient law of Scotland it behoved the puniſhment as well as the proſecution of a minor, who had been guilty of felony, to be delayed till he came of age. S minors ſeem to have enjoyed even in criminal matters a privilege, ſomething like that explained above, SK. *not. ad R. M. l.* 2. *c.* 41.—*R. M. l.* 2. *c.* 42 § 11.

ſides, the peace of ſociety and the intereſt of every member of it require that crimes be puniſhed, *neque impunita maleficia eſſe oportet*, l. 51. §. 2. *ff. ad leg. aquil.*

The damage done by *every* delinquency cannot be ſaid to be patrimonial; for one may be hurt by delinquencies in two ways: either his eſtate may be diminiſhed, and his property taken from him; or a wrong may be done him without any immediate diminution of his eſtate. In the firſt caſe it is plain, that the delinquent diminiſhes the value of the eſtate of him againſt whom he offends; therefore the loſs ſuſtained admits of a preciſe pecuniary eſtimation; by conſequence, it is reparable. In the ſecond the eſtate of him to whom the wrong is done, cannot be ſaid to be *immediately* diminiſhed, or rendered leſs valuable than it was; for no part of it is affected by the delinquent: damage however may be ſaid to be done it conſequentially; for one, who meets with an injury, may, if he bears it tamely, ſuffer in his character, may become aſhamed to appear before the world, may loſe ſpirits to manage his buſineſs, and may thereby ſuſtain great loſs. This damage therefore he muſt be entitled to get repaired. The reparation, to which he is entitled, it is plain, cannot be a preciſe thing, for he has not *ex hypotheſi* loſt money or goods of a determinate value; it muſt be left to be determined by the judge according to the condition of parties, and to the circumſtances of the caſe; and reparation may be made not by money alone, but in other ways *.

§705. From hence it is plain, that every delinquent is by his delinquency ſubjected to two actions. He has done damage to a private perſon; therefore one of them is an action which lies to the private party, who has been hurt, for recovering *reparation* of the damage ſuſtained by him. He hath alſo tranſgreſſed the law, and violated the tranquillity of his country; he muſt therefore be liable to be proſecuted *ad vindictam publicam*, in order to be made ſuffer the *puniſhment* of his crime.

As ſoon as the damage ſuſtained by the private party is made up to him, all the effects, which the delinquency *has had* upon his affairs, are at an end; and he is not more intereſted in the *future* conduct of the delinquent or in *preventing* him from tranſgreſſing for *the time to come*, than any other member of the commonwealth. The *reparation* therefore of his damage is all, which the private party is entitled to demand; and he is not ſuppoſed to be immediately intereſted in getting the delinquent *puniſhed*. For the tranſgreſſion of the law affects not him more than any other; 'tis the public which is offended by it; and every individual is held to be equally injured with every other. 'Tis therefore the public which is properly entitled to proſecute the criminal *ad vindictam publicam*. But expence, trouble, and obloquy often attend criminal proſecutions; and every member of ſociety is not qualified to judge of the propriety of commencing them, or capable of conducting them with prudence. Beſides, few people hear of the commiſſion of crimes; and thoſe few, who do, might eaſily either by acquaintance or by a falſe compaſſion be hindered from bringing the delinquents to puniſhment. It would be abſurd therefore to entruſt the power of proſecuting them to every one who chuſed to do it, as criminals might, in that caſe, either by the negligence, the ignorance, the avarice, or the humanity of their accuſers be allowed to eſcape; and the law has been obliged to depart from the cuſtom which ſeems to have prevailed in antient times, before experience had taught the nation the proper manner of adminiſtring juſtice, and to erect a proper officer, whoſe buſineſs it is to attend to this matter. The King is by

* To this purpoſe the words of GROTIUS, *lib.* II. *c.* 17. § 22. 'Damnum, ut diximus, etiam adverſus honorem et famam datur, puta verberibus, contumeliis, maledictis, calumniis, irriſu, aliiſque ſimilibus modis. In quibus non minus quam in furto atque aliis criminibus vitioſitas actus ab effectu diſcernenda eſt. Nam illi pœna reſpondet; huic damni reparatio; quæ fit *culpæ confeſſione, exhibitione honoris, teſtimonio innocentiæ*, et rer ea quæ his ſimilia ſunt; quanquam et *pecunia tale damnum rependi* potuit ſi læſus velit, quia pecunia communis eſt rerum utilium menſura.'

by the conſtitution of Britain veſted with the executive power of the ſtate; he is the guardian of his people, and the proper avenger of wrongs done them; and it is his province to provide officers for carrying the laws into execution. The conſequence is, that he has alone the power both of proſecuting criminals in order to get them *puniſhed ad vindictam publicam*, and of ſhewing mercy to them. Therefore the proper perſon, at whoſe inſtance a criminal can alone be proſecuted, is he whom the law authoriſes to proſecute them in name of the King: that is, either his Majeſty's Advocate-general, or the procurator-fiſcal of every court which has a power *de criminibus inquirendi*, 1587, *c.* 77.

The two actions therefore, to which every delinquent ſubjects himſelf, lie to different perſons; and may be ſued, each of them, by that party to which they lie reſpectively, without the conſent of the other. Thus the private party may bring his action of damages without the concurrence and againſt the will of the fiſcal; and the fiſcal may bring his proſecution *ad vindictam publicam*, in order to get the delinquent puniſhed and to obtain ſatisfaction to the public, without the concurrence and againſt the will of the private party, 1587, *c.* 77. But the individual, who is immediately injured by the delinquent, muſt be ſuppoſed to have in moſt caſes a ſtrong deſire to ſee him puniſhed, and be beſt acquainted with the circumſtances of the caſe; therefore the law allows him, or if he is ſlain thoſe nearly connected with him, to proſecute the criminal: for others, who have either none or a remote connexion with him, are not thought to have any title to bring the proſecution. But it entruſts the fiſcal with the ſole and abſolute power of determining, whether it is for the intereſt of the public that a criminal be proſecuted or brought to puniſhment; therefore it allows not the private party to proſecute *ad vindictam publicam* without the concurrence of the fiſcal. For it does not hold him to have a proper title to inſiſt in the proſecution; and all thoſe ſtatutes, which enact that it ſhall be lawful to certain individuals to proſecute criminals, mean no more than by ſtatutory and preciſe words to prevent diſputes concerning their *titles* to ſue: they imply, beſides, a limitation to thoſe individuals alone, and a prohibition to all others to do it. The fiſcal therefore may refuſe his concurrence, and cannot be compelled to give it; and without it the trial cannot proceed.

Theſe two actions aim at different concluſions; therefore they can have no effect upon each other, and the commencement of one of them hinders not the other from being brought. Thus one, who having been proſecuted *ad vindictam publicam* has been either acquitted by his judges or pardoned by his Sovereign, is, notwithſtanding, liable to be ſued by the private party for his reparation. For circumſtances might extenuate the guilt of the criminal, and hinder him from being thought to deſerve the puniſhment of the law, at the ſame time that there may not be wanting abundance of *media* on which to find him liable to make reparation. In the ſame manner one, who has been diſcharged of his obligation to make reparation, or has been found not obliged to make it, may be proſecuted *ad vindictam publicam:* for the evidence brought by the private party may have been inſufficient; the cauſe may have been improperly managed; the judges are not the ſame in both caſes; the criminal ones may be convinced by the proof already brought; or additional circumſtances may be diſcovered and may be laid before them.

§ 706. It frequently happens that more perſons than one concur in committing delinquencies: therefore each of them muſt be liable *in ſolidum* for the conſequences of their crimes, that is, both to repair the damage and to ſuffer puniſhment. For the damage is done, and the offence given by each of them. Conſequently, each of them muſt be liable to make reparation of it. He therefore, who has ſuſtained the damage, is entitled to ſue any one of them he pleaſes for reparation. But all, which he is entitled to demand, is reparation (§ 704.); therefore as ſoon as it is made him by any one of them, all the reſt are free; for the damage, which was done, amounted to a determinate quantity; and he,

who

who ſuſtained it, can demand no more than that quantity, becauſe he is entitled to get no more than reparation. But he gets full reparation, if he gets the quatity to which his damage extends. Conſequently, if he gets it from any one of the delinquents, no matter from which of them, he is not entitled to aſk any thing from the reſt. They therefore are freed from the obligation, under which they brought themſelves to repair the damage, and upon being ſued are entitled to plead that reparation has already been made by another. 'Tis otherwiſe with the obligation, under which they lie to ſuffer puniſhment; for every one of more delinquents offends againſt the laws of his country: conſequently every one of them muſt be liable to give ſatisfaction to the laws, for the offence committed by himſelf; for every one of them is guilty of a ſeparate tranſgreſſion. Hence the reſt are ſtill liable to puniſhed, tho any one of them hath already undergone the puniſhment preſcribed by law: for he ſuffered not for the guilt of the reſt, but for his own guilt alone.

§ 707. One therefore, who has been injured by a delinquency, has a right to ſue for reparation of the damage, which he has ſuſtained. For this purpoſe he is entitled to bring an action of damages, in order to get the amount of them determined, the way aſcertained in which they ſhall be repaired, and the offender decreed to repair them. This action he is entitled to ſue againſt any or every one of the delinquents *in ſolidum;* and it lies not only againſt the delinquents themſelves, but againſt their heirs, *l.* 7. § 2. *l.* 9. *ff. de cond. furt.*—*D.* II. 385. 13th *June* 1716, *Sutherland.*—*Fa.* II. 183. For an action, brought in order to get reparation of damage ſuſtained, is *mere rei perſecutoria.* 'Tis true, one is not entitled to recover from the heir of the delinquent more than ſimple reparation of the real loſs which he has ſuſtained; he cannot recover *penalties* from him, unleſs action was commenced againſt the original delinquent, and litiſconteſtation was made with him. If litiſconteſtation was made by him, he is held to have pleaded all the defences which he had both againſt the making of reparation and againſt being ſubjected to the penal conſequences of the action; theſe he hath ſuggeſted to his heir; and, as he was obliged himſelf to ſtand to the iſſue of the plea, and to the judgment which ſhould be given in it, this obligation, like every pecuniary one under which he lay, muſt deſcend to his heir, *Da.* 172. But, if the plea was not conteſted by the original delinquent, his heir is liable to ſimple reſtitution alone, becauſe he may be totally ignorant of many defences which his predeceſſor could have pleaded to bar himſelf from being found liable either to penalties, or to more than ſimple reſtitution: and he is liable to it, *ne alieno ſcelere ditetur;* he poſſeſſeth *ſine cauſa* the property of another, and is therefore bound to reſtore it (§ 639.), *l. unic. C. ex delict. def. in quant. her. conven.*—*l.* 38. 206. *ff. d. r. j.*—*F.* 5th *July* 1711, *Lewars.*—7th *Feb.* 1712, *Stuart.* 'Tis otherwiſe with the obligation to puniſhment. For nobody either can or ought to be puniſhed for the guilt of another; puniſhment is perſonal to the delinquent alone. Conſequently, the heir of a delinquent is not liable to it, *R. M. l.* 2. *c.* 55. § 15. Sk. *N. ad* § 15.; no matter whether litiſconteſtation was or was not made with the original offender.

TITLE II.

Of Injuries.

§ 708. THE delinquencies by which one is wronged may affect either his character, his perſon, or his eſtate; and may entitle him to ſue for reparation of the wrong or damage done to either of theſe. For one, whoſe character or whoſe perſon has been attacked, may be ſaid to be hurt or to ſuffer damage,

mage, as much as one whoſe eſtate has been diminiſhed. 'Tis true, wrong done to either of the former does not immediately take any thing out of the pocket of him to whom it is done: but it makes one, who feels and has human paſſions, have a high ſenſe of the injury done him; diſturbs the tranquillity of his mind, and may be attended with patrimonial damage (§ 704.). It muſt therefore in ſome ſort be eſtimable by money.

Thoſe delinquencies, by which one's eſtate is not diminiſhed, but his perſon or his character is hurt, are known, all of them, by one general name of *Injuries;* and one's perſon preſenting itſelf to view before his eſtate, theſe ſhall therefore be treated before thoſe by which damage is directly done to it.

The word *injury*, in its moſt extenſive ſenſe, ſignifies *every unlawful action;* every thing which is wrong, or is done wrongfully; *omne id, quod non jure fit, l.* 1. *p. ff. de inj.* Thus CICERO * defines avarice to be *Injurioſa appetitio alienorum.* But in this title it is uſed in a more limited ſenſe, and is defined both by the Civilians, *l.* 1. *p. ff. de inj.* and by the Scotch lawyers †, to be the ſame thing with an *affront* or *contumely;* a word which is not expreſſive of the full meaning of it. No doubt, every injury is an affront, but every affront cannot be ſaid to be an injury; the word *affront* is a ſofter one, and does not amount preciſely to the idea of an injury. For theſe reaſons it will be neceſſary to proceed in an analytical way, to inveſtigate a more proper definition of it.

HEINECCIUS calls it 'quodvis dictum factumve ad alterius contumeliam 'dolo malo directum,' *tit. J. et ff. de injuriis.* But this is no more than a circumlocution for an affront. CICERO, *l.* 4. *ad* HERENNIUM, gives a much fuller and properer definition of it. 'Injuriæ, ſays he, ſunt quæ aut pulſatione corpus, 'aut convicio aureis, aut aliqua turpitudine vitam cujuſpiam violant.' VOET, § 1. *Com. ad ff. de injuriis*, defines an injury to be 'delictum in contemptum 'hominis liberi admiſſum, quo ejus corpus, vel dignitas, vel fama læditur dolo 'malo:' and VINNIUS, *Com. ad p. J. h. t.* calls it 'omne dictum factumve, 'ad contemptum, infamiam, aut dolorem alterius directum.'

By comparing theſe definitions together, and attending to the ideas which the word *Injury* ſuggeſts, it will be eaſy to ſee, firſt, that every injury implies, that ſomething is done which it is wrong in him who does it to do; which he has no right to do: for that which one has a right to do, is not either a wrong or an injury, ſince it is lawful to him to do it; every one, who has a right, being entitled to exerciſe it by doing that which he has a right to do. Beſides, an injury is a delinquency; but it is eſſential to the idea of every delinquency, that he, who does it, had not a right to do it, (§ 701.). *Nullus videtur dolo facere, qui ſuo jure utitur, l.* 55. *ff. de reg. jur.*

Secondly; It is evident that, in order to make any thing capable of being held to be an injury, it muſt be done out of a malicious intention, *dolo malo, et animo injuriandi, on purpoſe to hurt* him to whom it is done; the *animus injuriandi* being eſſential to the idea of an injury. Any thing, which one does without an *animus injuriandi*, cannot be accounted an injury; *cum injuria ex affectu facientis conſiſtat. l.* 3. § 1. *ff. de inj.*

Thirdly; The wrong, which is done, muſt be done to ſome perſon or individual: for individuals are alone capable of receiving injuries.

Fourthly; In order to make one be ſaid to have received an injury, either his perſon muſt be violated, or his reputation muſt be hurt, or an atrocious affront muſt be done him. He muſt either be beaten, wounded, maimed or receive ſome other ſort of *bodily* ill; or ſome thing hurtful to his character muſt be either ſaid or done; or he muſt meet with ſome ſignally contumelious uſage.

But *fifthly;* One is not, ſtrictly ſpeaking, ſaid to receive an injury, either when he is put to death, or when he is deprived of part of his eſtate. 'Tis

* *Lib.* 4. *ad* HERENNIUM.

† See Sir GEORGE MACKENZIE's treatiſe of the criminal law, *title, Injuries.*

true, it is in one ſenſe an injury indeed to be ſlain; but one who is put to death is ſaid to be murthered, and he who commits the crime is ſaid to be guilty of *murder*. One who loſes part of his eſtate is ſaid to *ſuſtain damage*; and he, who commits the crime, is ſaid to commit either theft or robbery, or ſome other, which either has a name proper to itſelf, or is included under the general denomination of *damnum injuria datum*.

From whence it is plain, that an injury may be defined to be 'a wrong which 'is done one out of a malicious intention, and either violates his perſon, hurts 'or is at leaſt intended to hurt his reputation, or atrociouſly affronts him other-'wiſe, but does not either cauſe his death, or directly diminiſh his eſtate' *. This definition may be analyſed into the following axioms. I. Every injury is a wrong. II. It muſt be done to ſomebody. III. It muſt be done out of a malicious intention. IV. Either the perſon of him to whom it is done muſt be violated, or his reputation muſt be hurt, or at leaſt intended to be hurt by it, or ſome other conſiderable affront muſt be put on him. V. It does not either cauſe his death, or directly diminiſh his eſtate. From whence it will be eaſy to ſhew, 1) how injuries are divided; 2) who can do them; 3) to whom they can be done; 4) how they may be done; 5) what are the conſequences of them, after they are done, *i. e.* how they are revenged, and what legal means has one, who has been injured, to get reparation made him for the injury done him.

§ 709. Either the perſon of him to whom an injury is done is violated, or his reputation is hurt, or he is affronted by it (§ 708. *ax.* 4.). Therefore one diviſion of injuries may be derived from the nature of the wrong that is done; and, in this reſpect, they may be divided into ſuch as are done to the perſon, *R. M. l.* 4. *c.* 5. § 9.—*c.* 8. § 1. 2. 8. *c.* 39. 40. ſuch as hurt the reputation, and ſuch as import an affront, *l.* 1. § 2. *ff. de injur.* One's *perſon* may be hurt by being either beaten, wounded, maimed, or anywiſe violated. Thus one, whoſe chaſtity either is or is attempted to be violated, is ſaid to be injured, as well as one who has been maimed, *R. M. l.* 4. *c.* 5. § 9.—*c.* 8. § 1. 2. 8. One's *reputation* may be hurt by any thing which reflects upon it, or detracts from it; for inſtance, by calumnious defamatory expreſſions, writings, or actions, by which either the morality of his character, his ability for exerciſing his employment, or his pecuniary credit is impeached: for an attack made upon any of theſe is a ſignal wrong, and may be attended with the worſt conſequences. One may be *affronted* by every thing, which redounds to his diſhonour, or marks contempt of him, tho neither his perſon nor his reputation can be ſaid to be hurt by it; for inſtance, by abuſive language, by threats of beating him, by violent attacks made on his houſe, and in every other way by which a contumelious contempt may be ſhewn of him.

Injuries of the firſt ſort, thoſe by which one's perſon or body is hurt, may be called *corporal*; thoſe, by which the reputation is wounded, may be called *defamatory*; and thoſe, by which one is affronted, may be called *contumelious* injuries.

One, who does an injury, may employ very different means to do it. Hence injuries may be divided, ſecondly, in reſpect of the means employed by the injurious perſon in doing them. *Corporal* ones can be done, for the bodies of men can be hurt by ſuch actions † alone, as may immediately work upon them, *i. e.* by ſuch

* I ſay, '*or is at leaſt intended* to hurt,' becauſe one may intend, and may do every thing which he can do, to hurt the reputation of another, without being able to effectuate his purpoſe. Thus one, whoſe character bears him ſuperior to calumny, will not really be hurt by the tongue of an infamous or inſignificant fellow, let him ſay what he will; he may however, upon being traduced, be ſaid to have received an injury, tho it hath not the effect which the injurious perſon intended it ſhould produce. For the latter intended to do the injury; he uſed the means neceſſary for doing it; he did all that he could do to make it have its effect; the injury therefore is complete on his part; and it is no extenuation of his guilt, and cannot be pleaded as ſuch by him, that it hath not been actually followed by the conſequences which he intended it ſhould produce. If it hath not had its full and intended effects, no thanks to him.

† By an action, it is plain, that in this place is underſtood ſomething different both from language, verbal expreſſions, words, or converſation, and from writ. I mean the ſame thing, which the Roman lawyers meant by the word '*res*', when they ſaid that all injuries are done *aut re aut verbis. l.* 1. § 1. *ff. de injur.*

ſuch alone as are done by the intervention and by means of the body, and produce a viſible alteration and an external effect upon it: for things, that are corporeal, can be affected by corporeal things alone *. Theſe may be called *bodily* actions. An action of this kind may be defined to be 'a voluntary motion, 'change, or alteration of one human body, which has an external effect, or pro-'duces a motion, change or alteration on another, either immediately by being it-'ſelf in contact with it, or mediately, by cauſing ſomething, with which it is itſelf 'in contact, to go into contact with it.' For inſtance, a blow given with the fiſt is an injury done by an action of the firſt kind, becauſe it is given by the immediate contact of two human bodies: a blow given with a cane, a thruſt made with a ſword, a wound given by ſhooting a piſtol; theſe are injuries done by actions of the ſecond kind, for they are given mediately by ſome thing cauſed by one human body, with which it is in contact, to come into contact with another. 'Tis by actions of this kind alone, that corporal injuries can be done. But the reputations of men may be hurt, and affronts may be put on them, either by words, by writ, or by actions of other ſorts. No doubt, the two former are the moſt uſual and the moſt proper ways of wounding them: but they *may be wounded* in other ways alſo; for inſtance, by immodeſt geſtures or exhibitions which imply infamous familiarities. Hence injuries are divided into *real* and *verbal*. Real injuries are 'all ſuch, as are done *re*, or are not verbal.' Verbal are 'all ſuch as are given by words, whether expreſſed by the mouth, or on paper,' *ſt. Gild. c.* 5. 6. For lawyers uſe to refer to the claſs of verbal ones not only ſuch as are done by giving abuſive language, but ſuch alſo as are done by the publication of defamatory libels, *libelli famoſi*, or by words committed to writing and publiſhed. All others, which cannot be comprehended under this claſs, they call *real injuries*: for inſtance, the publication of an injurious picture they refer to the claſs of real injuries †; becauſe a picture does not conſiſt of words.

Thirdly; Injuries are divided into great or atrocious, and ſmall trifling or inconſiderable ones; *atroces et leves*, *R. M. l.* 2. *c.* 63. § 5. *ſt. R.* III. *c.* 17. § 2. Injuries are held to be great, when the wrong done is great; they are ſaid to be ſmall, when it is inconſiderable. 'Tis plain therefore that this is a very arbitrary matter, and muſt depend much upon opinion and upon circumſtances, *l.* 7. § 7. *ff. de injuriis*. It may however be remarked, that injuries may be either abſolutely or relatively atrocious. They are ſaid to be atrocious abſolutely, when the wrong which is done is great in itſelf, without relation to any other thing. For inſtance, one who ſtrikes out an eye, breaks a limb, or commits a rape, does an atrocious injury: for the loſs of an eye, the fracture of a limb, or the violation of one's chaſtity, conſidered alone and by itſelf, is no ſmall affair. They are ſaid to be atrocious relatively, when the wrong done is aggravated by certain extraneous circumſtances, which accompany it, and render the injury greater than it would otherwiſe have been. Theſe circumſtances depend 1) either on the comparative condition of the perſon who does, and the perſon who receives the injury; or 2) on the place, where it is done; or 3) on the time at which it is received. Thus an injury done by one to his parent is more atrocious than the ſame injury would have been, if it had been done to one with whom the injurious perſon had no connexion (§ 370. 371.). An injury done to a King, to a clergyman, to a judge, or to a magiſtrate, is greater than the ſame injury would have been, if it had been done to one veſted with none of theſe dignities. An injury done to a Peer or to a man of rank, is greater than the ſame injury would have been, if it had been done to a man of inferior ſtation. An injury done to a lady of faſhion, is greater than the ſame injury would have been,

* I mean that no man can hurt the body of another otherwiſe than by means of his own, either mediately or immediately. No doubt, mind has power over body: but one's mind has *immediate* power over his own body alone, and has not any *immediate* power over the bodies of others. It can affect theſe by the intervention either of its own body alone, or of it and of proper *media* employed by it.

† See HEINNEC. *ad tit. ff. de inj.* § 112.—VOET. *Com. ad d. t. ff.*

been, if it had been done to a proſtitute, or even to a woman whoſe rank rendered her, in ſome ſort, *infra legum obſervantiam.*

In the ſame manner, an injury done in a place of public reſort, in a church, at change, and before the world, is greater than the ſame injury would have been, if it had been done in a private place and before few people. An injury done in one public place, at church *v. g.* may be more atrocious than the ſame injury would have been, if it had been done in another, for inſtance, in a public walk, *ſt. W. c.* 5. 6. Nay an injury, done in one private place, may be more atrocious than the ſame injury would have been, if it had been done in another: Thus one, who beats a man in his own houſe, is held to have done him a much more atrocious injury than if he had beat him in any other place; *quia domus tutiſſimum cuique refugium atque receptaculum ſit, l.* 18. *ff. de in jus voc.*

Laſtly, An injury done at one time may be more atrocious than the ſame injury would have been, if it had been done at another time; for inſtance, an injury done to a judge when ſitting in judgment, to a miniſter when employed about the ſervice of GOD, to a bridegroom when celebrating his marriage, or to a man when attending his father's corpſe to the grave, is held to be much more atrocious than the ſame injury would have been, if it had been done to the ſame perſon, at another time, when he was not employed in this manner, *l.* 7. § 7. 8. *l.* 8. *l.* 9. *p.* § 1. 2. *ff. de injur.*

§ 710. Every injury is a wrong done *dolo malo*, out of a malicious intention, or *animo injuriandi* (§ 708. *ax.* 3.). Therefore thoſe who are capable of having a malicious intention or an *animus injuriandi*, are alone capable of doing injuries: ſuch as are *doli incapaces*, ſuch as are incapable of having a malicious intention or an *animus injuriandi*, are incapable of doing them. Hence not only 1) ideots, madmen, and perſons deprived by nature of the uſe of reaſon, but 2) children who have not attained it, are incapable of doing injuries; becauſe they cannot have the *animus injuriandi.* Therefore any thing, which they happen to do, can never be called an injury, *l.* 3. § 1. *ff. de injur.* I ſay indefinitely, 'children who 'have not attained the uſe of reaſon,' and are incapable of having an *animus injuriandi*: for it would be dangerous to define any particular age, before which children ſhould in all caſes be preſumed *præſumptione juris et de jure* to be incapable of having it. It muſt be left to the judge to determine from the circumſtances of every caſe, *v. g.* from the age and the character of the perſon accuſed and from the nature of the injury he is accuſed of having done, whether he could and actually did do it *animo injuriandi.* 3) Perſons who are drunk and are thereby deprived of the uſe of their reaſon, it is generally thought, are incapable of doing verbal injuries by giving abuſive language; at leaſt, they are preſumed not to have done them *animo injuriandi*, if they are willing to make a recantation, as ſoon as they return to the ſober uſe of their reaſon, are reminded of what they ſaid, and are deſired to do it. But drunkenneſs can never be a *total excuſe* for one who has done a corporal or an atrocious injury; it is no more than an *extenuation* of his guilt. For it both is and ought to be ſo in every caſe, becauſe the beſt people may be intoxicated on particular occaſions, and it would be hard to puniſh them *pœna ordinaria* for actions done by them when in this condition. I know it is commonly ſaid that if this be law, people have no more to do, in order to protect themſelves againſt the conſequences of the greateſt crimes, than to get themſelves drunk before they commit them. But they do not conſider, that drunkenneſs deprives one of the uſe of his reaſon, makes him forget his moſt deliberate purpoſes, lay aſide his moſt inveterate enmities, and renders him incapable of executing his deſigns. 'Tis therefore abſurd to ſuppoſe that one, who hath got himſelf drunk, did ſo on purpoſe to perpetrate criminal intentions with impunity; a drunk man cannot be ſuppoſed to retain a deep deſign long in his memory; and one, who appears to have been keeping this ſcheme in view, all the time that he was getting himſelf intoxicated, could not be ſaid to be drunk, or be allowed to plead his inebriation as an extenuation of his guilt.

But

But every injury is done in a particular way, by means neceſſary for doing it; every one therefore, who is incapable of uſing the means neceſſary for doing injuries of certain ſorts, muſt alſo be incapable of doing theſe injuries themſelves. Thus a dumb man cannot do a verbal injury, becauſe he cannot ſpeak; and one, who cannot write, cannot with his own hand write a defamatory libel againſt another.

One may, either himſelf, or by means of others, do injuries: for it is no matter by whom the malicious purpoſe be executed and an injurious action be done; whether by the original contriver of it, or by another employed or inſtigated by him. *Videtur enim feciſſe, qui per alium fecit.* Therefore not only he who did the action, but he by whoſe inſtigation it was done, is liable to be held to have done it, and to be ſued *actione injuriarum* (§ 706. 707.), *l.* 11. *p.* § 3. 4. 5. 6. *ff. de inj.* But it muſt be remarked, that connivance is not alone ſufficient for making one be held to have done an injury; for connivance is not the ſame thing with a mandate. Indeed one, who connives at any thing, can at moſt be ſaid to be paſſive: but in order to make one liable to be held to have done an injury, he muſt have been active; he muſt have done ſomething. Therefore one, who does no more than connive at another, cannot be ſaid to have injured him to whom the wrong is done; *unleſs* the perſon at whom he connived was ſo ſubjected to his authority, that he both was bound and had it in his power to hinder him. The reaſon is; becauſe he will be held to be acceſſary to the crime, and will be preſumed to have given a mandate to commit it, if he does not reſtrain one whom he both could and ought to have reſtrained, *l.* 121. *ff. d. r. j. In maleficio ratihabitio mandato comparatur, l.* 152. § 2. *ff. d. r. j.*

§ 711. Both the perſon and the reputation of every body may be hurt. Therefore every individual of human kind, men as well as women, young as well as old, high as well as low, rich as well as poor, wiſe as well as fooliſh, may receive injuries; no matter whether they do or do not know they are injured; whether they are preſent or abſent, whether they are or are not ſenſible of the injury done them, *l.* 3. § 1. 2. *ff. de injur.*

§ 712. But 1) one, who is willing that a thing be done, cannot be ſaid to have received an injury; becauſe he cannot ſay he has met with a wrong, and cannot complain of that to the doing of which he gave his conſent. Beſides, he who does it cannot be ſaid to have an *animus injuriandi;* ſince he does no more than is agreeable to the inclination of him to whom he does it. Hence a woman, who has with her own conſent been debauched by a man, and has born a child to him, is not entitled to ſue him for damages, *Fo.* 15th *July* 1696, *Ker. Nulla injuria eſt quæ in volentem fiat, l.* 1. § 5. *ff. h. t.* 'Tis true in moſt caſes advances are firſt made by the man; females are uſually coy; and art muſt be employed, in order to ſeduce and to overcome them. Therefore in all caſes, in which it is proved that a man employed artful means to ſeduce a woman, he ought to be obliged to pay damages to her, *Fo.* 15th *July* 1696, *Hiſlop.*—

1719, *Caſtlelaw v. Agnew.*—*Fa.* II. 22. For the law, at the ſame time that it excuſes the frailty of her, who has by deceitful means been enticed to indulge herſelf in the gratification of the keeneſt appetite implanted by nature into the animal kind, will call him to account who has been ſo baſe as to ſeduce her *. The quantity of the damages muſt be proportionable to the condition of the parties, to the heinouſneſs of the deceit, and to the other circumſtances of the caſe.

§ 713. Injuries cannot be done 2) *perſonis incertis*, to ſuch as it is not certain who they are; they muſt always be done to perſons who are certain, or ſuch as it is not uncertain who they are. For if no one to whom the injury is done can be aſcertained, it cannot be ſaid to be done to any body; it is really

* It muſt be remarked, that in all caſes both the man and the woman are liable to undergo puniſhment *ad vindictam publicam* (§ 390.); for there is a great difference between puniſhment and damages. Puniſhment is due in all caſes in which the law is tranſgreſſed; but damages are due in thoſe caſes alone, in which a private perſon has been injured.

done to nobody; but every injury muſt be done to ſomebody (§ 708. *ax.* 2.). This doctrine is of ſignal uſe in the caſe of injuries done *ſcripto*, or of *libelli famoſi*. For ſongs, ſatires, poems, pamphlets, *&c.* cannot be ſaid to be injurious to any one, unleſs a particular perſon againſt whom they are publiſhed is expreſsly named in them. 'Tis true, the civil law did not require ſo much; it held it to be enough, if the perſon, at whom the libel pointed, was ſo painted as to be known by every body. But this law was ſevere; and it was enacted by tyrants who were afraid to have the vices, of which they were conſcious they were guilty, expoſed to public view by witty men. Beſides, it expoſed people to the capricious conjectures, ſuſpicions, and opinions of judges, who were awed by the favourites on whom they depended. But the principles maintained in it are inconſiſtent with the ſpirit of the Britiſh government; it has too great a regard for the liberty of the people to lay an embargo on wit; a man who is not attacked directly and by name, ought not to think, he is not entitled to ſay that *he* is injured.

Nor can one be held to be deſcribed directly by the initial letters alone of his name, becauſe theſe do not aſcertain with abſolute certainty the individual againſt whom the injury is pointed; they make not a legal deſcription of any body; and one cannot be allowed to ſay, that it is *he* who is meant to be deſcribed by them; for they may mean ſome other perſon or thing. Therefore one cannot be held to be either injured or deſcribed unleſs his name and addition are fully written. The liberty, the wit, and the ſpirit of Britain are at an end the moment we lay a rigorous embargo or impoſe awe on that, which is one principal ſupport of them. At the ſame time the preſs ought not to be made the funnel of defamation; and every individual, who can ſhew that a defamatory libel has been publiſhed againſt *him*, on purpoſe to wound his character, to render him uſeleſs in life, to make him contemptible in the eyes of others, or to rob him of the good name he poſſeſſeth, is entitled to ſay that *he* has ſuffered an *injury*, and to get damages awarded to him for the wrong which has been done him, *D.* I. 233. 3d *July* 1733, *M'ewen*. For that liberty, which it has been ſaid (§ 76.) ought to be allowed the preſs and ought to be unbounded, relates to *geral* propoſitions, *general* truths, and *general* doctrines alone; it means not either that one individual has a right to employ it to the hurt of another, or that a man who has been injured by an abuſe made of it, is not entitled to complain of the wrong done him and to get redreſs for it.

The *private* perſons, to whom injuries are done by the publication of injurious defamatory libels againſt them, are well entitled to *reparation of the damage* done them; but thoſe who are convicted of publiſhing them, ought not to be *puniſhed* ſeverely. For the *public* can hardly be injured by the moſt enormous abuſes of the liberty of the preſs; it can hardly ſuſtain damage in this way; and offences committed by means of it ſeem in this country to be held to be puniſhed ſufficiently by the damages awarded to the private party who is wronged. 'Tis ſhocking to read the puniſhment appointed for the publiſhers of *libelli famoſi* by the Roman law; it was made capital both by the laws of the twelve tables, and by the imperial conſtitutions. But our law could not in any caſe go farther than a ſlight arbitrary puniſhment, ſuitable to the condition of the offender, and to the degree of his offence.

§ 714. Injuries can be done to the *living* alone; they cannot be done 3) to the dead. No doubt, the bodies of the dead may be abuſed; their tombs may be violated; their aſhes may be inſulted; and their characters may be traduced. But theſe cannot be ſaid to be injuries done to them: for they have not an exiſtence here below; they cannot have any rights in this world; wrongs therefore cannot be done them. Of courſe action can never lie to *them* for delinquencies committed *after* their deaths; and having never been *in bonis* of them, it cannot lie to their repreſentatives, for it is impoſſible to ſuppoſe action to lie

before

before the wrong is done. 'Tis in this ſubtile, and ſome may think ridiculous manner, that it is proved that *injuries* can be done to the living alone.

'Tis true, the law mindful of the mortality of human kind, forbids us to diſturb the aſhes of the dead, and employs the abhorrence and the veneration which we have of their remains, to impreſs us with an awful ſenſe of that futurity in which the dead are yet alive. It regards therefore with indignant eyes thoſe who abuſe the bodies of the dead, raiſe them out of their graves, or violate their tombs, and ordains them to be puniſhed by arbitrary puniſhments proportionable to the degree and to the circumſtances of their offence, *Tt. ff. et C. de ſepulchro violato.* But it conſiders the violation of their ſepulchres, not as an *injury done to the dead* whoſe remains are depoſited in them, but as an *extraordinary crime*, by which the *public* tranquillity is diſturbed, the thoughts of death are more than they ought to be familiarized to the living, and that reſtraint, which the dread of futurity impoſes on mankind, is more than it ought to be diminiſhed.

But grant that thoſe wrongs which are done to the *bodies* of the dead can be called *injuries*, it does not follow that the law of Scotland holds the ill, which may be ſpoken or told of their *characters*, to be in a juridical ſenſe an *injury* done *them*. The approbation with which virtue meets among men, as well as the fame that both attends and ſurvives it, are rewards which operate like charms and with power upon ingenuous minds; the diſapprobation with which vice is received, and the infamy conſequent upon it, are puniſhments which the world ought not to be reſtrained from inflicting on the memory of tranſgreſſors. The good of ſociety therefore requires, that men be allowed to make free with the characters of the dead. If one has acted a flagitious, a diſhoneſt, or a villanous part in life; if he has betrayed the intereſts of mankind, of his country, and of his friends; if he has abandoned the cauſe, to which it was his duty to have adhered; ought not his name, his character, and his conduct to be ſtigmatized, and to be painted to poſterity in thoſe odious colours which diſtinguiſhed them, and in which it cannot be denied they deſerve to be deſcribed? Were one liable to be called to account, and to be puniſhed for every thing he ſays of the dead, for the characters he draws of them, and for the actions he repreſents them to have done, hiſtory, the *teſtis temporum*, *lux veritatis*, *vita memoriæ*, *magiſtra vitæ*, *nuncia vetuſtatis* *, would be at an end; hiſtorians would not dare to tell the truth; they would be afraid to draw the real characters of men; they could not mark the true ſprings of their conduct; and poſterity would be left to be ignorant of the tranſactions of preceding times. For theſe reaſons the law, or rather the cuſtom of Scotland, hath in all caſes, and without diſtinction, overlooked injuries done to the memory, to the characters, or to the reputations of the dead; and hath thereby tacitly declared that one is in no caſe liable to be proſecuted for ſuch as are done them. No ſooner do mankind breathe their laſt than thoſe accidental diſtinctions, by which they were while alive divided into kings and ſubjects, high and low, rich and poor, are forgotten: and thoſe who ſurvive them acquire a right to *abuſe* their memories, and become entitled to uſe the ſame liberty of ſpeaking about them, which they uſe to take with thoſe of the moſt remote antiquity.

But injuries, it may be ſaid, done to the reputations of the dead reflect on the living, and may therefore be conſidered, in ſome ſort, as injuries done to theſe: the living therefore, who are hurt by them, muſt be entitled to get reparation. But this doctrine is not founded on ſolid principles. Every injury implies that it is done *dolo malo* on purpoſe to hurt one; and this individual, againſt whom it is pointed, can alone ſue for reparation of it. But wrongs done the reputations of the dead cannot be ſaid to be done *dolo malo*, on purpoſe to hurt the *living*; they may be done out of a miſapprehenſion of the characters of the dead, from the love of truth, hatred of vice, and without any intention to do ill to the living.

* Cic. *lib.* 2. *de orat.*

ving. These therefore cannot be allowed to say *they* are *injured* by them. 'Tis true they may create uneasiness to them: but one cannot be said to be *injured* by every thing which gives him uneasiness. A thousand things have this effect which yet are not actionable by him, because others have a right to do them. And misrepresentations of the characters of the dead do not alone reflect on their posterity. Every vicious, every indecent action, which they did, produces the same effect; and ought to do so, that mankind foreseeing that those, whom they regard with the most affectionate concern, if they themselves leave bad reputations behind them, will not be received on the most favourable footing by the world, may be induced to do no actions, of which either themselves or their posterity have reason to be ashamed. Every man's character depends much upon his own conduct alone; and the character or conduct of those, with whom he is connected, can have little effect upon it. Besides, if the representative of every one, whose character is traduced, be allowed to call him, who hath misrepresented it, to account for his conduct, the matter is inextricable; and I ask, Whether is this action *heritable* or *moveable*? It never was *in bonis defuncti*; it arose *after* his death, and cannot therefore be moveable. But having never been *in bonis defuncti*, how can it go to his *heir*? Going neither to the heir nor to the executor, is it not impossible to ascertain the person entitled to bring it? If you say, it descends by blood to those who are related to the deceased, I ask, whether does it go to his descendents alone, or to collaterals? To the former alone.

But do not the others feel the injury as well as they, and does it not reflect upon them? Does it go to the first descendents alone, or to others more remote? Does it go to all those who stand in the same degree of propinquity to the deceased, or to one of them alone? Does it divide among them *per capita*, or *per stirpes, jure repræsentationis*? And is every one, who can trace his pedigree to the person deceased, entitled to bring his action for every injury done his memory by every successive historiographer? Some of the present Italians pretend, and I am assured, upon good evidence, to trace themselves upwards to antient Roman families: are therefore those who can, tho I believe nobody pretends to do it, derive from TIBERIUS or NERO, entitled to sue every one who writes the history of those tyrants? Are the present representatives of our antient chieftains (§ 88. 630.) entitled to commence prosecutions against all those who speak ill of their predecessors? The law says, *Qui per successionem, quamvis longissimam, defuncto heredes constiterunt, non minus heredes intelliguntur, quam qui principaliter heredes existunt, l.* 194. *ff. d. r. j.* Does therefore the right of bringing the action descend *in infinitum?* 'Tis absurd to suppose it does. Where then can you stop? At descendents of the first degree? Why; where is the principle, the statute, or the lawyer that limits the action in this manner? And where is the medium on which you can stop at any determinate degree? The law therefore finding that it is absurd to allow the action to continue *in infinitum*, and that it is impossible to limit it any-where after it is once begun, must extricate itself in this manner, by declaring that it *never* lies, and by hindering it from being ever commenced. It sets therefore heirs of every degree, however near or however remote, upon the same footing, and hath declared that action doth not lie to any of them on account of injuries, which either have really or are pretended to have been done to the reputations of their predecessors. Those who want to defend the honour of their deceased friends must betake themselves to extrajudicial means, which are usually the most effectual as well as the most easy. Vindications of their characters, true accounts of their conduct, and apologies for it, may be published. In this way the truth or the falshood of every story may be proved.

Upon the whole matter therefore this doctrine is to be held, that by the practice of this country, by the principles of the law which are taught by it, and by the common sense of the people, action lies not to any man living for any ill which is either spoken or written or insinuated of the dead. 'Tis true, the civil law seems to have taught other principles, *l.* 1. § 4. 6. *ff. de injur.* But it must be

be remembered, that its doctrines and decisions have been received into the law of Scotland, only because they were thought to be agreeable to the principles of equity, and to be promotive of public good. Therefore in all cases, in which the silence of the law of Scotland makes it necessary to go in search after principles, doctrines, and decisions, it would be foolish to adopt those of the civil law, blindly, without considering whether they are right or wrong in themselves, were not suited to the peculiar manners of the Romans, were not the consequence of the tyrannical system introduced and supported by their Imperial constitutions, and are not repugnant to the free spirit of the British government. Besides, 'tis chiefly in matters of private right that the civil law is authoritative in this country; and it is seldom, that recourse ought to be had to it in matters of police and of public law. The present point seems rather to fall under the latter than the former class; for it was seldom that injuries could be done in this way to others than those who had borne the most important offices, and had held the highest rank in the state. Every one of these endeavoured by new constitutions to support the influence of one another, and to prevent every thing which might lessen the veneration had of them by the vulgar. In this case therefore their tyrannical maxims ought to be rejected by us.

§715. *Defamatory* injuries are those by which one's reputation is wounded (§708.); it seems therefore that they can be done to *individuals* alone; they cannot well be done 4) to *corporations*. For individuals can alone be said with propriety to have characters to lose; they can therefore alone be hurt by them: but corporations consist of many members, and are defended by the number of these; defamatory injuries cannot much hurt any of those individuals of whom the collective bodies consist, and *one* can seldom say that *he* is injured by them. Besides, one ought to be allowed to speak freely of corporations, because they have commonly weight enough to support themselves even against truth, and falshoods cannot lie heavy upon them. But this rule seems to admit of one exception; for it is not lawful to injure the *pecuniary* credit of a *trading* company, or to say that it is become *insolvent*.

Courts of justice are corporations, and being possessed of authority, ought to be respected by the people. But it seems to be doubtful, whether the freedom sometimes used in arraigning the judgments given by them, can be accounted in all cases an actionable offence. Charges made upon their decrees do little hurt to the judges who pronounced them; falshoods cannot bear hard upon the *courts;* and bad consequences cannot flow from allowing people to speak the truth on most occasions, *arg.* 1693, p. 26. 27. At the same time it must be confessed, that it is improper to arraign them in direct terms to the court itself; because *real* injuries as well as *contumelious* ones may be done it in its *presence*, and those who have business before it ought not to be allowed to express contempt of it to itself, or to diminish the respect due to it from those who practise before it. Besides, injuries may be done to individual judges by impeaching the opinions and the judgments given by them, and by arraigning them of being actuated by unjustifiable motives to give them.

The *public* is, in some sort, a metaphysical being, existing in the minds of those who think of it; defamatory injuries therefore cannot well be done to it. But it would be improper from thence to conclude, that it is lawful in Britain to say every thing which one pleases of the conduct of public affairs. For one may by the publication of inflammatory libels discover himself to have the most hostile intentions against his country. But the liberty of Britain depends greatly on the preservation of the privilege, which every man has enjoyed in it of communicating his thoughts freely to others; and it seems that one ought, in extraordinary cases alone, to be made accountable for misrepresentations given by him of public affairs. The public can never be much hurt by falshoods or misrepresentations; an administration which is not able to prevent these from having bad effects, and to justify its own conduct by publishing fair accounts of it, must be spiritless and feeble; and truth ought in all matters, which concern the general interest, to be allowed to be told. 'Tis the profusion of publications which on every event proceed from the press, that rouses the spirit of the people, informs them of the true interest of their country, produces consequences the most important in themselves, and makes those, who have not either departments in the administration

niſtration or ſeats in parliament, uſeful to the nation. I ſhould therefore tremble to ſe the moſt diſtant approach made towards reſtraining the liberty, I had almoſt ſaid th *licentiouſneſs* of publication. A good government ſuch as that of Britain, may deſpiſ all the efforts of thoſe who uſe their pens to miſrepreſent it. But you may aſk, O what principles are theſe doctrines founded? I anſwer, On the *ſpirit* of the gover ment, the uſage of the nation, the intereſt of liberty, the good of the public, and th nature of the thing; and one ought not at preſent to require better authorities.

§ 716. Injuries may be done one either immediately, when they are done to him ſelf, or mediately, when they are done to thoſe with whom he is immediately con nected. Thus an injury done to a wife is held to be done to her huſband alſo; an he acquires a right to bring all the actions, which ſhe would have been entitled t bring in caſe ſhe had been ſingle. For theſe and the damages which may be reco vered by them are part of her moveable eſtate, which is all of it tranſmitted to hi by his marriage (§ 205.), *arg. R. M. l.* 4. *c.* 5. § 8. But children are not by the la of Scotland held to be the *ſame perſons* with their fathers, and are capable of holdin eſtates proper to themſelves (§ 375.). Therefore injuries done them cannot be ſai to be done to their parents; they are held to be done, and the damages which the become entitled to recover for them accrue to themſelves alone; their parents hav no right to claim them, and cannot commence actions in their own names for reco vering them. But they are the adminiſtrators of the affairs of their children, an may ſue in their names, in order to obtain reparation.

§ 717. Every injury, it has been ſaid (§ 708.), is a wrong; that is, that whic is done it muſt have been wrong in him, who did it, to do; he muſt not have ha a right to do it. That, which one has a right to do, is not either a wrong or a injury; ſince it is lawful for him to do it. For every one, who has a right, is en titled to exerciſe it by doing that which he has a right to do.

Hence that which a magiſtrate or an officer of the law has been neceſſitated e ther to do or to cauſe to be done, when in the exerciſe of his office, or putting th law in execution againſt either criminals who are accuſed, or parties who have cauſe or lawyers who plead, or thoſe who officiate before them, cannot be ſaid to be a injury; becauſe he does it in *right* of the office which he bears, *l.* 13. § 6. *l.* 33 *ff. de injuriis*, *l.* 3. § 1. *ff. quod metus cauſa.* Thus neither the judge who pro nounces the ſentence dictated by the law, nor the officer who executes the ſentenc pronounced by the judge, can be ſaid to do an injury to the criminal con demned by it: *juris enim exccutio non habet injuriam*, *l.* 13. § 1. *ff. de injur.* In th ſame manner, an officer employed in executing a legal order, or in diſchargin any part of his duty, cannot, upon being reſiſted in the execution of it, and bein thereby laid under the neceſſity of uſing force, be ſaid to injure thoſe who are ac ceſſary in reſiſting him, provided he keeps within the limits of his duty. A meſſeng for inſtance, who has apprehended one againſt whom a caption is iſſued, is entitle to drag him by force to priſon, if he will not go without it: and the officers of th revenue, of the cuſtoms, and of the exciſe are, on many occaſions, warranted b the law to uſe force upon being reſiſted in diſcharging their duty. If they ſha therefore be obliged to uſe it, they are not culpable; provided they do not tran greſs the limits, which the law has preſcribed to them. For one who does n more than his duty is not, in any ſort, culpable; becauſe he has a right to d that which he does. But one may do more than he is entitled to do, and ma thereby become culpable; for every public officer is bound to know and to kee within the limits of his office. Therefore if he goes beyond them, he muſt be bot anſwerable and puniſhable for his conduct; for it would be hard to excuſe ever wanton exerciſe of power, or every tranſgreſſion of the law, in all caſes in which th offender could pretend that he did it in the diſcharge of his duty. Magiſtrates and o ficers, eſpecially inferior ones, uſe not to be diſpoſed to limit their own powers; an ſuperior courts, which have liberal notions, ought to look with jealous eyes upon them and to be ſo far from being diſpoſed to ſhew them favour, that they ought to preſum in moſt caſes againſt them. For they are often in fact diſpoſed to uſe the litt

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power they have tyrannically. Whether one ought to be held to have transgreſſed the limits of his duty, muſt depend on the nature of his office, on the diſcretionary powers it gives him, on the buſineſs he was employed to do, on the degree of reſiſtance with which he met, on the force which he has uſed, and on the actions which he has done, *l.* 32. *ff. de injur. l.* 29. § 7. *ff. ad leg. aquil. l.* 13. *ff. de peri. et commod. rei vend.*

For the ſame reaſon a maſter, who corrects his ſervants, his apprentices, or his ſcholars, cannot be ſaid to injure them; provided he exceeds not the bounds which the law preſcribes to his ſeverity: for he has a right, nay it is his duty to puniſh them moderately for their faults, and he will be held to do them a good office by doing ſo, *l.* 15. § 38. *ff. de inj. l.* 16. § 2. *ff. de pœn.* But one who exceeds the bounds of moderation and becomes cruel and ſevere, muſt be held to have *injured* them, and is therefore bound to make reparation for the injury done them * ; *quia levis duntaxat caſtigatio conceſſa eſt docenti.*

In the ſame manner one, who is wrongfully attacked by another, and is obliged to defend himſelf, cannot be ſaid to injure him by whom he is attacked; provided he does not, in defending himſelf, exceed the bounds of moderation. The law of nature, as well as that of every country, allows men to defend themſelves againſt attacks made upon them, *l.* 4. *p. ff. ad leg. Aquil. vim enim vi defendere omnes leges, omniaque jura permittunt, l.* 45. § 4. *ff. eod.* and it excuſes one, who immediately retaliates an injury that is done him; *ignoſcendum enim eſt ei, ſi voluit ſe ulciſci provocatus, l.* 14. § 6. *ff. de bon. lib.* Indeed the retaliation of an injury cannot be ſaid to be an injury: for one cannot complain of meeting with the ſame uſage which he gives another. *Injuria certe non eſt pati quod prior fecerit* †. But one who does more than defend himſelf, who does more than retaliate the injury, who exceeds the bounds of moderation, becomes culpable and injurious. In order to entitle one to ſay, that he hath *defended* himſelf, or retaliated an injury done him, it is neceſſary 1) that he be attacked; he muſt not be the aggreſſor: for one who is not attacked, cannot be ſaid to defend himſelf; becauſe the idea of defence implies an antecedent attack. He muſt 2) be attacked wrongfully: for one who is juſtly attacked has no cauſe of complaint; ſince he who attacked him had a right to do it. The defence made muſt 3) be ſuitable to the attack, and muſt not exceed it: for one has no right to exceed the bounds of moderation. Hence a verbal injury ought to be retaliated by words, unleſs the provoker has uſed ſuch injurious expreſſions as excuſe the injured perſon to adminiſter bodily chaſtiſement in moderation. A real injury may be reſented in the ſame way in which it is done. If it is done with a weapon that is not deadly, he who is injured ought to uſe a weapon of the ſame kind; if the aggreſſor beats him with a ſtaff, the injured perſon ought not to ſtab him with a ſword or ſhoot him with a piſtol ‡. But one, who is attacked with a deadly weapon, may defend himſelf by a deadly weapon alſo; and is, beſides, entitled to put the aggreſſor to death, if this be *neceſſary* for his own ſafety, becauſe the weapon ſhews he has every thing to expect from the fury of his aſſailant. The defence muſt 4) be made incontinently, that is, at the ſame time with the attack, or at leaſt ſo ſoon after it, that the attack and the defence may be capable of being conſidered as one continued complex act; for it is eſſential to the idea of defence, that it be made incontinently: an action done *ex intervallo* cannot be ſaid to

* It was otherwiſe by the civil law: for by it a maſter, who had corrected his ſervant, his apprentice, or his ſcholar, was not held to have done him an *injury*, even tho he exceeded the bounds of all moderation; becauſe he was not ſuppoſed to have the *animus injuriandi*, the malicious intention of injuring; he corrected his apprentice, *non faciendæ injuriæ, ſed monendi et docendi cauſa.* Therefore, not the *actio injuriarum*, but the *actio ex lege Aquilia*, lay againſt him, *l.* 5. § 3. *l.* 6. *l.* 7. *p. ff. ad leg. Aquil.* But the law of Scotland is not ſo critical and does not diſtinguiſh ſo nicely. It has not a different remedy for obtaining reparation of wrongs of every different kind; it has not an *actio legis aquiliæ* for vindicating wrongs of one ſort, and an *actio injuriarum* for vindicating thoſe of another. Every wrong it redreſſes by an action of damages. Beſides, it preſumes the *animus injuriandi* from the ſeverity of the maſter, and the atrocity of the wrong done by him.

† Seneca *de ira, l.* 2 *c.* 30 —*t.* 2. *l.* 2. *ff.*

‡ See Mackenzie's treatiſe of the criminal law, b. I. t. 11. § 3.

to have been done in defence; it is done in revenge and in cool blood; but the law does not allow any body in cool blood, and with his own hand, to take revenge for an injury done him. It excuſes, it is true, the frailty of human nature, and makes allowance for thoſe irregularities, which proceed from heat of paſſion raiſed by an injurious provocation. But it reſerves to itſelf the power of puniſhing, *ſ. ſt. R.* I. *c.* 15. § 1. 3. One therefore, who does no more than defend himſelf, is not culpable, and cannot be ſaid to have done an injury to him by whom he is attacked: but one, who exceeds the bounds of moderation, or does more than defend himſelf, becomes culpable and injurious.

From the ſame principles it follows that one, who in order to hinder a witneſs produced againſt him, from being ſworn and examined, objects againſt him anything which would be held to be injurious, if it were thrown out on another occaſion, will not in this caſe be held to have done him an injury; becauſe he made the objection in his own defence, and had therefore a right to do it.

The caſe is the ſame with advocates; they are entitled to bring forth all the facts which they are informed are true, to make proper commentaries upon each of them, and to draw every argument from them which may be material for ſupporting the cauſe of their clients. Therefore they will not be held either to have done or to mean to do an injury to any man, on whoſe character the facts they advance, the commentaries they make, and the concluſions they draw, bear hard; provided the facts, which they narrate, are connected with their cauſe, and they have been *informed* they are true. For an advocate is not bound to enquire into the evidence, which may be brought of them; the information he receives from his client is a ſufficient warrant to him; and the client muſt anſwer for the truth and the proof of them. But lawyers are not entitled, it is unworthy their characters to invent facts out of the fertility of their own brains; they are culpable for doing it; and if the facts invented by them reflect an injury on any individual, they are therefore liable to be proſecuted by a ſummary complaint exhibited for him to the Court of Seſſion. But facts may be true, or advocates may be informed of them, and may not however be entitled to throw them out in their pleadings; for they may not have the moſt remote connexion with their cauſes. But a lawyer is not entitled to avail himſelf of his gown, and under pretence of pleading the cauſe of his client, to ſpit out his venom and abuſe againſt perſons with whom it has nothing to do *.

On the ſame principles it is plain that one, who objects inſolvency to a cautioner offered to him, is not liable to be accuſed for having done him an injury, becauſe one is not bound to accept of bad caution; he has therefore a right to enquire, whether thoſe offered to be found him are reſponſible perſons. Of courſe he is entitled, if he finds he has reaſon to ſuſpect that they are not reſponſible, to refuſe to accept of them; and to aſſign his opinion or his ſuſpicions concerning their inſolvency for his reaſon. Indeed he is not entitled to declare the objection to others than thoſe who are immediately concerned in the matter, becauſe it is neceſſary to tell it to thoſe alone. By conſequence if he tells it to others, he does an injury to thoſe who are offered to be cautioners to him; he wounds their credit, and is therefore liable to be ſued by them. For the moment he tells it to any who have no immediate concern in the affair, he ceaſes *jure ſuo uti;* and muſt be held to ſpeak of them not as cautioners offered to him, but *tanquam quilibet*, as perſons with whom he has no concern.

Laſtly

* It may be remarked, that an advocate is and muſt be preſumed to have received information of every fact he aſſerts either from his client or from his agent. It muſt therefore be incumbent on thoſe, who affirm he was not informed, to prove it. This is not obliging them to prove a negative: for evidence may be brought of the particular information *given* him. No man would chuſe to plead a cauſe, if he could be obliged to prove he was informed of every fact he aſſerted to be true every time it took his adverſary in the head to demand him to do it.

Laſtly; It may be remarked, that one is entitled to give an advice to his friend, even tho it ſhould bear hard on the character or the fortune of another. For he does ſo not with an *animus injuriandi*, but out of regard for him to whom he gives the advice. Thus it is uſual to aſk characters of ſervants from thoſe whom they have ſerved, and who are acquainted with them; and it is lawful for one, who is applied to for this purpoſe, to tell his opinion freely concerning them. In the ſame manner it is lawful for one, who is deſired or to whoſe department it belongs, to inform thoſe, who have the diſpoſal of an office, of the character and qualifications of him who is making application for it; and in ſome caſes, in which the public good requires it, he may do it *ex proprio motu*, without being deſired. Many other inſtances might be given; but I ſhall content myſelf with one more. A man who gets notice that his friend is making his addreſſes to a woman whom he knows to be a drunkard or a proſtitute, is entitled to put him on his guard, and to acquaint him of the character of the lady. 'Tis true that, in this way, hurt is done to the perſon againſt whom the complaint is made: but it is hurt, which he who does it is entitled, nay which it is in ſome ſort his duty to do. Indeed, he ought to do it in the moſt private way, by telling his ſuſpicions to thoſe alone who are immediately intereſted in the truth of them. For he may accompliſh in this way the end he has in view. One, who tells them publicly to all the world, indiſcriminately, does what he has no right to do; he uſes not the proper means for effectuating his purpoſe; and ſhews plainly that he is not actuated by a ſerious concern for the intereſt of his friend or of the public, but by a wicked and malicious intention of injuring another, as he tells his ſuſpicions to perſons, to whom it can be of no uſe to tell them. Therefore he muſt be held to be an injurious defamer, *F.* 31ſt *Dec.* 1708, *Charles James*.

§ 718. 'Tis eſſential to the idea of an injury that it be done *animo injuriandi*; therefore 1) ſuch as do no more than they have a right to do, *qui jure ſuo utuntur* (§ 713. *ſqq.*), are not in any caſe liable to be accuſed of being injurious for having done what they have done. *Nullus videtur dolo facere, qui jure ſuo utitur*, *l.* 55. *ff. d. r. j.* 2) One, who does a thing out of a joke or by accident, cannot be ſaid to have done an injury; becauſe he does not do it out of a malicious intention. Hence one who, when aiming a blow at another at whom he was entitled to aim it, happens to hit ſomebody different from the perſon he intended, cannot be ſaid to have done *him* an injury; becauſe he had no intention to injure him whom he hit, *l.* 3. 4. *ff. de injur.* Nay, ſuppoſe he had not a right to uſe the perſon at whom he aimed, in the way in which he intended to uſe him, he will not be held to have done an injury to him whom he has unluckily happened to hit; becauſe *ex hypotheſi* he had not the moſt diſtant intention to injure him. 'Tis true, he intended to injure another: but an intention of injuring one is not an intention of injuring a different perſon. Therefore, however much he may be held to be culpable, to have offended againſt the law, and to be therefore liable to be proſecuted *ad vindictam publicam*, an action *injuriarum* will not lie againſt him either to him whom he intended to injure, or to him whom he did not intend to injure, but happened only to hit. Not to him whom he intended to injure, becauſe his intention was not carried into execution; not to him whom he happened to hit, becauſe him he had no intention to injure. Indeed he muſt in this caſe, in ſo far as concerns the public, be held to be as culpable and as much a delinquent, when he miſſes the perſon whom he intended to hit, as if he had hit him; becauſe his actions are as illegal, and indicate as much malice in the one as in the other caſe. Therefore he muſt be held to be as dangerous a citizen, to offend againſt the laws of his country, and to merit puniſhment in the one as much as in the other caſe. 3) Every little piece of incivility, rudeneſs, unpoliteneſs, or bad manners cannot be ſaid to amount to an injury. 'Tis true, it may in one ſenſe be ſaid to be an affront. But every affront, as it has been already remarked, is not an injury: for injury is a ſtronger

expreſſion than it. In order therefore to make an affront be capable of being held to be an injury, ſomething muſt be done which is atrocious, which indicates a contumelious contempt, and which, if it be not reſented, will hurt the character of him to whom it is done; for every ſmall affront, which a proud, a fooliſh, or a rude fellow puts on one in company or elſewhere, is ſo inconſiderable that it may be ſaid to be below both his notice and that of the law. Indeed it indicates a barbarity of temper, which reflects on him who does it much more than on him to whom it is done, and is thereby ſufficiently avenged. 4) It may be affirmed that thoſe, who tell a *fact* which is true, cannot be ſaid to injure any one, tho the ſtory may happen not to be much to the credit of him who is concerned in it. And it matters not of what ſort the fact be, whether it be a criminal or an indifferent action; whether it reflect honour or diſhonour; whether it accuſe one of having a vicious heart or of a natural defect; provided every particular of the ſtory be true. For either it is for the public intereſt that that which is told be brought to light; or the telling of it will not reflect diſhonour on him, whom it concerns; or it may reflect honour upon him. If it is for the intereſt of the public, that that which is told be brought to light, private intereſts ought to yield to thoſe which are more general, and to hinder ſuch, as endeavour to promote the public good, from being called to account by private men. From hence I conclude, that if one has committed a crime, murdered a man, forged a deed, or done any other bad action, every one, who knows the particulars and the truth of the ſtory, has a right to tell them, and cannot be ſued for having done it. *Eum, qui nocentem infamavit, non eſſe bonum æquum ob eam rem condemnari: peccata enim nocentium nota eſſe et oportere et expedire, l.* 18. *p. ff. de inj.* 'Tis for the intereſt of the public that crimes be detected, offenders be puniſhed, villains be diſcovered, and the world be put on its guard againſt them. One, who has done any action, has no title to complain of another for telling he has done it; for men ought not to do any thing, of which they have reaſon to be aſhamed. In caſe that which is told will not reflect diſhonour on him whom it concerns, he has no cauſe to ſay he is injured; becauſe wrong has not been done him (§ 717.). Thus one who gives an account of the particulars of any indifferent action which another has done, or tells that he labours under a bodily diſtemper, cannot be ſaid to injure him, and is not liable to be proſecuted *actione injuriarum*. No matter whether the diſtemper be a natural or an accidental, a permanent or a tranſitory one: for diſeaſes, of whatever kind they be, reflect no diſhonour upon thoſe afflicted by them. They ariſe frequently either from accidents, or from cauſes which are entirely independent on mankind; they detract not from the rectitude or the morality of one's character; no man therefore has reaſon to be aſhamed of them. Indeed it is otherwiſe if they ariſe from intemperance or from vice. Men have reaſon to be aſhamed as well of the diſeaſes which they have brought upon themſelves by their intemperance, debauchery, and vice, as of intemperance, debauchery, and vice themſelves. But they ought not upon this account to be concealed. In caſe the ſtory reflects honour on him of whom it is told, it is plain that he, who tells it, is ſo far from doing an injury, that he does good to him.

From hence it is eaſy to reſolve the queſtion, *An veritas convicii excuſat ab injuria?* Whether the truth of that which is ſaid excuſes from an injury? for it is plain from the principles which have been explained, that 'it excuſes in all thoſe 'caſes, in which a fact that is true is told;' and that 'it does not excuſe from 'defamation, ſlander, or injuries expreſſed in *general* terms.' Thus one is not entitled to call every man, a villain, a liar, a thief, a bankrupt, a robber, a murderer, whom he believes to be one, or who is one in reality. For the law has reſerved to itſelf the power of affixing bad *general* characters to men, becauſe it does it after having taken a fair trial, and giving the perſon accuſed an opportunity of vindicating himſelf. Therefore it preſumes men to be good, till it has found them upon proof to be otherwiſe. Beſides, a man may, in many ways,

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be led to do one inconſiderate, raſh or bad action, and yet may not deſerve to be called an ill man in general. Indeed the law preſumes that private perſons cannot know certainly the general characters of others; therefore it preſumes that a man who gives them, gives them *animo injuriandi*, accounts him an injurious perſon, and makes him liable for doing it. From hence it is plain, that one is entitled to tell the *general* character of another, to whom a general character has been given by thoſe who have power to give it. Thus it is lawful for one to ſay that another, who has been declared to be *infamous*, is ſo, becauſe he does in this caſe no more than tell a fact which is true.

But *omnis definitio in jure civili*, the law ſays, *periculoſa eſt: parum eſt enim, ut non ſubverti poſſit;* every general rule admits of exceptions; and the manner of telling facts which are true, as well as other circumſtances attending the narration, may make it amount to an injury. One may make large commentaries upon them, may give them gloſſes calculated to make the narration ſtab, may draw the attention of ſilly people to trifles which he thinks may make impreſſion upon them, or may revive the remembrance of ſtories which are old and which ought to be buried in oblivion, thoſe to whom they relate having by their ſubſequent behaviour made ample amends for them. Thus one may diſcover a plain *animus injuriandi*, a cruel, a mean, and a malicious diſpoſition, and may well deſerve to be puniſhed for the wrong which he does. Beſides, it is ſeldom that one ought to be allowed to ſhock the perſon himſelf, to whom it relates, by telling the truth of him, or by upbraiding him with it in his own preſence. It muſt therefore be determined from the circumſtances which diſtinguiſh every caſe, whether that which has been done was done or ſaid with or without an *animus injuriandi*, and is actionable.

§ 719. Every one to whom a wrong is done, is entitled to redreſs (§ 704. 707.), and muſt therefore have a legal mean afforded him for getting it. That, by which one gets reparation made for an *injury* done him, is an *action of damages*. Every one therefore, who has been injured, is entitled to ſue it; and he muſt ſpecify, in his libel, the particular injury which has been done him, *l.* 7. *p.* § 4. *ff. de inj.*—*p. ſt. R.* I. *c.* 14. § 2.

The end of the action is to get reparation of the wrong which has been done. The reparation therefore, which one is entitled to get, muſt be different in different circumſtances, for it muſt in all caſes be adequate to the wrong which has been done, *R. M. l.* 4. *c.* 39—*ſt. W. c.* 5. 6. Sufficient reparation will therefore be, in ſome caſes, held to be made, if the offender expreſſes in a public way his ſorrow, and begs pardon for the injury he has done. In others, in which ſomething that is falſe has been ſaid, he may be obliged not only to expreſs his ſorrow and to beg pardon for it, but to recant it, and to declare it was falſe, *arg. L. B. c.* 104. But a recantation or, as in juridical language it is ſometimes called, a *Palinody*, it is plain, cannot have place in all caſes; it can be made for verbal injuries, and in thoſe caſes alone in which that, which has been ſaid, is not true. For it is in theſe alone, that it can be owned to be falſe; it would be tyrannical and immoral to order one to own a thing, which he believes to be true, to be falſe. But ſometimes the wrong, which has been done, is conſiderable; the methods which have been mentioned of repairing it may be inſufficient; and a pecuniary reparation ought to be made to him who has ſuffered it: for every injury is in ſome ſort eſtimable by money. In thoſe caſes therefore the offender ought to be decreed to pay a reaſonable pecuniary conſideration by way of *ſolatium* and reparation to the offended, *R. M. l.* 4. *c.* 39. 40.—*L. B. c.* 103. *ſt. W. c.* 5. § 1. 2. 3. *c.* 6. § 1. 2. proportionable to the circumſtances of parties and to the nature of the wrong. The judge ought to accommodate his decree to the circumſtances of every caſe, and according to them ordain either one, or ſome, or all of theſe ſorts of reparation to be made. And it muſt not be omitted to be remarked, that in all caſes, in which the perſon injured is found

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to be entitled to even the ſmalleſt reparation, full coſts of ſuit muſt be awarded to him: otherwiſe reparation could not be ſaid to be made him.

Actions of damages may be brought in all caſes before the Court of Seſſion for injuries of every ſort, verbal as well as real ones, *C. F.* 147. But they cannot be brought indiſcriminately before every *inferior* judge. For actions concerning matters of ſcandal, can be ſued before the Commiſſaries of dioceſes alone, 1609, *c.* 6. *Aſ.* 28th *Feb.* 1666, who have a privative juriſdiction in them. But breaches of the peace may in all caſes be ſued before the Juſtices of the Peace; and on this principle they have, on many occaſions, aſſumed to themſelves a juriſdiction in caſes of verbal injuries, *C. F.* 1.—147. becauſe theſe are uſually attended with diſturbance, vociferation, clamour, and noiſe. For they have not *ſtrictiſſimo jure* juriſdiction in ſcandal, ſlander, or defamation, which is not attended with noiſe, but wounds in a ſecret and ſilent way. But breaches of the peace as well as other injuries, in ſhort injuries of every ſort, except ſuch as can properly be ſaid to be *matters of ſcandal*, may be repaired by actions of damages brought before Sheriffs of ſhires, Stewarts of ſtewartries, and Magiſtrates of boroughs.

§ 720. One, who has been injured, loſes in many caſes his right of recovering damages, and of bringing his action for this purpoſe. He loſes it, 1) by having forgiven the injury; and that, whether he has or has not got ſatisfaction made him for it extrajudicially. For he cannot alter his reſolution, after he has declared it, and has thereby acquitted one of an obligation under which he lay to him, *l.* 75. *ff. d. r. j.* *A fortiori* he loſes his action, in caſe 2) he has got ſatisfaction made him extrajudicially, and has accepted of it; becauſe acceptance of ſatisfaction is equal to an acquittance and to forgiveneſs of the injury, *l.* 17. § 6. *ff. de injur.* 3) He to whom an injury is done loſes his right to bring his action by neglecting to commence it in proper time. For injuries ought to be immediately reſented, and one by delaying to take ſteps in order to obtain reparation may ſhew that he either never minded or hath forgiven them. But one who appears not to mind a wrong done him, muſt be preſumed not to have looked on it as an injury; *quia nulla injuria eſt, quæ in volentem fiat.* One therefore, who hath kept ſilence ſo long as to indicate forgiveneſs, loſes his right of action. How long and how great this ſilence muſt be, muſt depend on the nature of the injury, on the behaviour of the perſon offended to the offender, on the condition of both, on the length of the time that is paſt, and on the other circumſtances of the caſe; and it muſt be left to the judge either to ſuſtain or to repel this defence, when it is made, according to circumſtances *. 4) An injury is extinguiſhed by the death of him who is injured, and the action cannot be commenced by his heir, for *ex hypotheſi* nothing *aleſt ex patrimonio* (§ 708.), and the end of the action is, in ſome ſort, revenge as well as reparation: *tendit ad vindictam.* Therefore if he who has ſuffered the injury dies without having ſought reparation of it, he muſt be preſumed to have forgiven it. By forgiving it he left not *in bonis* a right to ſue the action, or to recover damages; of courſe it cannot go to his heir. But he may either himſelf have commenced action before his death, or die immediately after receiving the injury; and in both caſes the action lies to his heir. For in the firſt it was *in bonis defuncti*, and of courſe deſcends to him; in the ſecond the injury cannot be preſumed to be forgiven, for the perſon to whom it was done had not time to declare by a long ſilence his forgiveneſs of it.

But it muſt be remarked that it is not in like manner extinguiſhed by the death of the perſon who did it. For he ſubjected himſelf by doing it to make reparation out of his eſtate. Therefore his heir muſt take the eſtate charged with this burden; and the death of him to whom it belonged, and who was originally obliged, cannot hurt the right of the perſon entitled to this amends.

§ 721.

* By the antient law of Scotland one loſt in ſome caſes his right to ſue an action of injury, if he delayed above one night to take counſel of his friends about it, and did not commence his ſuit *de recenti*, *R. M. l.* 4. *c.* 10.

§ 721. By every injury not only is wrong done to ſome private perſon, but the law is tranſgreſſed (§ 704.). Therefore the offender is bound not only to make reparation for the wrong he has done to the private perſon, but to give ſatisfaction to the law which he has offended; that is, he is liable to be proſecuted *ad vindictam publicam*, and to be puniſhed with a puniſhment proportionable to his crime, *ſt. W. c.* 5. 6. For ſome injuries are more atrocious, and deſerve therefore to be puniſhed more ſeverely than others. In ſome caſes the injury done is ſo atrocious, and the tranſgreſſion of the law is ſo great, that it is ordained to be puniſhed by death: thus rape and haime-ſuckin are puniſhable by it, *R. M. l.* 4. *c.* 8. 9. 10. Others are puniſhed by arbitrary puniſhments: others again are ſo inconſiderable as to be held to be ſufficiently puniſhed by obliging the delinquent to make reparation of the damages alone.

In thoſe caſes, in which the ſuit is brought to obtain puniſhment as well as reparation, the action muſt be brought at the inſtance of the private party with the concurrence of the fiſcal. For the private party is properly entitled to demand no more than reparation, and the fiſcal proſecutes for the intereſt of the public. His concurrence therefore is neceſſary in order to entitle the private party to ſue for *puniſhment*, *ad vindictam publicam;* for the law intruſts him with the power of determining whether it is proper, and for the public good, to get a criminal puniſhed. Therefore the private party may ſue for reparation, without the concurrence and againſt the will of the fiſcal; and the fiſcal may ſue for puniſhment, *ad vindictam publicam*, without the concurrence and againſt the will of the private party (§ 705.).

TITLE III.

Of Aſſithment.

§ 722. REPARATION is due for corporal as well as defamatory or contumelious injuries; and for them it is due to thoſe perſons alone to whom the injuries have been done. For theſe alone ſuſtain the damage; therefore they alone have a right to ſue for reparation of it.

But one, who has been killed by another, is not properly ſaid to have received an *injury*, but to have been murdered (§ 708.). It may however be ſaid, that *wrong* has been done him; and not to himſelf alone, but to all thoſe intereſted in him. His wife becomes a widow; his children are made orphans; and his relations are deprived of their friend. All thoſe, whoſe maintenance depended on his life, may be reduced by his death to poverty, to want, and to dependance. Therefore *damage* may properly be ſaid to be done to them; and they muſt of courſe be entitled to get amends made for it *.

The reparation, which is made for corporal injuries or for ſlaughter, is uſually called by its proper name *Aſſithment;* he, who makes it, is ſaid to aſſithe thoſe to whom it is made; and thoſe, to whom it is made, are ſaid to be aſſithed. 'Tis true the word is ſometimes uſed for *a pecuniary reparation made for every ſort of injury, wrong, or damage done;* and in this extenſive ſenſe *to aſſithe* ſignifies *to make a pecuniary reparation for wrong done*, 1424, *c.* 33. At other times it is applied to great corporal injuries and to ſlaughter alone, and in this ſenſe it ſignifies *reparation made for ſlaughter and for great corporal injuries*. And at others it is uſed in a ſenſe more limited than either of theſe, is applied to ſlaughter alone, and ſignifies *a pecuniary ſatisfaction due* in ſolatium *for ſlaughter;* and in this ſenſe, in the antient juridical language of Scotland, it was called *Cro* or *Croy*, SKENE *title Cro.*

* See GROTIUS *de jure belli ac pacis, lib.* 2. *c.* 17. § 12. 13. 14.

Cro.—*R. M. l.* 4. *c.* 36. *ſqq.*—1424, *c.* 33.—1425, *c.* 51.—1426, *c.* 93. 98.—1528, *c.* 7.—1592, *c.* 157. In this title it is uſed for 'a pecuniary ſatisfaction due 'from the delinquent to one to whom a corporal injury has been done, or to the 'wife and next of kin of one who has been wrongfully ſlain.' One, who has ſuſtained a corporal injury, may be ſaid more properly to have ſuſtained patrimonial damage than one who is killed. For a dead man cannot hold an eſtate in this world, and the loſs of life is hardly eſtimable by money. Beſides, the relations of one, who is killed, acquire immediately right to ſucceed to his eſtate; he might have happened to die about the ſame time, at which he was ſlain; and violent means are entitled to be numbered among the natural as well as ordinary ones, which providence ſometimes employs to put an end to human life. But one who is left alive may be hindered by a corporal injury done him from going about his buſineſs, may be obliged to lay out much money in getting himſelf cured; and the injury done him may be followed by bad conſequences in other reſpects. Therefore the aſſithment due to one for a corporal injury may in ſome ſort be ſaid to be a *reparation* made for *damage* ſuſtained: but that, which is due to the relations of one who has been ſlain, cannot be called ſo; it is more properly a *ſolatium* given them for the misfortune which has been made to befal them. From whence it plain, I. That aſſithment is a pecuniary ſatisfaction. II. That it is due in thoſe caſes, in which one has either ſuffered a corporal injury or been wrongfully killed. III. That it is due to the perſon himſelf, to whom the atrocious corporal injury has been done. IV. That it is due to him as a *reparation* of the damage which he has ſuſtained. V. That it is due to the wife and neareſt of kin of one who has been killed. VI. That it is due to them *in ſolatium* for the wrong done them. From theſe axioms it will be eaſy to ſhew, 1) the caſes in which, 2) the perſons to whom it is due.

§ 723. It is due 1) in thoſe caſes, in which one has ſuffered a corporal injury (§ 722. *ax.* 2.). Hence Mr MACDOUAL * calls it 'A conſideration given to 'repair the damage ſuſtained by death, mutilation, or other harm done to the 'life, members, or health of the body.' Therefore it is due for blows, beatings, wounds, fractures, mutilations; in ſhort for every corporal injury which is not below the notice of the law.

A fortiori it is due 2) for ſlaughter.

§ 724. But corporal injuries may be done, ſlaughter may be committed as well without as with violence. Therefore it is not neceſſary, in order to make one liable to aſſithe another, 1) that the ill which he hath done be done by violence. The law enquires not into that matter; the delinquent is liable to make reparation for ill done by him, tho he hath done it without violence.

The minuteneſs of lawyers is frequently objected to them; but it is neceſſary. Therefore it would be wrong to omit remarking 2) that if an injury is done, or ſlaughter is committed by violence, the law does not care with what inſtrument, after what manner, at what time, or in what place it was done. All to which it attends is the atrociouſneſs of the injury itſelf, *l.* 7. § 1. *ff. ad leg. aquil.*

Beſides, we are in this title treating of the doctrine of *reparation*; therefore it muſt be remarked 3) that the law makes one liable to aſſithment, without diſtinguiſhing whether the injury be done or the ſlaughter committed *dolo* or *culpa*, with or without a malicious intention. All which it requires in order to make one liable to aſſithe, is that he, who hath done the wrong, be not altogether blameleſs. For one is in all caſes bound to repair damage done by him, even *culpa leviſſima*, § 3. *J. l.* 44. *ff. de lege aquil.*—1661, *c.* 22. becauſe it is more reaſonable, that the loſs ſhould fall on him who is culpable than on one who is not.

But 4) one, who is not in any degree culpable, cannot be bound to aſſithe one for damage ariſing from accident; for it cannot be ſaid to have been done by

* Book I. t. 10. § 11.

by him, ſince it is accidental, 1661, *c.* 22. But it is a general rule, that nobody is either culpable or anſwerable for accidents, and cannot be bound to aſſithe one for them. *Nemo caſum præſtat.*

One is bound to repair damage ariſing even from his careleſſneſs; he muſt therefore be bound 5) for injuries or deaths ariſing from his want of ſkill in that employment which he profeſſeth to know, or of ability to do that which he hath undertaken to do, *l.* 8. § 1. *l.* 9. *p.. l.* 27. § 29. *ad leg. aquil. l.* 13. § 5. *locati.*

§ 725. It would be eaſy to branch out this general doctrine into many particular examples. But it is needleſs; for the principles, which have been eſtabliſhed, may be applied with the greateſt facility to every particular caſe, which may either be ſuppoſed or happen. I ſhall therefore content myſelf with remarking a few of thoſe caſes, which the Scotch legiſlature hath thought worthy its notice. Many more may be ſeen in the title of the *Pandects ad legem aquiliam*, and in the commentaries which have been written upon it.

The firſt inſtance I ſhall bring from the fourth book of the *Regiam Majeſtatem.* A man riding on horſeback is liable for damage done by the fore-feet of his horſe, but not for that which is done by its hinder-feet. 'Tis on this principle that the law declares a rider to be bound to aſſithe a man, whom his horſe trades down with his fore-feet; and makes him liable to pay only a ſmall conſideration for hurt done by him by ſtriking back with his hinder ones. The reaſon is, that he is preſumed to be culpable in the one, but not in the other caſe. 'Quia ſtatu-'tum eſt,' ſays the law, 'quod omnis equitans anteriores pedes equi ſui a dam-'no faciendo cuſtodiat. Et illi homines, qui retro cedunt vel ſtant, antecedem-'tem equum evitare debent, ne malum ab eo recipiant retro; quia nemo, equi-'tans, retrocedentes vel retroſtantes ab equo ſuo cuſtodire poteſt,' *R. M. l.* 4. *c.* 24. §4. 5. 6. But this is no more than a preſumption; it may appear from circumſtances, that the rider either was not culpable in the firſt caſe, in which the damage is ſuppoſed to be done by the fore feet of his horſe, or was ſo in the other, in which the damage is ſuppoſed to have been done by his hinder feet; and in both caſes judgment muſt be awarded either for or againſt him, according to the truth of the fact *. On this principle one, whoſe horſe has run away with him, and who has thereby loſt the command of it, muſt be preſumed to be innocent, and cannot be bound to aſſithe thoſe whom he rides over; for the moſt cautious may happen to meet with an unruly horſe, and to loſe the command of him. But one may have known the fault of the horſe and the riſk he ran, and would, notwithſtanding, ride him: he muſt therefore be liable for what happens through his own raſhneſs and obſtinacy, 'cum affectare quiſque non debeat, in quo vel in-'telligit, vel intelligere debet, infirmitatem ſuam alii periculoſam futuram.' 'Tis to this caſe in which the rider can be accuſed of wilful raſhneſs, that the doctrine of the civil law, *l.* 8. § 1. *ff.* § 8. *J. de leg. aquil.* muſt be confined. For it would be hard to make one, whoſe horſe has run away with him, liable in all caſes to repair the damage done by it, *arg. Q. A. c.* 48. § 10. 11. 12. †.

For the ſame reaſon one who is driving a loaded horſe, cart, waggon, or carriage, is bound to repair the damage ariſing from his careleſſneſs either in packing the goods, or in loading the carriage. Thus if any thing happens to fall from the horſe or carriage, and to kill a man who could not avoid paſſing it; he muſt aſſithe the wife and neareſt of kin of the perſon ſlain. If it wounds mutilates or does other bodily hurt to the perſon who is near it, the driver muſt repair the loſs; and the principle is general, for the driver muſt make good damage of any other kind done either to the goods themſelves or to any other thing.

* It may be remarked, that this principle may be extended to every ſimilar caſe, in which any ſort of damage is done by a man riding on horſeback.

† In antient times a beaſt, which, without being provoked to do it, killed a man, eſcheated to the crown: for it was preſumed, that the owner of it could not be ignorant of its faults. It was otherwiſe in caſe it was provoked, either by the perſon to whom it did the ill, or by ſomebody different from the owner of it, *Q. A. c.* 48. § 10. 11. 12.

thing. But it muſt be remarked, that two things are neceſſary in order to make him who is driving liable to aſſithe or to repair. *Firſt;* It is neceſſary that the damage be in ſome ſort owing to his fault; he muſt be culpable; for one, who is not culpable, is not bound to make reparation. *Secondly;* He, who has been hurt, muſt not be culpable; he muſt not be liable to be accuſed of careleſſneſs; the misfortune which has befallen him muſt not be owing to his own fault. *Quod quis ex culpa ſua damnum ſentit, non intelligitur damnum ſentire, l.* 203. *ff. d. r. j. R. M. l.* 3. § 4. 5. Whether either the one or the other is culpable or not culpable, muſt be determined by conſidering the nature of the carriage, of the goods, and of the roads. If the driver has ſhewn the ſame care which others of his trade uſe to ſhew, and which uſed to prevent harm, he is not culpable, and of courſe is not liable to repair the damage, that may happen; becauſe it muſt be held to be accidental, *l.* 7. § 2. *l.* 27. § 23. 33. *l.* 52. § 2. *ff. ad leg. Aquil. l.* 13. *p. ff. locati.*

The law mentions many other caſes. But I ſhall take notice of no more than one of them.

I ſaid, that one is bound to repair damage ariſing from his careleſſneſs, his *culpa leviſſima;* but want of ſkill of the buſineſs one profeſſeth is held to be culpable; *Imperitia culpæ adnumeratur, l.* 132. *ff. d. r. j.* Therefore one ought in all caſes to be liable to repair damage done by him through ignorance of it; a principle which is applicable to mechanic and illiberal employments alone. For it is poſſible to diſcover, whether a mechanic is culpable or not; and whether the damage, that has been done, is or is not owing to his careleſſneſs. But it it otherwiſe with the liberal profeſſions. In particular it may be remarked, that the ignorance of ſurgeons, phyſicians, or midwives does not make them liable in all caſes to aſſithe thoſe, who have ſuffered bodily harm through it; for they are not liable *propter culpam;* they are liable *ex dolo* alone. The reaſon is becauſe it is impoſſible to diſcover with certainty the caſes in which they can be properly ſaid to be culpable; the human body is liable to innumerable accidents; its habits are continually changing; diſeaſes come upon it from unknown cauſes; and it is the moſt difficult thing in the world to diſcover, whether they proceed from the ignorance of the ſurgeon, the phyſician, or the midwife. The cauſe of the evil being therefore in all caſes uncertain, innocence ought to be preſumed always till an actual *intention* of doing miſchief is proved; ſo they are liable *propter dolum* alone*. Indeed it would be the hardeſt thing in the world to make them liable for any thing more, becauſe every body has a certain degree of ſkill; ſome have more, others have leſs. Therefore people ought to hold themſelves contented with the ſkill of thoſe whom, it muſt be preſumed, they have employed an account of it, and whoſe ſkill, it muſt be preſumed, they knew. Beſides, it would be dangerous to ſociety to make them liable for more; for few people would chuſe to profeſs thoſe liberal employments, if every accident, to which mankind are liable, was to be imputed to their careleſſneſs or want of ſkill.

§ 726. But it is not enough, that one has done bodily harm to another, or has killed him; the ill which he hath done, he muſt 6) have done *wrongfully*, in order to be liable to aſſithe the perſon to whom he did it; he muſt not have had a right to do it; for one who had a right to do it, is not culpable (§ 722. *ax.* 2.). And upon this point every thing which has been ſaid, every inſtance given in the foregoing title, may be repeated on this occaſion; for the principles and the concluſions are the ſame in both caſes.

Thus a magiſtrate or officer of the law is not bound to aſſithe one, to whom he hath been neceſſitated either to do or to cauſe to be done ill, when he was in the exerciſe

* It was otherwiſe by the civil law; it made ſurgeons, phyſicians and midwives liable not only *ex dolo*, but alſo *propter culpam*, § 7. *J. l.* § 6. 8. *l.* 8. *l.* 9. *p.* § 1. *ff ad leg. Aquil. l.* 9. § 5 *ff locati.* And it would ſurely have done right in ſo doing, provided it were poſſible to diſcover with certainty whether one was or was not culpable. But the nature of the thing admitting not of abſolute certainty, they muſt be liable *propter dolum ſolum.* And this ſeems to be agreeable to the doctrine of *l.* 6. § 7. *ff. de off. præj. prætextu humanæ fragilitatis* delictum decipientis *in periculo homines innoxium eſſe non debet.*

ercise of his office, or putting the laws in execution (§ 717), *juris enim executio nod habet injuriam.* For inſtance, neither an executioner who executes the ſentence the law has pronounced upon a criminal, nor the judge who pronounces it, is liable to aſſithe the relations of the guilty perſon. In the ſame manner an officer, who is employed in executing any legal order, is not, upon being reſiſted in the execution of it, and being thereby laid under the neceſſity of uſing force, liable to aſſithe people for ill which he may have been obliged to do them in the exerciſe of his office; provided he keeps within the limits of his duty: for one, who does nothing but his duty, is not culpable; becauſe he has a right to do that which he has done. A remarkable inſtance of this may be ſeen in 1*mo* G. I. *c.* 4. But one, who does more than he was entitled to do, becomes culpable, muſt therefore be anſwerable for his conduct, and muſt be liable to all the penal as well as pecuniary conſequences of its illegality, 1736, *Captain Porteous*, *l.* 13. § 1. *l.* 32. 33. *ff. de inj. l.* 29. § 7. *ff. ad leg. Aquil. l.* 13. *ff. de per. et com. rei vend. l.* 3. § 1. *ff. quod met. cauſa.*

For the ſame reaſon a maſter who corrects his ſervants, his apprentices, or his ſcholars, is not bound to aſſithe them for every chaſtiſement which he gives them; provided he exceeds not the bounds the law preſcribes to his ſeverity: for he has a right to puniſh them moderately for their faults. But he may exceed theſe bounds, and may become cruel and ſevere; he muſt therefore be bound in that caſe to aſſithe them for the ill he does them, *quia levis duntaxat caſtigatio conceſſa eſt docenti*, *l.* 5. § 3. *l.* 6. *l.* 7. *p. ff. ad leg. Aquil.*

A fortiori, one, who is attacked, and is obliged to defend himſelf, is not culpable either for wounding or for killing another, provided he does not exceed the *moderamen inculpatæ tutelæ. Nam jure hoc evenit, ut quod quiſque ob tutelam corporis ſui fecerit, jure feciſſe exiſtimetur*, *l.* 3. *ff. de juſt. et jur.* In order to entitle one to be ſaid to have uſed the *moderamen inculpatæ tutelæ*, it is neceſſary, *firſt*, that he be *attacked;* he muſt not be the aggreſſor, becauſe one, who is not attacked, cannot be ſaid to defend himſelf, or to commit, as the law very properly expreſſes it, 'homicide in lawful *defence*,' 1661, *c.* 22. *Secondly*, He muſt be attacked *unjuſtly;* for one, who is juſtly attacked, has no cauſe to complain, ſince he who attacked him had a right to do it. *Thirdly*, It is neceſſary, that an immediate danger, which cannot be averted *otherwiſe* than by force, threaten him; for if the danger may be averted by calling the law to his aid and by waiting its aſſiſtance, he ought to call for it. 'Tis in thoſe caſes alone in which the aſſiſtance of the law would come too late to avert the danger, that it is lawful for one to defend himſelf by force. *Fourthly*, It is neceſſary that the defence be proportionable to the danger; it muſt not exceed it. On this matter lawyers conſider three things which it may be neceſſary to defend, life, chaſtity, and property; and it is admitted by them all to be lawful for one, whoſe life or whoſe chaſtity is going to be violated, to defend either of them, even by killing the perſon who threatens them. For theſe being once loſt cannot be recovered; and one, who murders or raviſhes another, is liable to be puniſhed by death. But it muſt depend on circumſtances, whether one, who kills another in order to defend his property, and to hinder it from being taken from him, is or is not culpable. For one is not bound inſtantly to cede the poſſeſſion of his goods to another who is going to deprive him of them; he is entitled to keep it; and to defend it by force, if the invader is ſo hardy as to uſe it. Every thing therefore, which is *neceſſary* to maintain him in poſſeſſion, it is lawful for him to do; and as long as the aggreſſor ceaſes not to abandon his purpoſe, it is lawful for the owner to repel him by force. But farther than neceſſity requires, he is not allowed to go. Therefore as ſoon as he has vanquiſhed his foe, and has ſecured to himſelf the poſſeſſion of his goods, he muſt deſiſt; for all, which he does afterwards is unneceſſary, and is done in revenge. For the ſame reaſon he is not entitled to uſe more deſperate methods, if gentler ones will ſerve his purpoſe. But the invader may be obſtinate; his force may be great; and he may diſcover that he comes

with the moſt deſperate reſolutions: in theſe caſes it is ſtill lawful to repel force by force; the affair may become continually more and more ſerious; and ſlaughter may be excuſable in the defence of one's property. *Fifthly*, The defence muſt be made *incontinently*, *i. e.*. at the ſame time at which the attack is made, or at leaſt ſo ſoon after it, that the defence may appear to be nothing but a continuation of the attack, and the attack and the defence may be one continued complex act. For it is eſſential to the idea of defence, that it be made incontinently; an action done *ex intervallo*, cannot be ſaid to have been done in defence; it is done in revenge. But revenge ought to be left to be taken by the law, *ſ. ſt. R.* I. *c.* 15. § 1. 3. One therefore, who does not exceed the *moderamen inculpatæ tutelæ*, is not culpable, and is not liable to aſſithment, even tho he ſhould kill, much leſs if he only wounds the perſon who attacks him. Indeed, if he exceeds the bounds of moderation, he muſt be liable, for he is culpable in ſo far as he exceeds them.

But one is not bound to wait, till he is actually invaded; he may be threatened with a danger which may prove fatal to him, and has a right to prevent the evil, with which he is threatened. Therefore one in this condition, who is obliged in his own defence to do ill to him who is about to attack him, is not culpable. Conſequently he is not liable to aſſithe, or to repair any damage he may happen to do; for he did no more than he had a right to do. Indeed if he does more, he becomes culpable, and is therefore liable to aſſithment.

Hence one, who kills a thief or a robber that has invaded his houſe or himſelf, is not bound to aſſithe the relations of the delinquent whom he has killed; provided he has not done more than he was *neceſſitated*, and had therefore a right to do for his own ſafety. On this account one, who kills a thief in the night, is more excuſable than one who does it in the day-time, becauſe the night is more than the day favourable to the execution of crimes and to the eſcape of delinquents. Aſſiſtance cannot be ſo eaſily had; people cannot ſee the danger, that threatens them, ſo well; criminals are not ſo eaſily frightened; they are more audacious in the night than they are in the day-time; for this reaſon the law *preſumes* innocence *more eaſily*, if a thief, a robber, or depredator is ſlain in the night, than when he is ſlain in the day-time. This is the doctrine of the civil law, *l.* 4. § 1. *ff. ad leg. aquil. l.* 54. § 2. *ff. de furt. l.* 9. *ff. ad leg. Cor. de ſic.* AUL. GELL. *l.* 11. *c. ult.* of the Moſaical law, EXOD. ch. xxii. *v.* 2. 3. of the canon law, *c.* 3. *decretal. de homicidio*, and of both the antient and the modern law of Scotland, *R. M. l.* 4. *c.* 23. *ſ. ſt. R.* I. *c.* 30.—1594, *c.* 227.—1661. *c.* 22. for all theſe texts muſt be explained after this manner, in order to make them agree with the principles of common ſenſe and of equity: they can never mean that one, who is in danger, either is not entitled to defend himſelf, or is entitled to do in his defence more than is proportionable to the danger which threatens him, *l.* 9. *ff. ad leg. Cor. de ſic.*

But it muſt be remarked that it is neceſſary, in order to entitle one who has put another to death to be held to be *altogether* blameleſs, that he be threatened with an actual and an immediate *danger of loſing his life.* 'Tis not enough that he can ſay, he was *provoked* to do what he did. 'Tis true ſome ſorts of provocation will juſtify one for doing very atrocious things (§ 717.). But no degree of it can juſtify murder, or altogether exculpate a murderer. It may indeed render his crime leſs atrocious, and may free him from the *pœna ordinaria*, which the law would have inflicted on one, who had with a felonious intention done the ſame action which he has done; but he will ſtill be liable to be puniſhed by an arbitrary one *. For man ought to reſtrain the fury of his paſſions; and is culpable, if he lets them get the better of him. Hence one, who catches his wife in the very act of committing adultery with another man, is not entitled to kill either her

* In antient times a privilege is ſaid to have been granted by a law of MALCOLM CANMORE, to all belonging to CLAN MACDUFF, that every one who was related within the ninth degree to the chieftain of the clan, ſhould pay no more than 24 marks for the unpremeditated ſlaughter of a nobleman, and 12 for that of any other perſon, *ſt. W. c.* 27. § 2.—*Crawford's* peerage, title *Macduff Earl of Fife.*

her or the adulterer. He is therefore, if he kills either the one or the other, guilty of homicide, and muſt of courſe aſſithe the relations of the perſon whom he has killed. 'Tis true he is not guilty of *homicidium doloſum;* he got high provocation, by which his guilt is extenuated; and his crime amounts to no more than *homicidium culpoſum.* He is not therefore liable to the ordinary puniſhment of murder: but he is culpable and muſt be liable to a ſlight arbitrary one; for the law of Scotland allows not the *calor juſtæ iracundiæ* to be an abſolute excuſe for murder, and diſtinguiſhes upon that account between *homicidium doloſum* and *homicidium culpoſum.* Every man who is guilty of *homicidium doloſum*, is liable *lege talionis* to ſuffer the pain of death; becauſe he committed the crime with a deliberate intention and purpoſe. But every one, who puts another to death, is not guilty of *homicidium doloſum;* circumſtances may extenuate his guilt; and he may be no more than *culpable.* He cannot therefore be ſubjected to the pain of death; but he is not altogether free from blame, and is therefore liable to an arbitrary puniſhment, *l.* 38. § 8. *ff. ad leg. Jul. de adult. l.* 1. § *ult. ff. ad leg. Cornel. de ſicar. arg. ſt. D.* II. *c.* 50.—*ſt. R.* II. *c.* 3. 4. 6. 9.—1425, *c.* 51.—1426, *c.* 90. 96.—1469, *c.* 35.—1494, *c.* 63. *. If it is not lawful to the huſband, much leſs can it be lawful to the father of the adultereſs to put either her or her corruptor to death †: for the injury done by adultery is done to the huſband more immediately than to the father; the law will therefore more eaſily excuſe the paſſion of the former than of the latter; becauſe he is more ſenſibly affected by the wrong. But one, whoſe honour is attacked in this manner, receives a high injury; and the provocation given him, though it will not excuſe the committing of murder, will however excuſe him for giving the man who hath done him the wrong a ſound drubbing, or for uſing him perhaps as they do in Sweden the prieſts of the Romiſh religion.

§ 727. Aſſithment for mutilations, wounds, or bodily hurts, which are not followed by death, is due to the perſon himſelf to whom the wrong was done; becauſe it was he to whom the injury was done; he received the damage; reparation therefore muſt be made to him. But that, which muſt be made for ſlaughter, is due to the widow and the next of kin of the perſon ſlain; for theſe are moſt immediately afflicted by his death, and need ſomething to comfort them for the loſs they have ſuſtained (§ 722. *ax.* 3. 5.), *ſt. W. c.* 5. § 4. *c.* 6. § 3.—*ſt. R.* II. *c.* 11.—1425, *c.* 51. One third of it goes to the relict, and two thirds are divided among *all* his children or next of kin. *Ha.* 18th *July* 1605, *Guild.*

In the firſt caſe it is in truth a ſort of *reparation* of the damage which the perſon injured has ſuſtained. Therefore it is recovered by an action preciſely like to that which has been explained in the preceding title: for the foundation of it is an injury. Of courſe it muſt lie both to and againſt the ſame perſons, muſt ceaſe in the ſame caſes, and may be brought before the ſame courts with the common action *injuriarum.* Beſides, it has no connection with the criminal action which lies againſt the delinquent; it lies whether he has or has not been proſecuted *ad vindictam publicam*, whether he has been puniſhed or not. For the right, which the private party has to get his damage repaired, is totally different from that of the fiſcal to get the delinquent puniſhed, and is not in the leaſt affected by the puniſhment inflicted upon him. But aſſithment made for ſlaughter is not properly *reparation of damage*; it is rather a *ſolatium* given to comfort thoſe who are moſt nearly related to the perſon ſlain, and muſt be ſuppoſed to be moſt afflicted by his death (§ 722.). 'Tis therefore their connection with him which entitles them to demand it; and their right to it depends on the relation they have to him. The aſſithment, which they are entitled to demand, was never

* It is remarkable, that ſuch as committed crimes deliberately, after premeditation and forethought, were not in antient times entitled to the privilege of girth, or of protecting themſelves from the vengeance of law by flying for refuge to a ſanctuary, 1535, *c.* 23.—1661, *c.* 22.

† It was otherwiſe by the Roman law. The reaſon was the extent of the *patria poteſtas.*

ver a part of his eſtate; for he died before it became due. Of courſe it does not go to them *jure hereditario*, by inheritance or by ſucceſſion, but *jure ſanguinis*; and they have a title to ſue for it, without being either ſerved heirs or confirmed executors to him, and having acquired his eſtate. Their right to it depends not on his inheritance; and they have it, tho they have renounced his ſucceſſion. The relation, in which they ſtood to him, is their title. By conſequence they are entitled to it, whether he hath died inſolvent or *in facultatibus*, for it is not attachable by his creditors; whether he died *teſtate* or *inteſtate*; whether he hath or hath not diſinherited them. For he could not annihilate the connection they had with him, and could not diſpoſe of what did not belong to him. Beſides, being not a part of his eſtate, the receipt of it does not make them liable to his debts, or, as the law of Scotland expreſſeth it, infer a paſſive title againſt them. Beſides, being in this caſe due *in ſolatium* alone, it cannot be demandable when the murderer actually ſuffers the puniſhment of the law: for his undergoing of puniſhment muſt be *ſolatium* enough to them. But it is the *actual* puniſhment of the delinquent, which alone deprives them of their right to it; for they are held to be fully *ſolaced* by it alone. Conviction or condemnation is not ſufficient; and aſſithment is due by one who has obtained a pardon for his crime, either before or after condemnation, *I. juſt.* § 15.—*ſt. D.* II. *c.* 44.—1424, *c.* 46.—1457, *c.* 74.—1483. *c.* 94.—1528, *c.* 7.—1584, *c.* 136.—1593, *c.* 173. 178.

In antient times the legiſlature determined with preciſion the reparation due for every injury; and cows being in thoſe days more common in Scotland than money, almoſt every thing was rated by them. For the effuſion of the blood of an earl nine cows were due; of the ſon of an earl, or of a thane ſix; of the ſon of a thane three; of the grandſon of a thane two and two thirds. For a blow without drawing blood ten pence; for a foot a mark; for a tooth twelve pence; for a hurt an inch long twelve pence; for a blow below the ear, or one with a ſtaff, ſixteen pence. For the life of an earl ſeven ſcore of cows, *&c. R. M. l.* 4. *c.* 36. *ſqq.* But the quantity of it is not now a fixed ſum in every caſe; it varies with the condition of parties or the circumſtances of the offence. 'Tis therefore left to the judge to determine it, 1424, *c.* 46.

The manner in which it is made effectual for ſlaughter, for that by which it is made effectual in other caſes has been explained, is different in different caſes. In thoſe in which the criminal obtains a pardon for his crime, the court, before which he pleads it, ought to cauſe him to be impriſoned till he find ſurety to pay the ſum which ſhall be fixed for the aſſithment due to the relations of the perſon ſlain, *Q. A. c.* 69.—1426, *c.* 95.—1457, *c.* 74.—1593, *c.* 178. For the pardon cannot take full effect, and he is not entitled to his liberty till he has found it. The moveable eſtate of every one, condemned for a capital crime, eſcheats to the crown; the Court of Exchequer has the care of the revenue; and beſides, it muſt grant warrant for the pardon to paſs the ſeals. Therefore it is the court by which the aſſithment is uſually modified, 1584, *c.* 136.—1593, *c.* 173. But the criminal may not have been proſecuted; his crime may be connived at; and he may not either get or ſtand in need of a pardon. In theſe caſes thoſe, who are entitled to be aſſithed for the ſlaughter, muſt ſurely be entitled to bring an ordinary action either before the Court of Seſſion, or before the ſheriff of the ſhire, or before the magiſtrates of the borough, in order to get the aſſithment modified, and the criminal decreed to pay it, 1426, *c.* 95.—1592, *c.* 157.—*arg. Sp. ſummons and libel.*

Money decreed to be paid one by way of aſſithment for ſlaughter is due *ex delicto*: therefore the delinquent is not entitled to the benefit of a *ceſſio bonorum*, in caſe he has been committed to priſon, till he ſhall find ſurety to pay it, *Fa.* II. 230. For the privilege of making a *ceſſio bonorum* is indulged to thoſe alone whoſe affairs have innocently and by misfortunes fallen into diſorder.

TITLE

TITLE IV.

Of Damage.

§ 728. EVERY delinquent is brought by his delinquency under an obligation to make reparation for the wrong which he hath done; and in the foregoing titles we have treated of that which one is bound to make, becauſe he has injured either the character or the perſon of another. But damage may be done to one's eſtate, as well as injuries to his perſon or character; and every one who doth a thing, which it is wrong in him to do, and by which the eſtate of another is diminiſhed, becomes bound *ex delicto* to repair the damage done by him, whether he is himſelf enriched by his delinquency or no. For he had no right to do it; he was blameable for doing it; 'tis therefore much more reaſonable that he, who hath done the damage by doing ſomething which it was wrong in him to do, ſhould bear the loſs, than he to whom it is done. But it muſt fall upon him to whoſe eſtate the damage is done, unleſs it is repaired by him who hath done it. We proceed therefore now to conſider that reparation which a delinquent is bound to make for having done damage to the *eſtate* of another.

The word *Damage* is uſed in ſeveral different ſenſes. When taken in its moſt extenſive one, it ſignifies *any ſort of hurt done one*, whether it is or is not attended with a diminution of his eſtate. Thus a verbal injury does not directly take one farthing out of the pocket of him to whom it is done; yet he is ſaid to ſuſtain *damage*, and to be entitled to ſue an action of *damages* for it (§ 708. 719.). Sometimes it is taken in a more limited ſenſe, and is uſed to ſignify *patrimonial loſs*, that is, every loſs by which one's eſtate is diminiſhed, from whatever cauſe the diminution proceeds, whether from accident or from deſign; whether on occaſion of a contract or of a delinquency; whether he, who does it, is or is not enriched by it. But it is frequently uſed in a ſenſe more limited than any of theſe, for 'a diminution of one's eſtate, cauſed by wrong done by another;' whether he, who does it, is or is not enriched by it. Thus one, who has ſtolen a horſe, is ſaid to have done damage to him from whom he ſtole it. But it is generally in this title uſed in a ſenſe more limited than any of the former, and ſignifies 'a diminution of one's eſtate, cauſed by ſomething which it was wrong in him, 'who has done it, to do, and which does not make him richer than he was be-'fore he did it.' For the delinquency of one, who is enriched by it, is either theft or robbery, or ſome other which either has a name proper to itſelf, or is comprehended under a general one different from damage. In the civil law it is called *Damnum injuria datum*.

From what has been ſaid it is plain, that, in order to bring one under an obligation to repair damage, or to entitle one to get reparation of it, it is neceſſary I. That one's eſtate be actually diminiſhed; II. that it be diminiſhed by ſome perſon; III. that it be wrong in him, who has diminiſhed it, to do that by which it is diminiſhed. From theſe axioms it will be eaſy to ſhew 1) to what things, 2) to whom, 3) by whom, 4) in what caſes it may be done; 5) what are the obligations of him who does it, and the rights of him to whom it is done.

§ 729. Every man's eſtate conſiſts either of things corporeal, or of things incorporeal, or of things of both ſorts. 'Tis to things of the firſt kind, to corporeal things alone, that the word *Damage* ſeems to be both applied and confined. For they are alone capable of being deteriorated: therefore damage can be done to them alone; it cannot be done to things that are incorporeal. No doubt, one may loſe his right; but loſs of that ſort does not properly fall under the denomination of damage.

But damage may be done to corporeal things of all ſorts; to moveables as well as to immoveables (§ 143.): for things of the one as well as thoſe of the other ſort may be damaged.

§ 730. The eſtate of every body, who has one, may be diminiſhed; therefore damage may be done to every one who has an eſtate.

§ 731. Damage may be done by every one who is capable of doing miſchief to another, and of diminiſhing his eſtate.

But he who does it muſt, in order to be brought under the obligation to repair it, know, that it is wrong to do it (§ 728. *ax.* 3.); therefore 1) not only ideots, madmen, and perſons who are by nature deprived of the uſe of reaſon, but alſo 2) children who are incapable of diſtinguiſhing right from wrong, are incapable of doing it, *l.* 5. § 2. *ff. ad leg. Aquil.* (§ 702.). Damage done by one of theſe is regarded in the ſame light, as if it had been done by a brute, or had been owing to accident. But damage occaſioned by accident cannot be ſaid to be done by any body. Conſequently no particular perſon is liable to repair it, ſince no individual can be ſaid to be the cauſe of it. Beſides, in order to bring one under an obligation to repair damage, it is neceſſary that it be wrong in him, who hath done it, to do it. But one cannot be ſaid to have done wrong, who can hardly be ſaid to be the cauſe of the harm that is done.

§ 732. One is liable to repair damage done by him in all caſes, in which it was *wrong* for him to do it. But it is wrong for one to do any thing, which he is culpable for having done. Hence one is liable to repair not only the damage which he has done out of a malicious purpoſe, on deſign, or *dolo malo*, but alſo that which is occaſioned by his careleſſneſs, or neglect of his duty; *culpa etiam leviſſima*, *l.* 44. *p. ff. ad leg. Aquil.*—10th *March* 1757, *James Fraſer v. Mrs Campbell.*

One being bound to repair damage occaſioned even by his *culpa leviſſima*, he muſt therefore be bound to repair that which he does either out of ignorance of his trade, buſineſs, or employment, or out of inability to do that which he hath undertaken to do. 'Imperitia culpæ adnumeratur, *l.* 132. *ff. de r. j.* 'Nec 'videtur iniquum, ſi infirmitas culpæ adnumeretur; cum affectare quiſque non 'debeat, in quo vel intelligit, vel intelligere debet, infirmitatem ſuam alii periculoſam futuram,' *l.* 8. § 1. *ff. ad leg. Aquil. l.* 9. § 5. *l.* 13. § 5. *ff. locati.*—1477, *c.* 78.

But one, who is not culpable, is not liable to repair any damage, which he may have done. Hence one, who *jure ſuo utitur*, or does no more than he has a right to do, is not bound to repair the loſs he hath cauſed another to ſuffer. *Nemo damnum facit, niſi qui id fecit quod facere jus non habet*, *l.* 151. *ff. d. r. j.*—*ſt. W. c.* 12. (§ 701.).

Much leſs can one be liable to repair accidental loſſes: for theſe cannot be ſaid to proceed from any individual *.

A fortiori, one is not entitled to get reparation of loſſes, ſuſtained by him through his own fault, *l.* 203. *ff. d. r. j.* † *arg. Q. A. c.* 48. § 11.

§ 733. Every one, who does damage which he is culpable for doing, is bound, and is liable to be ſued, in order to be decreed and to be compelled to repair it ‡. The action founded on this obligation is a patrimonial one; it is brought in order to recover reparation; therefore it lies againſt the heirs of the original delinquent

* One would be apt to think, that by the antient law of Scotland accidental loſſes were not borne by the owner of the things which met with them, but divided between him and that perſon to whom the accident was owing, *p. ſt. R.* l. *c.* 33. §4. This may ſeem at firſt ſight to be equitable, but it is not ſo in truth; for an accidental loſs is not owing to any body; no individual can be ſaid to be the cauſe of it; therefore no one can be blamed for it; and it would be iniquitous to make any part of it fall upon any other than the owner of the thing, which has met with it.

† A remarkable inſtance of this occurs in *R. M. l.* 3. *c.* 8. § 4. 5. But the law would not at preſent bind the debtor; it would only preſume againſt him, and put upon him the *onus probandi* that he had loſt the cuſtody of the ſeal, that another had got poſſeſſion of it, and that this one had ſealed the writ with it, *ſt. W. c.* 12.—1540, *c.* 117.

‡ The action which lay againſt him proceeded, in antient times, on a brief called *Breve de protectione et pace regis infricta*, in caſe the damage was done and was accompanied with a breach of the peace, *Q. A. c.* 54.

delinquent as well as againſt himſelf. For the ſame reaſon it lies as well to the heirs of him to whom the damage was originally done, as to himſelf; for the right of ſuing it is *in bonis*, a part of the eſtate of their predeceſſor, and is tranſmitted to them with the reſt of the inheritance, *l.* 23. § 8. *ff. ad leg. Aquil.* Beſides, the eſtate is made by the delinquency to deſcend to them leſs valuable than it would have been, if damage had not been done it. 'Tis true one, who has an action to recover a thing, may in ſome ſort be ſaid to have the thing itſelf, *l.* 15. *ff. d. r. j.* At the ſame time it muſt be confeſſed that one, who is laid under the neceſſity of commencing a law-ſuit, in order to recover it, has not ſo ſure a hold as if he had the real poſſeſſion of it. *Minus eſt actionem habere, quam rem, l.* 204. *ff. d. r. j.* The reaſon is plain; one, who has no more than a perſonal action to recover a thing, has not *præſentis corporis facultatem*, and is, beſides, expoſed to the hazard of the inſolvency of the perſon whom he has bound to him, and on whoſe ſecurity he muſt reſt. *Plus cautionis in re eſt, quam in perſona, l.* 25. *ff. d. r. j.*

But in ſome caſes one is bound not only to repair the damage he has done, but alſo to undergo a puniſhment ſuitable to his delinquency. This happens in all caſes, in which either the malice of the delinquent, or the hurt done to the public, or the offence committed againſt the law is great; for damage may be done not only *dolo*, but alſo *culpa lata, levi et leviſſima*. Some caſes therefore the law has taken under its eye, and in them hath defined the puniſhments of the delinquents; in others it hath left them to be determined by the judge according to circumſtances.

The foregoing principles make the ſubſtance of the general doctrine concerning damage done wrongfully by one to another, and the reparation of it. In order to illuſtrate it, lawyers have branched it out into an innumerable multitude of particular examples, and have given deciſions of each of theſe, derived from ſome one of the foregoing principles. This ſeems to be a very ſuperfluous as well as a needleſs buſineſs. No doubt there are ſome loſſes, which happen more frequently than others in the ordinary courſe of human affairs: but damage may be done to one's eſtate in an almoſt infinite number of different ways; for the variety of nature and of contingencies is almoſt infinite. Were one therefore to go into a detail of all the particular examples, which have either happened in real life, or been imagined by lawyers, that variety would not be exhauſted. Events new and ſurprizing would be continually happening, to ſuggeſt the fruitleſſneſs and the vanity of ſuch enumerations. I ſhall not therefore pretend to do more than give a few of thoſe examples, which ſeem to be the moſt notable.

§ 734. I. One, who ſows the land of another with the ſeed of any ſort of noxious weed, does ſignal damage to it, eſpecially if it cannot be eaſily killed, deſtroyed, or eradicated. For it fouls the ground, chokes the good ſeed, takes its nouriſhment from it, and hinders it from growing. Therefore he muſt at leaſt be bound to repair the damage he has done, *l.* 27. § 14. *ff. ad leg. Aquil.* Indeed this is a ſpecies of wickedneſs hardly known either to the people or to the letter of the law of this country. But it could not proceed from any but the moſt abandoned heart, and would therefore deſerve to be puniſhed in the moſt ſevere manner *. A tenant, who ſhould be ſo malicious as, out of ill-will to his landlord, to ſow his farm with ſuch ſeed, would fall under the deſcription of this crime; and would be bound not only to repair the damage he did to the land, but to undergo a puniſhment adequate to the extraordinary malice of his heart. By the antient law of Scotland it was puniſhable as treaſon, *ſt. A.* II. *c.* 18. and might, no doubt, at preſent be in ſome caſes puniſhed capitally.

§ 735. II. Hunters are uſually fond of their game; and mind not the damage they do to the fields through which they are obliged to purſue it. The law hath therefore, in order to put them on their guard againſt their own keenneſs, and to protect

* See MAT. *c.* XIII.

protect others againſt the conſequences of it, enacted 1) that no man, whether he is or is not entitled by law to hunt, ſhall either walk or ride through ſown land belonging to another, from the time at which it is ſown and harrowed till the corn is cut; or range through the woods, parks, hainings, or incloſures of others, without the leave of the owners*: and 2) that ſuch, as do otherwiſe, ſhall be liable not only to repair the damage done by them, but alſo to be fined in ten pounds for the firſt, to pay twenty for the ſecond, and to have all their moveables confiſcated for the third fault, 1555, *c.* 51.—1685, *c.* 20.—1707, *c.* 13.

§ 736. III. One who either walks or rides through fields, that are plowed, ſown and harrowed, muſt as well as one who either walks or rides through fields covered with growing corn, be bound to repair the damage he does; and muſt be liable to be puniſhed either by a pecuniary or by a corporal puniſhment, proportionable to his offence, 1555, *c.* 51.

IV. *A fortiori* one, who wilfully deſtroys *and* cuts growing corn, muſt be liable to repair the damage he does, *l.* 27. § 25. 26. 27. *ff. ad leg. Aquil.* Indeed this is a crime ſo hurtful to ſociety, that the law hath taken particular notice of it, and hath ordained thoſe guilty of it to be puniſhed by death, 1587, *c.* 83.

V. Much more criminal are thoſe who wilfully burn it, no matter whether it is growing in the fields, lying cut on the ground, gathered into ſheaves, or brought into the barn-yard. Therefore, beſides being bound to repair the damage to him who ſuſtains it, *ſ. ſt. R.* I. *c.* 29. they are alſo liable to be puniſhed by death, 7*mo* AN. *c.* 20. Indeed by the antient law of Scotland they were held to be guilty of treaſon, and were therefore puniſhable as traitors, 1528, *c.* 8.—1540, *c.* 118.—1567, *c.* 33.—*l.* 9. *ff. de incend. ruin. et naufrag.*

§ 737. VI. This country was in antient times ſo naked and ſo open, that the legiſlature thought it neceſſary, by ſpecial ſtatutes, 1457, *c.* 80.—1503, *c.* 74.—1535, *c.* 10.—1671, *c.* 41. to order trees to be planted, hedges to be raiſed, and incloſures to be made; and was obliged to take them under its protection, in order to hinder them from being deſtroyed. Indeed all its care was neceſſary; for it had to defend them againſt the prejudices of a people, rude, barbarous, and ignorant, that was accuſtomed to nothing but arms, was ſtrongly attached to its own manners, regarded its antient cuſtoms as ſacred, and was averſe from nothing ſo much as alterations of theſe.

For this reaſon it was enacted, that ſuch as maliciouſly cut, bark, break, ſpoil, or deſtroy growing trees, green wood, hedges, ditches, dikes, fences, gates, or incloſures, ſhall not only repair the damage done by them, but alſo undergo a puniſhment adequate to their offence. The puniſhment was determined by various ſtatutes. The crime ſeems to be puniſhable at preſent according to circumſtances; ſometimes by a pecuniary, ſometimes by a corporal, ſeldom, if ever, by a capital puniſhment, 1424, *c.* 33. 34.—1503, *c.* 71.—1535, *c.* 10.—1555, *c.* 58.—1567, *c.* 30.—1579, *c.* 84.—1587, *c.* 83.—1607, *c.* 3.—1617, *c.* 8. § 9.—1661, *c.* 38. 41.—1685, *c.* 39.—1698, *c.* 16.—1*mo* G. I. *c.* 18.—6*to* G. I. *c.* 15. †.

And in order to make people more keen to preſerve them, it is ſpecially enacted by 1*mo* G. I. *c.* 18. that the owner of the trees, woods, hedges, which have been damaged, ſhall be entitled to recover his damages, with coſts, from the inhabitants of the pariſh, village, or hamlet, within which the wood is ſituated and

* I ſay, whether he is or is not entitled to hunt. For one whom the law entitles to hunt, has, no doubt, a right to hunt through every field that is not either incloſed, or laid out in kept graſs or ſomething which may be ſpoiled; without the leave either of the owner, or of the tenant of the ground; neither the owner nor the tenant has a right to hinder him from hunting, provided he do it 1) *legitimo loco*, 2) *legitimo tempore*, 3) *legitimo modo*. For there are certain ſeaſons, during which it is unlawful to hunt; and no man is entitled either to ſhoot hares or *other terreſtrial game* at any time, or on any grounds; or to hunt on the grounds of another with ſetting dogs and nets, in order to kill fowls with the latter, without the leave of the owner, 1707, *c.* 13.

† The act 1685, *c.* 39. declares one who either has or uſes the timber of any tree, that has been cut, broken, or pulled up, to be liable to the penalty it appoints for thoſe who tranſgreſs it; unleſs he can produce the perſon from whom he got it: for it preſumes that he would be able to produce him, if he was himſelf really innocent. This preſumption is founded on common ſenſe, and would therefore take place at this day; eſpecially as this act is not repealed by 1*mo* G. I. *c.* 18.

and the damage done, in caſe the perſon who did the damage ſhall not, within ſix months from the time at which he committed the offence, be convicted of having committed it at the inſtance of the pariſh, village, or hamlet; that is, of any one of the inhabitants who ſhall proſecute the offender, and cauſe him to be convicted. For leave is given by the act not only to the owner of the trees, but alſo to every inhabitant of the pariſh, village, or hamlet who pleaſes, to exhibit a complaint againſt the offender to any two Juſtices of the peace* of the county to which the village hamlet or pariſh belongs, to proſecute him before them, and to bring him to condemnation. If therefore the pariſh neglects to proſecute him for all this long time, the law preſumes, *præſumptione juris et de jure*, that all and every one of the inhabitants of it are acceſſary to the offence, ſince they have connived at it; for it is impoſſible to believe, that they did not hear of it during this time. They are liable, each of them, *in ſolidum* to the whole damages and coſts; for every one of them has power to proſecute the offender. No doubt, the inhabitants of a village are alone liable for damage done to trees ſituated in it; thoſe of the hamlet, for damage done to ſuch as are planted in it; and thoſe of the pariſh for that done to wood ſituated in a place, which cannot be ſaid to be either a hamlet or a village. But all and every one of them are liable to him who ſuſtains the damage; therefore thoſe, who are ſingled out among them, and ſued for his damages by the owner of the trees, are entitled to be reimburſed by all the reſt who are equally liable with them, *D.* II. 87. 17th *Nov.* 1719, *Naſmyth.*

I ſay, the offence is puniſhable according to circumſtances, ſometimes by a pecuniary, ſometimes by a corporal, ſeldom, if ever, by a capital puniſhment. No doubt, poſterior laws derogate from thoſe which were prior to them (§ 79.), *l. ult. ff. de conſt. princip.* and in all caſes to which a poſterior ſtatute can be applied, its ſanction muſt take place. Hence one, whoſe offence falls under the act *1mo G.* I. *c.* 18. is liable to be condemned to ſuffer the puniſhment appointed by it; provided he is of a rank ſo mean, as makes it lawful to inflict that puniſhment upon him. Therefore, if there is a houſe of correction within the juriſdiction of the judge before whom he is ſued, he muſt be committed to it, be kept in it to hard labour for three months, and be publicly whipped once every month during theſe three, either in the borough within which the offence was committed; or, if it was not committed in a borough, in the market-town within which the houſe of correction ſtands, or if the houſe of correction does not ſtand in a market-town, in the next one of the county within which it ſtands, on the market-day between the hours of eleven and two. But there may not be a houſe of correction within the juriſdiction of the judge; in that caſe he muſt order the delinquent to be committed to priſon for four months, and to be publicly whipped once every month during theſe four. Beſides, it is enacted that, before he is diſcharged, he ſhall find bail for his good behaviour for two years. But the law diſtinguiſhes the ranks of men, ſutes the puniſhments it inflicts on offenders to theſe, and inflicts not ignominious ones on perſons of condition. 'Tis plain therefore, that the ſanction of this act was intended againſt low people alone; it was not intended againſt people of condition: for it could not ever mean, that a gentleman ſhould be condemned either to be kept to hard labour or to be whipped. If therefore the offender is a perſon of condition, his puniſhment muſt be determined by the judge according to circumſtances. In moſt, if not in all caſes it ought to be a pecuniary one; but it can ſeldom, if ever, be capital; for the rigour and the ſeverity of the antient law of Scotland is contrary to the humanity and to the civility of modern times. In many caſes, in which the fierceneſs of our anceſtors breathed nothing but cruelty and death, the law hath kept pace with the mild ſpirit of the people, and hath aſſumed a ſofter air. 'Tis true the antient laws are not expreſsly repealed, and caſes may be ſuppoſed in which it would be proper to revive their ſeve-

* This does not exclude the ſheriff or other judges competent.

rity; they may however be held to be abrogated in ſome ſort by the taciturnity of the people and of the Judges of the law.

VII. But lands are uſually poſſeſſed by others than their owners: therefore the law hath, in order to make tenants careful to preſerve the trees planted on their farms, enacted 1) that they ſhall preſerve and ſecure all growing wood and plantations, which are upon the grounds poſſeſſed by them, from being cut, broken, barked, or pulled up by the roots; under the penalty which it is declared, the landlord or owner of the ground, and he alone, ſhall be entitled to exact from them, of ten pounds Scotch for each tree which is not ten years old, and of twenty for every one above that age, which they ſhall have thus abuſed without his warrant and order. Tenants are conſtantly going about their fields, and have thereby opportunities of preventing harm from being done to their lands. Therefore it is enacted 2) that every tenant ſhall be liable for his wife, children, ſervants, and all others in his family, who ſhall contravene the act. From whence it is plain, that the law *preſumes* not the damage done to the trees to have been in all caſes done by the tenant himſelf; and does not make him liable for it, unleſs he proves that it was done by another, for whom he is not anſwerable, as was found *D.* II. 87. 24th *July* 1734, *Ferguſſon.* All which it means to ſay is, that he ſhall be liable to certain penalties for damage done either by himſelf or by perſons belonging to his family. But the landlord muſt prove either from the preſumption founded on 1685, *c.* 39. or from other circumſtances, that the damage was done by ſome one of theſe. For an action of this kind cannot be eaſily concealed; and it would be hard to make a poor tenant liable for damage which is not done by him, or to lay him under the neceſſity of finding out the perſon who did it.

VIII. One who is ſo wicked as maliciouſly to ſet on fire, to burn, or to cauſe to be burnt any wood, underwood, or coppice, is ordained to be puniſhed by death, 7*mo* AN. *c.* 20.—1*mo* G. I. *c.* 18.

§ 738. IX. Damage may be done not only to land and to thoſe things which grow out of it, but alſo to houſes and to ſuch things as are built on it. Thus one, who demoliſhes or pulls down a houſe belonging to another, is not only bound to repair the damage done by him, *l.* 27. § 31. *l.* 50. *ff. ad leg. Aquil. l.* 2. *C. cod.* but liable to be puniſhed according to the degree of his delinquency. One who does it by open force, ſeems to be guilty of a ſpecies of *vis publica* ſo atrocious as to be puniſhable by death: indeed, this is a ſort of robbery. One who does it in a ſecret but malicious way, by undermining it or by doing any other thing on purpoſe to make it fall, muſt alſo be liable to be puniſhed capitally, in caſe it is inhabited; becauſe he thereby endangers the lives of the inhabitants: and if it is not inhabited, he muſt be puniſhable ſeverely, by an arbitrary puniſhment. If he demoliſhes it without an intention, he is only culpable, and is therefore puniſhable according to his culpability.

X. People who aſſemble in a riotous and tumultuous manner *, and pull down or demoliſh, or begin to pull down or demoliſh any church or place of religious worſhip tolerated by law, dwelling-houſe, barn, ſtable, or out-houſe, are, all and every one of them who are convicted of having had a ſhare in doing it, liable to be puniſhed by death and by confiſcation of all their moveables. And the law, preſuming that ſo atrocious violence could not be done without the connivance, if not the aid, of the inhabitants and the magiſtrates of the town, borough, pariſh, or ſhire in which it is done, hath therefore enacted that thoſe, who are aggrieved by the demolition of their property, ſhall be entitled to get the damage which they have ſuſtained, repaired to them by that town, borough, pariſh, or ſhire; and in order to recover it, to bring a ſummary action and to obtain a decree againſt any two of the pariſh. To this action the magiſtrates and the county

* People are ſaid to aſſemble in a riotous and tumultuous manner, if the mob conſiſts of twelve or more perſons.

county muſt, in ſome caſes, be made parties; therefore the magiſtrates muſt be ſummoned after the ordinary form, and the ſhire or ſtewartry by an edictal citation at the market-croſs of its head-borough, without mentioning its name, 1*mo* G. I. *c.* 4. But it would be iniquitous to make any two alone bear the whole burden of repairing the damage, if there are more who are equally guilty with them; the law therefore entitles thoſe, againſt whom the decree is awarded, and who have repaired the damage, to be reimburſed proportionably by all thoſe who are equally guilty with them.

The governors of boroughs are ſometimes not the moſt reſpectable men in them; they have not always metaphyſics enough to deſtinguiſh the good of their own corporations from that of the public; and taking theſe to be ſynonymous expreſſions, they believe every project, formed for decorating their towns or for the conveniency of thoſe who live in them, to be eſſential to the good of the nation. Thus they forget, that the public impoſts are impoſed by parliament proportionably on all the people; that the legiſlature itſelf lays in no caſe *extraordinary* burdens on individuals; and that it never deprives one of his property even for the good of *the nation*, without granting him an equivalent for the loſs which he ſuſtains more than others. Hence they uſe not to be ſcrupulous about making encroachments on the property of private perſons; and having the public money to lay out both in ſuing others and in defending their own decrees, they are not ſlow either in iſſuing or in executing their orders. But property is ſacred; and the law is careful to protect individuals againſt the arbitrary proceedings of their governors. Magiſtrates are not hindered, indeed it is their duty both to form and to execute ſchemes, which may be uſeful to their communities, provided the execution of them hurts not the right of any private man. But they cannot on any pretence, either on that of levelling their ſtreets, of erecting edifices for the decoration of their towns, or of other public utilities, make the ſmalleſt encroachment on the property of the very loweſt of the people; they cannot even force one to accept of an equivalent for it, or oblige him againſt his will to part with the moſt inconſiderable advantage, of which the law entitles him to maintain the poſſeſſion. For the legiſlature has alone this power; and the preſervation of the rights of private perſons is as important in the eye of the law as the promoting the utility of any corporation. Every order therefore, which violates the rights or the property of any man, is oppreſſive and illegal, and every individual, who either may be or is aggrieved by it, is entitled to get the execution of it ſuſpended, and to recover full reparation of the damages, which he hath ſuſtained in conſequence of it, from thoſe individuals who made it or cauſed it to be executed. For theſe muſt be held to have employed the money and the power, with which the law hath entruſted them, to abuſe thoſe ſubject to their authority; and the pretence of *bona fides* can neither have place, nor ought it to be admitted as any excuſe in this caſe.

§ 739. XI. If one who demoliſhes a houſe is, much more muſt one who fires it, be liable to repair the damage done by the fire. Fire may proceed either from deſign, from careleſſneſs, or from accident. If it is kindled on deſign, with a malicious purpoſe and intention, *nequiter et malitioſe*, as the ſtatute of MALCOLM *c.* 11. expreſſes it, or *dolo malo*, the criminal is bound not only to repair the damage done by it, but alſo to be puniſhed by death*. But it ſeems not that one, who ſets on fire a houſe belonging to himſelf, can be puniſhed capitally; unleſs it appears either from the ſituation of the houſe or from other circumſtances to have been ſet on fire, either that the fire ſpreading farther might conſume the property of his neighbours, or that he might recover inſurance from thoſe who had

* Indeed this is one of thoſe crimes, which were called the *placita coronæ*, the pleas of the crown; becauſe criminals accuſed for having committed them could be tried by the judges named by the crown, that is, by the Court of Juſticiary alone. For the Juſticiary had in antient times, as it has at preſent, a privative juriſdiction in them, *ſt. M. cap.* 13. § 2. *&c.*—*R. M. l.* 4. *c.* 6. *c.* 1.—*ſt. A.* II *c.* 14. § 2.—*ſt. R.* III. *c.* 43.

had inſured it, or that by moving the compaſſion of the world he might get a contribution made for him.

In caſe fire happens through negligence, careleſſneſs, or *culpa, through miſgovernance or rekleſſhie* as the law ſpeaks, he to whoſe fault it is owing, is alſo bound both to repair the damage, *arg. ſt. D.* II. *c.* 26. § 1. 2. 3.—*n.* 43. and to ſuffer an arbitrary puniſhment proportionable to his culpability. Fire, which happens in towns, is more dangerous and more deſtructive than that which happens in remote places. Therefore it is enacted by an old ſtatute that, in caſe it happens in a town, through the careleſſneſs either of him to whom the houſe belongs, or of his wife, or of his children, or of him who tenants it, or of one who lodges in it, the delinquent ſhall be baniſhed the town for three years. If it happens through the fault of a ſervant belonging to the houſe, he ſhall repair the damage if he is able, and ſhall be baniſhed the town for three years: but he may not be able to repair it; in that caſe his puniſhment is made more ſevere, for it is enacted, that he ſhall be *dung* openly, at the market-croſs, and through the town; and ſhall be baniſhed it for ſeven years.

When fire happens accidentally, nobody is liable either to repair the damage done by it or to be puniſhed for it; becauſe nobody can be ſaid to be the cauſe of it, *L. B. c.* 54.

Therefore in order to diſcover whether a fire is kindled *dolo malo*, is owing to careleſſneſs, or happens by accident, it is the duty of the magiſtrates of the place* where it happens, and they are ordained, incontinently to inquire into the cauſes from which it proceeded, the way in which it happened, and the circumſtances attending it, 1426, *c.* 75. *l.* 1. *ſqq. ſt. de off. præf. vig.* †.

'Tis ſometimes neceſſary to pull down the houſe of one man, or to deſtroy his property, in order to hinder fire from ſpreading, to put a ſtop to it, and to ſave the properties of others. In this caſe, he whoſe houſe has been thrown down, or whoſe property has been deſtroyed, ſeems to have a claim founded on equity to be reimburſed by *thoſe whoſe property is thereby ſaved*, and to get a contribution made by them for that purpoſe, provided his property, which can hardly be ſuppoſed, would not itſelf have been deſtroyed by the fire. For the damage he has ſuſtained was ſuſtained by him for their common utility, in order to avert a danger that threatened them all alike. Æquiſſimum enim eſt, commune detrimentum fieri eorum, qui propter amiſſas res aliorum, conſecuti ſunt, ut ſuas ſalvas haberent, *l.* 1. *l.* 2. *p. &c. ff. de lege Rhod. de jactu.* But thoſe, whoſe property is deſtroyed by the fire itſelf, are not entitled to get a contribution made for them in order to make up their loſs. Fires uſually ariſe from accident; but every one ought to bear thoſe accidental loſſes which befal his own property; and a merchant, whoſe goods have been loſt at ſea, has as good a title to get his loſs made up by the public as one whoſe goods have been burned. Beſides, fire uſually ariſes from the careleſſneſs of thoſe whoſe property is deſtroyed by it, *culpa inhabitantium;* and it would make people leſs careful to prevent it, if they thought their loſs would be fully made up by others. 'Tis eaſy for one to ſet his houſe on fire; and it is of all things in the world the moſt difficult to diſcover that he hath done it wilfully. Thus people, whoſe ſubſtance and whoſe loſs are unknown, may be invited to commit the moſt horrid crimes, in order to create to themſelves eſtates out of the compaſſion of the public. Beſides, for paying a ſmall yearly premium every man in this country may get his property inſured; and it is ridiculous for one, who hath this advantage, but hath, out of avarice or from other views, neglected to take the benefit of it, to recur to the public upon every loſs. But people

* Beſides, it is the duty of magiſtrates not only to extinguiſh fire after it is kindled, but to uſe proper precautions, in order to prevent it from being kindled, and to have machines ready, which may be uſeful in extinguiſhing it, 1426, *c.* 71. 72. 73. 74. 75. Such as are negligent, are liable to be puniſhed, and, in ſome caſes, to repair the damage alſo.

† The act 6*to A. c.* 30. extends not to Scotland; it ſeems to have been intended principally for the ſecurity of the city of London, and to extend no farther than the places comprized within its weekly bills of mortality.

people may ſometimes loſe their all; they may be reduced to want, and may be diſabled by poverty from carrying on buſineſs; 'tis therefore reaſonable that in ſome caſes they get *as much as* will enable them to do for themſelves. But it would be impolitic to give thoſe who have made great loſſes any thing like the full amount of theſe; and this is in *all* caſes more than they can in reaſon demand. 'Tis abſurd to ſay that one who hath loſt fifteen hundred pounds is entitled to get theſe fifteen hundred *fully* made up to him by the public; and that every one, who hath not loſt on the ſame occaſion with him, and is in tolerable circumſtances, ſhould contribute *ſomething* in order to make up this ſum for him. Equity can never require any man to contribute either to make the ſufferer richer, or to enable him to live in more affluence than himſelf. Of courſe one cannot be entitled to more than will juſt put him in a way of doing; and money ought not to be expected from any, whoſe ſtock amounts not to much more than the ſum intended to be raiſed by the contribution.

XII. One, who maliciouſly ſets a coal-pit on fire, is not only bound to repair the damage done by it, but alſo puniſhable by death, 1592, *c.* 148. One, who does it through careleſſneſs, is bound to repair the damage, and liable to an arbitrary puniſhment.

§ 740. Damage may be done not only to things which are immoveable, but alſo to ſuch as are moveable (§ 729.). Moveables are either ſuch as have an internal faculty of moving themſelves; of this ſort are all living creatures, and they alone, terreſtrial, aerial, and aquatic: or they are ſuch as have not an internal faculty of moving themſelves, but are capable of being removed by men from place to place; of this ſort are all inanimate things which are moveable, *corpora mobilia inanimata* (§ 143.).

XIII. The moſt memorable animals are horſes, oxen, and thoſe which are uſeful to mankind. Hence the law, 1581, *c.* 110. 1587. *c.* 83. ordains ſuch as maliciouſly hough the horſes, oxen, or cattle of others, during the ſeaſon of labouring the ground, or maliciouſly either ſtick, gore, or kill oxen or horſes, belonging to others, during the time of leading either corn or feuel, to be puniſhed by death *. One can hardly be ſuppoſed to have done this without a malicious intention; but it is poſſible one may do it through careleſſneſs, and he could be puniſhed only by a ſlight arbitrary puniſhment; and in both caſes it is plain, that the delinquent muſt be bound to repair the damage done by him.

XIV. In the ſame manner one, who, either by over-loading or by over-driving it, kills, burſts, cripples, or hurts an animal which belongs to another, and which he hath either hired or borrowed from him, is bound to repair the damage done by him, *l.* 27. § 22. 23. *ff. de leg. Aquil. l.* 30. § 2. *ff. locat.*—*p. ſt. R.* I. *c.* 33. § 3.—*ſt. D.* II. *c.* 15.—*Ha.* 10th *July* 1610: as is alſo one who has, by a blow or by bad uſage, cauſed a mare, cow, or other ſhe-animal to caſt its young, *l.* 27. § 22. *ff. ad leg. Aquil.*

§ 741. XV. Highways are not of an infinite breadth; men, horſes, and carriages frequently meet upon them; they uſe, if they can, to keep the middle of the road; and it may be neceſſary for them to paſs one another. But it is reaſonable that the one, which can alter its courſe with greateſt facility, yield the way to the one, which cannot do it with equal eaſe. Thus a man walking on foot ought to yield the way to one riding on horſeback; one riding on horſeback to a loaded horſe; a horſe to a carriage; and a lighter carriage to a heavier one. But people are ſometimes, from pride or from perverſeneſs, obſtinate on theſe occaſions, and will not yield to one another; he therefore, who ought to have yielded, muſt be anſwerable for all the damage which happens, is bound to repair it, and in caſe he ſuffers any himſelf, is not entitled to get reparation of it; becauſe he is the alone culpable perſon, and is the cauſe of all the miſchief that happens, *ſt. W. c.* 12.

* By cattle we muſt, in this place, underſtand ſuch alone as uſe to be employed either to labour the ground or to lead corn or feuel.

The ſame principles hold in thoſe caſes, in which it is neceſſary for one of them to return, in order to let the other go on.

§ 742. XVI. Ignorance of the trade, which one profeſſes to underſtand, has been ſaid (§ 732.) to be culpable; and every one is bound to repair the damage he does through it (§§ 732.), *l.* 27. § 29. 35. *ff. ad leg. Aquil. l.* 9. § 5. *l.* 13. § 5. *l.* 25. § 7. *ff. locati.* Hence we find it enacted by an antient ſtatute that a ſmith, who pricks a horſe to the quick in ſhoeing him, ſhall, if the horſe is curable, not only pay the charges both of curing and of maintaining him, but alſo provide his owner with another fit for the ſame uſes to which the pricked one was employed, till he is cured: that if he is incurable, he ſhall take him to himſelf, and pay the price of him to the owner, 1477, *c.* 78.—*St.* 19th *Feb.* 1670, *Leſlie.*

§ 743. XVII. One, who deſtroys any paper, writ, inſtrument, bond, charter, or deed belonging to another, is liable to make up the damage ſuſtained through the want of it. If it will be repaired by getting the tenor of it proved before the Court of Seſſion, it will be ſufficient if he preſents him with a decree finding the tenor of it proved. If that is not enough, he muſt do any thing which is neceſſary; for inſtance, pay the debt due by the deed that he deſtroyed.

§ 744. XVIII. Damage may be done not only to goods on land, but alſo to ſhips at ſea. If it is done either malitiouſly or culpably, by one ſhip ſtriking againſt another or otherwiſe, he, to whoſe fault the damage is owing, is bound not only to repair it, *arg. ſt. W. c.* 12. but alſo to ſuffer the puniſhment the law appoints for his offence. If it happens through ſtreſs of weather, or any other unavoidable accident, every one is innocent, and muſt therefore bear the loſs his property ſuſtains.

§ 745. XIX. Damage may be done not only by a perſon himſelf, but alſo by others for whoſe conduct he is anſwerable. It is plain, that one muſt be anſwerable for every thing which another doth in conſequence of his order or commiſſion. *Quod quis per alium facit, per ſe feciſſe videtur.* Therefore he muſt be anſwerable in the ſame manner, in which he would have been, if he had done it himſelf. Thus every judge, clerk, or officer, is liable for the deeds of his deputies; becauſe theſe are choſen by himſelf, 1424, *c.* 6.—1469, *c.* 26.—1540, *c.* 73.—1587, *c.* 72.—20*mo* G. II. *c.* 43.—21ſt *Dec.* 1756, *Robertſon v. Sir Ludovic Grant.* But one, who has not given orders or commiſſion to do it, is anſwerable in thoſe caſes alone, in which the connexion he has with the perſon, by whom the damage is done, is ſuch as makes it reaſonable, that he ſhould be made anſwerable for his conduct. The only connexion, which law makes produce this effect, is that which one has with his wife, children, ſervants, and family, *ſt. W. c.* 19.—1503, *c.* 69.—1515, *c.* 2.—1528, *c.* 6. Theſe are, in ſome ſort, ſubjected to his authority; they are bound, indeed they uſe to obey him; his inſtructions, his example, his orders have the greateſt weight with them. Beſides, he ought not to admit bad people into his family. Therefore the ill, which they do, may in ſome ſort be imputed to him, 1581, *c.* 112.—1585, *c.* 16.—1587, *c.* 93. *et ſeqq.*—1594, *c.* 231.—1633, *c.* 7.—1690, *c.* 4. But it is hard to make one liable for any thing done by another. Therefore the law of Scotland ſeems not to have defined any rule for determining the caſes in which one ought, and thoſe in which he ought not to be anſwerable for the actions of thoſe in his family, more particular than this, that it makes him liable in all caſes, in which he either has been acceſſary to that which has been done, or can be ſaid to be culpable in having allowed it to be done; in ſhort, in which the ill that has been done can be ſaid to have been done through his fault. It muſt be left to the judge to determine, from the circumſtances of every caſe, whether this can or cannot be ſaid, *ſt. W. c.* 19.—1503, *c.* 69.—1481. *c.* 81.—1681, *c.* 3.---1617, *c.* 18.

* § 746.

* Lands, which were ſpecially erected into foreſts, had, as well as the royal foreſts, very great and very remarkable privileges. People were reſtrained from encroaching upon them by very ſevere penalties. *Vide Leges For.*—1535, *c.* 12.—1592, *c.* 130.—1594, *c.* 210.

§ 746. XX. One is, in ſome caſes, not anſwerable for the actions of the people of his family; but every one is, in all caſes, anſwerable for treſpaſſes committed by horſes, cows, oxen, bulls, ſwine, ſheep, goats, hens, geeſe, or other brutes belonging to him. Men are rational creatures; therefore they are voluntary agents; they cannot be every moment tended by thoſe to whoſe authority they are ſubject; they muſt, on ſome occaſions, be allowed to guide, to direct, and to act for themſelves. But the brutes, deprived of the faculty of reaſon, are in all caſes ſubject to the dominion of man. Thoſe therefore, to whom they belong, are anſwerable for treſpaſſes committed, and damage done by them; becauſe it is their duty, law obliges them to take care to hinder them from doing it. The damage they do may be either ſuch as it is natural, or ſuch as it is unnatural for them to do; but one is, in both caſes, liable to repair it, *L. B.* 126.—*ſt. W.* *c.* 24.—*p. ſt. R.* I. *c.* 33. § 1. 2. *,

XXI. The moſt notable inſtance of damage of the firſt ſort is that which is done by cattle belonging to one, to the grounds, woods, hedges, or trees of another. In order to reſtrain people from allowing their cattle to commit treſpaſſes on the grounds of their neighbours, it is enacted by 1686, *c.* 11. 1) that ſuch as allow their horſes, cows, oxen, bulls, ſheep, ſwine, or goats, to feed in the open fields, ſhall cauſe them to be tended by a herdſman, through the whole year, during the winter as well as the ſummer, in the night as well as in the day-time; 2) that the owner ſhall pay for every beaſt, which he ſhall have going on the ground of his neighbour, half a merk *toties quoties*, over and beſides the reparation of the damage done by it. One therefore, who finds the beaſts of another on his ground, is not entitled either to kill them by ſhooting them or otherwiſe, or to drive them off in a hurtful way, or to abuſe them, or, if he takes them into his cuſtody, to ſtarve them. He is in all caſes bound to uſe them in the ſame way, in which a man would uſe his own, *l.* 39. *ff. ad leg. Aquil.* But theſe penalties are ſmall; proof of the commiſſion of the treſpaſſes may often be difficult to be made; and it would be hard to oblige a poor tenant to commence on every occaſion a law-ſuit, in order to recover them. Therefore it is enacted, 3) that it ſhall be lawful to him who poſſeſſeth the ground, whether he be landlord or tenant, to detain beaſts he finds upon it, till he gets payment not only of half a mark for each of them, but alſo of the charges of their maintenance †. For it is not ſufficient that ſecurity be offered him for them; the law entitles him, and for good reaſons, to keep the beaſts till he gets actual payment of the money.

But one, whoſe beaſts have been pointed for their treſpaſſes, may neglect to ſeek them back; and he, who has taken them into his cuſtody, is not bound *infinitam cuſtodiam præſtare*, to be at the expence of keeping and of feeding them for ever. There muſt therefore be a time, after which they muſt be held to be relinquiſhed by their owner. That muſt be the ſame time, after which the law holds waif beaſts to be relinquiſhed, and makes them eſcheat: for the ſame principles apply to both caſes, and it is impoſſible to fix upon another period (§ 628. 629.).

XXII. One who allows his horſes, cattle, or ſheep to go over any ditch, hedge, or dyke, by which the ground of another is incloſed, beſides being bound to make up the damage, *L. B. c.* 126. § 3. is declared, 1685, *c.* 39. to be liable to pay ten pounds Scotch *toties quoties;* the one half of which is to be given to the owner of the incloſure, the other for the reparation of the highways and bridges

* One would conclude from this ſtatute, that the *noxæ deditio* had place in antient times in the law of Scotland; and that the owner of an animal, which had done ill to another, had the option either of repairing the damage, or of delivering the animal to make ſatisfaction for it by his labour, 1503, *c.* 69.

† In antient times a beaſt which committed a treſpaſs, uſed to become the property of him on whoſe ground it treſpaſſed, *L. A. c.* 48. § 6. he might have killed and eaten it. But this forfeiture ſeems to have been reſtricted to animals of ſmall value, ſuch as geeſe, hens, and goats, *L. B. c.* 126. § 3. 4.—1535, *c.* 12.

Something of the ſame kind is reported by Boes, *l.* 10. *c.* 12 to have been enacted by the laws of Kenneth Macalpin. 'Suem ſegetes edentem, aut grunno cultum ſubruentem agrum, occidito impune. Cætera 'animantia quæ nobiſcum degunt, ſi tua læſerint terræ naſcentia, donec eorum dominus damnum reparaverit, 'te penes ſervato.'

ges ſituated within the pariſh, where the treſpaſs is committed, at the ſight of the ſheriff, ſtewart, or juſtices of the peace, before whom the tranſgreſſors ſhall be proſecuted.

XXIII. One, whoſe cattle treſpaſs on his neighbour's ground, is liable to make up the damage done by them; and muſt therefore, if they kill or hurt any beaſt belonging to the poſſeſſor of the ground, make up the loſs to the owner: for they ought not to have been allowed to come into the field on which they have treſpaſſed, and if they had been hindered from coming upon it, the damage would not have been done. Therefore he, to whoſe fault it is owing that they came upon it, muſt be liable to repair the damage done by them. And it matters not, whether the beaſt, that is hurt, was the provoker or was provoked *.

By a ſtatute found among the laws of KENNETH MACALPIN it was enacted, *ſi coeuntibus bobus quævis icta incerto percuſſore interierit caſu, quæ earum fuerit cornuta cædis authorem judicanto: ejus dominus, mortuo accepto animali, damnum proximo reparabit*, BOET. *l.* 10. *c.* 12.

But both beaſts may have been entitled to be on the ground; they may have been paſturing on a common, and one of them may happen to kill or to hurt the other. In this caſe the owner of the provoker will not be liable to repair the damage done by him, *l.* 1. § 11. *ff. ſi quod. paup.* unleſs he either was certified, or knew it was a vitious beaſt. For if he knew it was vitious, he muſt be liable to repair the damage, which it does, and he has not taken proper precautions to prevent, *arg. p. ſt. R.* I. *c.* 33. § 2. *in fine.*

If the damage, which is done, is owing to the fault of him, to whoſe property it is done, for inſtance, if he provoked or inſtigated it to do it, he has no title to complain. *Quod quis ex culpa ſua damnum ſentit, non intelligitur damnum ſentire, l.* 203. *ff. d. r. j. arg. Q. A. c.* 48. § 10. 11. 12. †.

I ſhall conclude this title with quoting a ſtatute of DAVID the Second, which decides ſeveral appoſite caſes, proves the principles which have been laid down, and is expreſſed in ſuch language as cannot miſs to afford a relaxation and ſome entertainment to the curious. 'Ane man, paſſand be the Kings hie way, callis 'before him twa ſcheip bound together with ane tow, and with the twa ends 'thereof; and be chance ane horſe, havand ane ſair back, is lyand in the ſamine 'hie way: ſwa the ane of the ſcheip paſſes be the richt ſide, and the other ſcheip 'be the other ſide of the horſe: and the tow, quherewith they are bound, 'tuiches his ſair back; wherethrow he is moved to riſe up, and caries the ſcheip 'hingand ane upon his ane ſide and the other upon the other ſide, here and there in 'ſundrie places and throw the fieldis, untill he comes to ane open miln without 'ane keiper, havand ane fire in the midde flure; and the fire being ſkattered, 'the miln is brunt with the twa ſcheip and the horſe. It is demanded, quha 'ſall anſwer for this ſkeath and damnage? It is anſwered, the awner of the 'horſe ſall pay for the twa ſcheip, becauſe the Kings hie way ſould not be occupied be the horſe; and the milner ſall anſwer for burning of the miln, for the 'horſe and for the ſcheip, and for all other ſkaith and damnage done in the 'miln, becauſe he left the miln open, and fire in it without ane keeper,' *ſt. D.* II. *c.* 26.

TITLE

* It was otherwiſe by the Roman law, *l.* 1. § 11. *ff. ſi quad. paup. feciſ. dic.* Nor can the deciſions of *p. ſt. R.* I. *c.* 33. be held to be agreeable to the principles, which prevail at preſent in the law of Scotland; unleſs they are *explained* ſo as to be agreeable to them.

† In antient times a beaſt, which killed a man, eſcheated to the crown, in caſe it was not either inſtigated or provoked to attack him, *Q. A. c.* 48. § 10. 11. 12.

TITLE V.

Of Extortion.

§ 747. ONE, who is either compelled by actual force or frightened by dreadful threats to do an action, cannot be ſaid to do it freely and voluntarily; for one cannot be ſaid to do a thing freely and voluntarily, who has no choice, who has it not in his power either to do or to forbear doing it according to his pleaſure. But one, who is actually compelled by force, it is plain, is not free; for he is laid under a phyſical neceſſity of doing that which he is forced to do, is totally deprived of his liberty, and cannot forbear doing it, were he ever ſo deſirous of forbearing. And in caſe one is frightened by dreadful threats, he has no choice; the fear of the danger, with which he is threatened, deprives him of it in effect: for no man in his wits can well be ſuppoſed to heſitate a moment in determining which part he ſhould chuſe, when he is reduced to this unhappy alternative, either to do that which he is deſired to do, or to expect the ill which is threatened to be done him. Few people have reſolution to bear hardſhips, inhumanity, cruelty, or pain; men ſhrink at the thoughts of them, and on a near proſpect of being obliged to undergo them they uſually ſuccumb; and fear impells them to do that which they are deſired to do, in order to avoid the ill which is threatened to be done them. Therefore one, who is by terrible threats frightened into doing a thing, can never be ſaid to do it freely; he gives not his conſent to do it. Of courſe if his conſent was neceſſary to the doing of it, it cannot be ſaid to be rightly, legally, or properly done; for wanting his conſent, it wants that which is neceſſary to give it perfect validity, and can hardly be ſaid to be a deed done by him. Therefore it cannot, becauſe it ought not, to have the effects which a legal deed of the ſame kind would have had either on his perſon or on his eſtate. It muſt be illegal, defective, and invalid; and he, who has done it, muſt have a right to be reſtored againſt it, or to get it ſet aſide, becauſe he was forced to do it.

Beſides, thoſe who employ forcible means to accompliſh their ends are guilty of a delinquency, and deſerve not the favour of the law; their crimes ought not to be allowed to turn to their account; they ought not to be allowed to make profit by them. They muſt therefore be perſonally liable, *ex delicto*, to reſtore that which they have got by violent means, and to repair the damage they have done.

For theſe reaſons the Law of Scotland hath, after the example of that of the Romans, given every one, who has been forced, by violent and unlawful means, to do any patrimonial deed, a right to get himſelf reſtored againſt it, *Q. A. c.* 29. § 2. This ſpecies of reſtitution is uſually called reſtitution on the head of force and fear, *ex capite vis et metus*.

Every one, who has, by violent and unlawful means, been forced to do any deed, having a right to be reſtored againſt it; the privilege of reſtitution *ex capite vis et metus* may therefore be defined to be 'a right which every one has 'to be reſtored againſt any patrimonial deed, which he has, by violent and un-'lawful means, been forced to do.' From the definition it follows, I. That one is entitled to be reſtored, *ex capite vis et metus*, againſt every *patrimonial* deed, II. Which he has been *forced* to do; III. Provided the force was *violent* and *unlawful*. And from theſe axioms it will be eaſy to ſhew, 1) who are entitled to be reſtored *ex capite vis et metus*, 2) againſt what deeds one may be reſtored *ex capite vis et metus*, 3) againſt what perſons reſtitution may be ſued; 4) within

what time it muſt be ſued; 5) after what manner people may be reſtored, 6) what are the effects of reſtitution.

§ 748. Every one, who has been forced to do any patrimonial deed, is entitled to be reſtored againſt it; without diſtinction of ſex, of age, or of condition.

But every right which one has goes to his heirs: therefore 2) the heirs of him, who was forced, have a right to ſue for it; for they are held to be the ſame perſons with him. Every thing which can be ſaid to be a part of his eſtate, deſcends to them, *l.* 14. § 2. *l.* 16. § 2. *ff. quod met. cauſ. l.* 3. *C. de his quæ vi met. cauſ.*

Every thing, which is not perſonal, but patrimonial, may be made over by its owner to another. Therefore the right of being reſtored *ex capite vis et metus* goes 3) to the voluntary aſſigns of the perſon who was forced; becauſe every one, to whom an aſſignable right is made over, may exerciſe it after the ſame manner with him who aſſigned it.

By the Roman law every one, *cujus intererat*, was entitled to take the benefit and to avail himſelf of the right, which the perſon forced acquired to be reſtored. Therefore it goes 4) to his neceſſary aſſigns. Thoſe are neceſſary aſſigns, in whom the right is veſted by the law, without an aſſignment from him, who originally had it. Of courſe it goes, 5) to ſuch as have adjudged it; for the right, which one has of ſuing for reſtitution, is a faculty which may be beneficial to others. Conſequently thoſe, who are entitled to get any part of his eſtate, may get it adjudged to them. But creditors are entitled to recover payment of the debts due to them; and their debtor is not allowed, in caſe he is inſolvent, to withdraw any part of his eſtate from them. As therefore they may attach every part of it, ſo they may avail themſelves of every faculty which he has and which will be beneficial to them. And being creditors, they have a title to found upon it directly, without having got it adjudged to them. Therefore 6) his creditors may either ſue for it, or found upon it otherwiſe, as their occaſions require; for he cannot defraud them by refuſing to avail himſelf of any faculty which may be beneficial to them. But it is not tranſmitted 7) either to general aſſigns, ſuch as legatees, donees, or any others; or 8) to cautioners who have become ſurety for one, who was himſelf forced to become bound. 'Tis true, the perſon, for whom theſe became ſurety, has a right to get himſelf releaſed from his obligation. Therefore, if he exerciſes his right, and if the principal obligation is thereby annulled, that, which is acceſſory to it, muſt fall of courſe; for on this ſuppoſition there is not any obligation, for which they can be ſureties. But they have no proper right to ſue it, if they cannot ſay *they* were forced to become cautioners. Therefore, if two or more people bind themſelves jointly and ſeverally, it ſeems not to be competent to thoſe of the co-obligants, who, it was underſtood among them, ſhould fulfil the obligation, only in caſe one of them did not fulfil it. For theſe are not cautioners; they are principals; every one of them is bound *in ſolidum*. Therefore it cannot be competent to them; ſince they voluntarily brought themſelves under an obligation. Beſides, they either did or did not know, that the obligation of him, along with whom they bound themſelves, was extorted from him by force, and was therefore voidable. If they voluntarily bound themſelves along with one whom they knew to be forced to grant his obligation, they muſt be preſumed to have renounced any right they might have to get free on that account: if they did not know he was forced, they ought to have known it; therefore *ſibi imputent*. Indeed it cannot have any effect on their obligation, whether the principal was or was not forced to grant his, ſince it was optional to them either to grant or not to grant it; they were not forced to grant it; they might have not granted it, if they had pleaſed. Therefore, tho the principal debtor ſhould get himſelf looſed from his obligation, they will notwithſtanding remain bound; becauſe his obligation is entirely different from theirs. Indeed, if they were forced to grant it, they have a right to be reſtored againſt it. But this right

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they have not as they are cautioners, for cautioners they are not; but *ex propria perſona*, becauſe they were themſelves forced.

§ 749. One is entitled to be reſtored *ex capite vis et metus* againſt every *patrimonial* deed, which he has been forced to do. No matter of what ſort it be; whether it be unilateral or bilateral, judicial or extrajudicial; whether he is or is not leſed by it. All which the law requires, in order to entitle one to be reſtored *ex capite vis et metus*, is, that the deed againſt which he ſues for reſtitution be a patrimonial one, and that it has been extorted by forcible and unjuſt means. 'Tis not neceſſary that he be *leſed* by it, or that it be a patrimonial loſs to him. For the law eſteems one to be highly wronged, who has been forced to do a thing againſt his will. Therefore all after which it enquires is, whether he has or has not been forced to do it; it enquires not whether he has or has not ſuffered a pecuniary loſs by it. If it finds he has been forced to do it, it reſtores him to the freedom of his will, provided he wants to be reſtored to it, tho that againſt which he ſues for reſtitution, ſhould not be hurtful to his intereſt; nay, tho it ſhould be beneficial to him, *St.* 10th *Jan.* 1677, *Stewart.*— *Di.* 419. Thus one, who has been forced to grant a leaſe of a farm, is entitled to be reſtored againſt it, tho the rent, which the tenant binds himſelf to pay, and the terms of his leaſe be much more advantageous to the landlord than thoſe he could get from any other body. The reaſon is plain: extortion is a violent encroachment on the rights of mankind; it deprives one of his liberty; and a man who forced another to grant him a leaſe, deprives him of a right which the law gives him. For every landlord has a right either to cultivate his eſtate himſelf, or to let it out to be cultivated by others; and to chuſe whom he pleaſes to tenant it.

But one is entitled to be reſtored *ex capite vis et metus* againſt patrimonial deeds alone. By patrimonial deeds I mean ſuch as concern the eſtate, or relate to the patrimony. For theſe alone are *Jumno jure* valid, ſubſiſt till they are ſet aſide, and admit of reſtitution. No doubt, one who is forced is in *every* caſe highly wronged; but he muſt ſeek reparation of wrong done by deeds, which do not concern his eſtate, after a different manner. Thus one, who is forced to marry another, ſeeks not to be *reſtored* againſt the marriage, but to get it declared to have been and to be void: One, who has been forced to commit a crime, or to aſſiſt others in committing it, ſues for reparation of the wrong which has been done him, by an action of damages.

§ 750. In order to entitle one to be reſtored againſt a patrimonial deed, which he has been forced to do, it is neceſſary, that the force employed to make him do it be both 1) violent and 2) unlawful.

Firſt; It muſt be *violent*. This implies 1) that that, which is threatened to be done, be ſomething atrocious; 2) that it be threatened to be done immediately, unleſs he, who is threatened, ſubmits.

That, which is threatened to be done, muſt be ſomething atrocious; for that which is not atrocious, is not dreadful. Hence the law ſays, it muſt be *vis atrox*, *l.* 3. § 1. *ff. quod met. cauſ.* Metum accipiendum Labeo dicit non quemlibet timorem, ſed majoris malitatis; non vani hominis, ſed qui merito et in hominem conſtantiſſimum cadat, *l.* 5. 6. *ff. eod.*—*arg. Q. A. c.* 29. § 2.

One therefore cannot be reſtored for every trifling or inconſiderable reaſon. For one who yields to any thing, which is not dreadful, cannot be ſaid to be either forced or frightened; he cannot therefore be entitled to be reſtored *ex capite vis et metus*. Proinde, ſi quis meticuloſus rem nullam fruſtra timuerit, per hoc edictum non reſtituitur: quoniam neque vi, neque metus cauſa factum eſt, *l.* 7. *p. ff. eod.* He muſt have a reaſonable cauſe of being afraid; a fooliſh fear is inexcuſable; *vani timoris juſta excuſatio non eſt*, *l.* 184. *ff. d. r. j.*

'Tis impoſſible either to compriſe under a general rule, or to ſpecify all the caſes in which the force that is uſed either can or cannot be called atrocious, in which one can be ſaid to do a thing out of a reaſonable or an unreaſonable fear. For every

every caſe muſt depend on its own circumſtances; and it muſt be left to the judge to determine from theſe, whether there is or is not good reaſon for reſtoring him who ſeeks to be reſtored *ex capite vis et metus*. He ought therefore to attend to the ſex, the age, the condition, and the character, of thoſe concerned. Women are more eaſily frightened than men; old age than young; perſons of low than thoſe of high rank; and the weak, the ſilly, and the ignorant, than thoſe of ſenſe, of knowledge, and of abilities, *Ha.* 21ſt *Feb.* 1606, *Vinfra.*—*Fo.* 22d *Feb.* 1688, *Gray.*—29th *June* 1708, *Johnſton.*—7th *Dec.* 1686. The ſame thing, which would make an impreſſion and would have influence on the former, would be diſregarded by the latter, and would not have any effect upon them, *l.* 3. *ff. ex quib. cauſ. major.* Thus much however may be ſaid, that the fear 1) of being killed, 2) raviſhed, 3) tortured, 4) confined, *S.* 12th *April* 1543, *Earl of Morton.*—*Q. A. c.* 29. 5) beaten, 6) ſtarved, or 7) otherwiſe cruelly abuſed, is a juſt cauſe of reſtoring one againſt deeds extorted from him, when under the influence, impreſſion, or apprehenſion of theſe evils, *l.* 3. § 1. *l.* 4. *l.* 7. § 1. *l.* 8. § 2. *l.* 22. 23. § 1. *ff. quod. met. cauſ. l.* 3. *ff. de extraord. cog. l.* 13. *C. de tranſact. l.* 4. *C. de his quæ vi metuſve cauſa.*—*Q. A. c.* 29. § 2. But one, who has done any thing out of that awe which he has either of a parent, of a huſband, or of any other, is not entitled to be reſtored againſt it, *Ha.* 16th *June* 1613, *Hepburn.*—*St.* 24th *Jan.* 1674, *Murray.*—*H.* 878.—*Fo.* 16th *July* 1696, *Leiſhman.*—*F.* 28th *June* 1706, *Hay.* Indeed if a parent, a huſband, or any other, exceeds the bounds of moderation, and employs cruel means in order to force thoſe, who ſtand in awe of them, to do any deed, they, who do it, are entitled to be reſtored againſt it; becauſe it can, in this caſe, be ſaid to be actually extorted *vi et metu*, *Du.* 27th *June* 1632, *Caſſie.*—*Fo.* 29th *June* 1708, *Johnſton.*

But that which is threatened to be done muſt not only be atrocious; it muſt alſo be threatened to be done immediately, unleſs he, who is threatened, ſubmit to the will of the extortioner, and do that which he deſires him to do, *l.* 9. *p. ff. quod. met. cauſ.* For it is not neceſſary that the threats be executed; 'tis ſufficient that they be made, ſince one may relieve the extortioner from the neceſſity of putting them in execution, and may immediately ſubmit. But one, who is not in immediate danger, cannot be ſaid to be compelled *vi et metu*, and cannot therefore be reſtored: for he may ſave himſelf from it. Therefore the threats muſt be threatened to be put in execution immediately; otherwiſe the danger cannot be ſaid to be immediate, and he who is threatened cannot be ſaid to be influenced *juſto metu*. Hence that fear, which entitles one to be reſtored againſt it, is defined *inſtantis vel futuri periculi cauſa mentis* trepidatio, *l.* 1. *ff. quod met. cauſ.* By threatning to execute them immediately, I mean threatening to do it, before he, who is threatened, can either by flight, or by lawful means, defend and protect himſelf againſt the danger. For one, who can be free from the danger, ought to get out of it, not to do that which he is deſired to do. Hence one cannot be reſtored on account of threats of death, of infamy, or of the greateſt ill, which he, who makes them, threatens to put in execution not immediately, but at ſome diſtant time; becauſe threats of this kind are frequently no more than raſh haſty expreſſions, uſed without any intention of putting them into execution. Beſides, one, who apprehends any danger from another, is provided by law with means of ſecuring himſelf againſt it. Therefore if he does the deed after he has it in his power to fly to the law for refuge, and to employ thoſe means, he can hardly be ſaid to have been forced to do it; becauſe the danger does not immediately threaten him; he is ſafe from it, and is out of the reach of violence, *Du.* 12th *Feb.* 1642, *Grant.* This ſeems to be agreeable to law, for it minds not, whether the threats proceed from one of a fierce diſpoſition who uſes to put his deſigns in execution, or from one of another character; becauſe one, who can condeſcend to be forced to do any thing, ought to condeſcend to defend himſelf by legal means. But the perſon, who is threatened, may be an ignorant body;

body; he may not know the legal method of protecting himſelf; he may live in a remote country, ſurrounded by banditti, at a diſtance from the protection of the law, and may not be able to alter his place of abode; and a variety of other caſes may be ſuppoſed, in which it may be reaſonable to reſtore one againſt deeds extorted from him by threats, and made by him at a time when he may appear to be in ſafety. For law holds unjuſt force in abomination; and judges ought in all caſes to ſet aſide every deed, which hath the moſt diſtant appearance of being extorted by illegal violence. *Du.* 27th *June* 1632, *Caſſie.*—*Fo.* 28th 1708, *Johnſton.*

If threats made by others, *a fortiori* ſuſpicions entertained by one's ſelf are not a ſufficient cauſe of reſtitution; becauſe they are frequently groundleſs. Beſides, one who knows his danger, and is put on his guard, may uſe proper means to defend himſelf, *l.* 7. *C. de his quæ vi metuſve cauſa, l.* 7. 9. *p. ff. quod metus cauſa, l.* 9. 10. *C. eod.*

Secondly; the force, which is uſed, muſt be unlawful; it muſt be not lawful to do that which is done, or to uſe thoſe forcible means which are uſed. For one is not entitled to be reſtored againſt a deed which he has been compelled to do by means, which it was lawful to employ for this purpoſe; becauſe he cannot in this caſe be ſaid to be wronged. He does no more than he was antecedently obliged, and might therefore be forced to do, *l.* 13. § 1. *ff. de inj.*

Hence one is not entitled to be reſtored againſt a deed done by him in obedience to the lawful ſentence of a judge; no matter whether he does it before or after execution is made againſt him by uſing thoſe legal means, which may be employed in order to force him to obtemperate it, *l.* 3. § 1. *ff. h. t.*

But one who, inſtead of employing thoſe means which the law allows him to employ in order to carry decrees made in his favour into execution, and to compel thoſe againſt whom they are made to obey them, abuſes thoſe means, and makes them ſubſervient to other purpoſes, is guilty of an atrocious offence, and deſerves to be puniſhed. Therefore he, againſt whom a decree was made, is entitled to be reſtored againſt any deed which he has by thoſe means been forced, but which he was not ordered by the decree itſelf to do, *N.* 4.—*Fo.* 18th *Dec.* 1708, *Niſbet.* For a deed, which one is decreed by a lawful ſentence to do, is not voidable.

Hence the law is ſuſpicious of all deeds granted by perſons, while they are either under caption or in priſon, makes diligent enquiry after the cauſes of granting them, and preſumes that they were granted *metu carceris*, unleſs either they were done preciſely in obedience to the decrees awarded againſt them, or honeſt cauſes of granting them are proved, *Q. A. c.* 29. § 2.—*Ba. obligation*, 4th *July* 1555, *Craig.*—*C. April* 1586, *Love.*—*St.* 18th *Feb.* 1680, *Burnet.*—*D.* I. 573. 574. 4th *Nov.* 1738, *Munro.*

Therefore deeds, granted by one in theſe circumſtances, give not abſolute validity to that which was the foundation of the decree, are not held to import either a ratification or a corroboration of it, and do not bar him who granted them from objecting either againſt it or againſt them; unleſs it appears, that they were granted either in ſecurity of a juſt debt on which the caption was iſſued, *St.* 28th *June* 1672, *Murray.*—2d *Dec.* 1675, *Thomſon*, or for ſome other juſt cauſe, for inſtance, *tranſactionis cauſa:* for a tranſaction which contains no marks of extortion, may be a reaſonable deed; and implies the reality and the ſubſiſtence of an antecedent debt, *St.* 22d *Jan.* 1667, *Mair.*—3d *July* 1668, *Rue.*—*H.* 508.—*Da.* 5.—*Fo.* 7th *Dec.* 1698, *Ker.*—9th *Dec.* 1698, *Rutherford.*

All which is neceſſary, in order to entitle one to be reſtored *ex capite vis et metus*, is, that it be not lawful to uſe thoſe forcible means by which the deed has been extorted; it matters not therefore whether he, from whom it is extorted, was or was not doing an unlawful action at the time at which it was extorted from him. All which is neceſſary is, that he, who extorted the deed, have no right to do that which he threatened to do, and by which he frightened the other to grant it. Thus one, who is catched in the very act of

committing adultery, theft, or any other crime, is entitled to be reſtored againſt any deed which he may have been forced to do, in order to avoid the immediate effects of the reſentment of him who catches him; provided he, who catches him, threatens to do a thing, which it was unlawful for him to do: Suppoſe, for inſtance, he threatens to put him to death immediately, unleſs he grants the deed. For no man has a right to kill another, except it be abſolutely neceſſary for his own ſafety; and extortion is not the proper method of reſenting injuries, *l.* 7. § 1. *l.* 8. *p. ff. quod. met. cauſa.*

One is entitled to be reſtored on account of ill threatened to be done to himſelf: he is alſo entitled to be reſtored on account of that which is threatened to his wife, to his children, to his parents, or to thoſe in whom he is ſo much intereſted, that he may be ſaid to have near as much concern about their ſafety as he has about his own, *l.* 8. § 3. *ff. cod.*---*St.* 8th *Dec.* 1671, *M'Intoſh*; ſince a man, who has any humanity, may well be ſaid to be frightened by the apprehenſion of their miſery.

§ 751. One may be reſtored *ex capite metus* 1) againſt the extortioners themſelves, thoſe who extorted the deed, and forced him who did it to do it. Theſe are perpetually and in every inſtant *in mala fide*; therefore they are in all caſes bound, by their delinquency, to reſtore not only that which they have unjuſtly extorted, but to reſtore it *cum omni cauſa, fructibus, et acceſſionibus.* And it matters not what they have done with it, or whether they continue or have ceaſed to hold the poſſeſſion of the thing extorted, or have aliened it. If there are more than one of them, it may be ſued againſt each of them *in ſolidum*: for each of them is bound by his own delinquency, and is anſwerable for it. But as ſoon as one of them has made full reſtitution, the reſt ceaſe to be liable to it, and are releaſed from their obligation; becauſe he who ſues for reſtitution demands, indeed he is entitled to demand no more than he has loſt; *rei habet perſecutionem, l.* 14. § 15. *l.* 15. 16. *p. ff. quod met. cauſ.* (§ 706.).

The right of being reſtored is in all caſes *rei perſecutoria*; therefore one muſt be entitled to be reſtored *ex capite vis et metus*, 2) againſt the heirs of the extortioners, and to recover from theſe every thing which he might have recovered from the extortioners themſelves. *Licet enim pœna ad heredem non tranſeat, attamen quod turpiter vel ſcelere quæſitum eſt, ad compendium heredis non debet pertinere, l.* 16. § 2. *l.* 17. *ff. quod metus cauſa.*

'Eum qui metum fecit, et de dolo teneri certum eſt,' ſays the law, *l.* 14. § 13. *ff. quod met. cauſ. l.* 2. § 8. *ff. vi bon. rapt.* But one is in all caſes entitled to be reſtored *ex capite doli* againſt thoſe who are called *gratuitous ſucceſſors*, that is, ſuch as acquire by gift, without a valuable conſideration, *St.* 18th *Dec.* 1667, *Auchinleck.* Therefore 3) one may alſo be in all caſes reſtored *ex capite metus* againſt the gratuitous ſingular ſucceſſors of the extortioners. For it is much more reaſonable that they be deprived of that which they have acquired *gratis*, than that he, from whom it was extorted, be allowed to want it.

But onerous ſingular ſucceſſors have purchaſed for valuable conſiderations, and it may be, *bona fide*; they are therefore in different circumſtances, and one cannot be reſtored 4) againſt deeds made over by the extortioners to them, on which ſeiſin has actually followed. But one is entitled to be reſtored againſt them, 5) in caſe ſeiſin has not followed on the deeds, or 6) they purchaſed *mala fide.* The reaſons of this have been explained already (§ 563.).

§ 752. One may be reſtored *ex capite vis et metus* either by way of exception or by way of action. In ſome caſes the one, in others the other is the proper method of obtaining reſtitution. One may be reſtored *ex capite metus* by way of exception in all thoſe caſes, in which a minor may be reſtored in the ſame manner *ex capite minorennitatis et læſionis*; and by way of action in all thoſe in which a minor can be reſtored in that manner. Theſe caſes have been explained (§ 565.).

But

But it must be remarked that all, which one can obtain by way of exception, is to be *assoilzied* from the action to which he opposes it. This appears from the definition given of an exception above (§ 565.). If he wants more, he must himself become plaintiff, must bring an action in his own name, and must cause a summons to be issued containing the necessary conclusions.

§ 753. The effect of restitution is, that the affairs of him from whom the deed was extorted *, be reduced into the same state in which they were at the instant before he did it, and would have been in case it had not been extorted †. For that is the meaning of being restored (§ 568.). Therefore proper conclusions must be inserted in the libel by which he sues for it, and proper decrees must be made in order to get them reduced into that state.

First; That deed, which has been extorted from him, must be set aside, and must be declared to be void and ineffectual against him for the time to come.

Secondly; He must recover possession of the principal thing which has been alienated, or extorted from him.

Thirdly; The fruits yielded by his property during its absence from him, which he is entitled to recover, must be restored to him: that is, those reaped *mala fide* by him against whom he is restored; for one, who reaps fruits *bona fide*, is not in any case accountable for them.

Fourthly; The proper orders, interlocutors, or decrees must be made in order to make these things effectual to him (§ 568.). If that, which has been extorted, has itself perished, its value must be restored, *i. e.* the value of every thing, which would have been restored, had it been in being.

But restitution is in all cases reciprocal; therefore he who is restored must restore to him, against whom he is restored, every thing given him in consideration of that, which was extorted from him ‡, or at least as much of it as is proportionable to that which he recovers. Otherwise he could not be said to be restored; he would be benefited by the wrong done him.

§ 754. Two observations remain to be made on this matter.

The first is, that one, who sues to be restored *ex capite vis et metus*, avers that he has been compelled by illegal force, and must therefore make proof of his allegation; for he must prove the facts which he affirms.

The other is, that one may sue for restitution *ex capite vis et metus* at any time before 40 years pass from that, at which he did the deed extorted from him. For action begins to lie to him at that time; and actions for obtaining restitution are not in this case limited by the law of Scotland, as they were by that of the Romans, to a shorter period than the usual one. Therefore they last for 40 years, and cease to lie only after the course of the negative prescription is allowed fully to run.

TITLE VI.

Of Circumvention and Fraud.

§ 755. 'TIS essential to the well-being, if not to the subsistence of society, that his property be secured to every member of it. The law hath therefore found it necessary not only to defend men against those open violent and forcible means, but also to protect them against those secret and concealed ones, by which they may be deprived of it. Indeed it is usually more easy to defend one's self against the former than against the latter; people may be on their guard

* Who has been defrauded.
† If he had not been defrauded.
‡ Of which he has been defrauded.

guard againſt open force, and may repel it by oppoſing force to force. But ſuch, as employ ſecret means to defraud mankind, work under ground and accompliſh their ends, ere thoſe againſt whom they are deſigned have the ſmalleſt apprehenſion of their danger.

'Tis the duty of every man to allow his neighbour to enjoy his property; he has no right to encroach upon it, or to deprive him of it. One therefore, who deprives another of any part of it, does an unjuſt, an unlawful action. No matter, what ſort of means he employs in doing it; whether he does it in an open and violent, or in a covered, but fraudulent way.

Beſides, the different degrees of ſenſe, of abilities, and of perſpicacity, which are ſhared out among the individuals of human kind, make it neceſſary to protect the weak, the ſimple and the fooliſh againſt their own facility, as well as againſt the ſhrewdneſs, the craft, and the impoſitions of deſigning men.

For theſe reaſons the law hath thought it proper to deprive thoſe, who have defrauded others, of the profit which they have made by their fraud, and to compel them to make reſtitution to thoſe whom they have defrauded. For they have no right to keep that which they have acquired, and are bound to reſtore it to thoſe whom they have ſpoiled. 'Tis plain therefore that the law reſtores men not only againſt ſuch deeds as have been extorted from them by force, but againſt thoſe by which they have been defrauded by others.

§ 756. Fraud is 'an unlawful artifice, contrivance, machination, or device, 'executed without force, and by which one is made unjuſtly to ſuffer a patrimo-'nial loſs.'

I. It is called an artifice, a machination, a contrivance, or device: for a deſign, an intention, a purpoſe, a knowledge, a conſciouſneſs, of doing wrong, is eſſential to the idea of fraud. That, which either happens by accident, or is done without a wicked deſign, cannot be ſaid to be done fraudulently.

II. This artifice, contrivance, or device muſt be an *unlawful* one: for the word *fraud* is not, like the *dolus* of the Romans, taken ſometimes in a good, ſometimes in a bad ſenſe; it is always uſed in a bad one. Indeed the meaning of *dolus* is not preciſely the ſame with that of *fraud*. *Dolus* ſignifies a trick or an artifice, conſidered abſtractly and ſeparately from the end, to accompliſh which it is employed; and it may with propriety enough be tranſlated into the Engliſh word 'guile.' Thus it is ſaid in ſacred writ, that St. PAUL, being cunning, caught the people with *guile*. For the end intended to be accompliſhed by it may be either a lawful or an unlawful one. In caſe it is a lawful and honeſt one, the *dolus*, provided it has not in itſelf any thing which makes it deſerve to be called bad, may be ſaid to be *good*, *dolus bonus*, and uſes to be called a ſtratagem, a contrivance, or an artifice: for theſe are words of doubtful acceptation, and may be taken in a good as well as in a bad ſenſe. If the end for which it is uſed, is an unlawful or diſhoneſt one, the *dolus* will be ſaid to be *bad*, *dolus malus*, and is properly called a trick. But fraud ſignifies ſomething more than a contrivance, an artifice, or a trick, conſidered abſtractly from its end: it ſignifies not the trick alone, but 'a trick which has been carried into execution, and by which one is made un-'juſtly to ſuffer patrimonial loſs.' So it is taken for the whole complex act, and comprizes all the ideas which both the contrivance and the execution of it ſuggeſt. Therefore it muſt be always taken in a bad ſenſe, becauſe *ex hypotheſi* the end, to which it is employed, is an unlawful one; for every fraud implies a trick played in order to do injuſtice to one by depriving him of his property.

III. It muſt be executed without force: for fraud excludes altogether the idea or the appearance of violence; it is executed not in an open but in a ſecret way; he, to whoſe hurt it is employed, is not in any ſort conſtrained.

Laſtly; It muſt be executed by doing injuſtice to ſomebody, and wrongfully depriving him either of all or of part of his eſtate. An action, which has not this effect, cannot be ſaid to be fraud: for fraud implies, that ſomebody has been

been defrauded; that is, has wrongfully ſuffered a patrimonial loſs. If no body has ſuffered any loſs, nobody can be ſaid to be defrauded.

I ſay, *patrimonial* loſs: for fraud is a word, which is confined to the pecuniary tranſactions of mankind, and is applied to them alone. It is not applied either to thoſe ruſes which politicians employ in the management of the political affairs of ſtates, parties, and courts; or to the ſtratagems, of which ſoldiers make uſe in the field; or to thoſe arts, which paſſion ſuggeſts to the ingenuity of lovers.

But patrimonial loſs is not always meaſured by the *diminution* of one's eſtate; and one may be ſaid to have been defrauded, the value of whoſe eſtate has not been leſſened. For one may be induced by fraud to alter the nature of his property, to ſell for inſtance for value a parcel of lands of which he had no intention to diſpoſe; and he may in this caſe be ſaid to be defrauded, and to have ſuſtained a loſs.

§ 757. It is plain from the condition of human affairs, that people may be defrauded in two ways; either in dealings which they have themſelves with others, and to which they are parties; or by dealings which others have among themſelves, and to which thoſe who are defrauded are not parties. In order to entitle people to ſay, that they have been defrauded in dealings which they have with others, they muſt not only have ſuſtained a patrimonial loſs, but have alſo been *circumvented*, that is, over-reached or impoſed on. To circumvent is a metaphorical expreſſion, which ſignifies properly *to come about;* it is applied to thoſe who inſtead of the patent road take round-about ways, in order to deceive others, to hinder their real deſigns from being diſcovered, and thereby to accompliſh their ends with greater facility. Hence thoſe, who over-reach others, are ſaid *to go about them, to go beyond them* *, and to *circumvent* them.

But in order to entitle one to ſay he has been defrauded by dealings which others have among themſelves, and to which he was not a party, it is not neceſſary for him to have been circumvented by them. Indeed it is impoſſible; for *ex hypotheſi* they had no opportunity of circumventing him, ſince they had no dealings with him. But they might both have the intention of defrauding him, and effectually defraud him in dealings which they had among themſelves, without his privity or participation.

§ 758. The law allows not thoſe, who have made acquiſitions by fraudulent means, to retain them; and it reſtores thoſe who have been defrauded by others, againſt the patrimonial loſſes which they have ſuſtained, as well as againſt the fraud by which they have been made ſuſtain them. The right of reſtitution therefore *ex capite fraudis* (§ 755.) may be defined to be 'a right which every 'one, who has been defrauded by another, has to be reſtored againſt the patri-'monial loſs he hath thereby ſuſtained.' From which and from the foregoing definitions, it follows, I. That *every one*, who has been *defrauded* by another, has a right to be reſtored *ex capite fraudis*, II. That he has a right to be reſtored againſt *patrimonial loſs* which he has ſuſtained, III. That he is entitled to be reſtored againſt it. From theſe axioms it will be eaſy to ſhew, 1) who are entitled to be reſtored *ex capite fraudis;* 2) againſt what deeds one may ſue for reſtitution *ex capite fraudis;* 3) againſt what perſons it may be ſued; 4) within what time it muſt be ſued; 5) after what manner people may be reſtored; 6) what are the effects of reſtitution.

In order to reſolve each of theſe queſtions with the greater diſtinctneſs and perſpicuity, it will be neceſſary to diſtinguiſh the two caſes, which have been remarked already (§ 757.), and to treat of them ſeparately from one another; for the principles, the doctrines, and the concluſions, which hold in the one, are, in many points, inapplicable to the other caſe.

* THESSAL. *Ep.* I. *c.* 4. *v.* 6.

PART I.

§ 759. The firſt is that in which one is ſuppoſed to be defrauded by others in dealings, which he has himſelf with them, and to which he is himſelf a party.

Every one, who has been defrauded by another, has a right to be reſtored againſt that fraud by which he has been circumvented, and the patrimonial loſs which he has ſuſtained (§ 758. *ax.* 1.). Therefore 1) no regard is had to the ſex, age, condition, or rank of the perſon who is defrauded. Perſons of every age, condition, and rank are entitled to obtain reſtitution *ex capite fraudis*. But if the perſon himſelf who has been defrauded is, 2) his heirs muſt of courſe be entitled to be reſtored againſt it: for every patrimonial right, which he had, devolves with the reſt of his eſtate to them, *l.* 13. *p. ff. de dolo malo.* 3) his aſſigns, thoſe to whom he has made over his right of obtaining reſtitution, are entitled to ſue for it: for they are ſubſtituted into his place, and ſue in his name. We ſhall ſee in the ſecond part of this title that an inſolvent perſon is not allowed to defraud his creditors; therefore 4) theſe may ſue for it, in caſe he neglects to do it in order to defraud them. And they may do it *proprio nomine*, without obtaining an adjudication of his faculty to ſue for it: for *being creditors* they have *thereby* a *title* to bring the action. But neither 5) his general aſſigns, thoſe to whom the faculty of ſuing for it is not ſpecially made over, ſuch as legatees and donees, nor 6) his cautioners are entitled to be reſtored *ex capite fraudis:* for the right of ſuing for reſtitution is perſonal to him who has it originally, and is not *preſumed* to be made over.

§ 760. It is neceſſary, that he, who ſues for it, hath been defrauded; therefore he muſt have 1) both ſuſtained a patrimonial loſs, and 2) been circumvented.

He muſt have ſuſtained a patrimonial loſs; for that is implied in being defrauded (§ 756.), and is, beſides, the foundation of his right to be reſtored. In this reſpect reſtitution *ex capite fraudis* differs from that which is obtained *ex capite vis:* for it is not neceſſary in order to entitle one to be reſtored *ex capite metus*, that he hath ſuſtained a patrimonial loſs. Therefore 1) one, who has not ſuffered any patrimonial loſs, is not entitled to be reſtored; for he cannot ſay he has been defrauded: 2) one, who has ſuffered no more than an inconſiderable loſs, is not entitled to be reſtored againſt it; for the law would loſe both its dignity and its end, if it was to interpoſe on every trifling occaſion. Many things are juſtly ſaid to be below its notice. It muſt be left to the judge to determine from the circumſtances of every caſe brought before him, and from the condition of the parties concerned in it, whether the loſs, which one has ſuſtained, be ſo conſiderable as to make it proper to reſtore him againſt it, *l.* 7. § *ult. l.* 9. § *ult. l.* 10. 11. *p. ff. de dolo malo.*

He muſt have been over-reached, deceived, or impoſed on; that is, he muſt, by ſome artful contrivance, have been made to believe, that that which he was doing would not be a loſs to him; for it is eſſential to entitle one to ſay he has been defrauded in dealings which he has himſelf had with others, that he hath been circumvented by them. Therefore 1) one, who was not impoſed on, was not ignorant of the fraudulent deſigns of thoſe with whom he dealt, or knew that in conſequence of them he was to ſuſtain a loſs, is not entitled to be reſtored; becauſe he cannot ſay that he was impoſed on. And it matters not how great be the loſs, which he has ſuſtained: for the law of Scotland does not infer fraud, or preſume it *præſumptione juris et de jure*, from enormous leſion alone; and does not reſtore one on account of it, *l.* 34. *C. de tranſact. l.* 1. § 5. *ff. de injur. A fortiori* 2) one, who intending to cheat another, is himſelf over-reached, is not entitled to be reſtored againſt the loſs which he ſuſtains through his own fraud; no matter whether he, by whom he was over-reached, over-reached him by fraud

fraud or without it, *l.* 36. *ff. de dolo malo, l.* 30. *C. de tranſ.* for the law gives not relief to the crafty who are caught in their own ſnares, and thinks they have not any title to complain. Hence he, who has been defrauded, has it in his option either to ſtand or not to ſtand to the bargain, and according to his pleaſure either to ſue or not to ſue for reduction of it. He cannot be forced not to ſtand to it; for it is complete on the part of the perſon who defrauded him. The law allows not one, who has himſelf defrauded another, to found a *replication* upon fraud, and by it to deſtroy the force of the *exceptio doli*, pleaded to bar an action commenced by him, *l.* 4. § 13. *ff. de doli mali et metus except.* Cum par delictum eſt duorum, ſemper oneratur petitor, et melior habetur poſſeſſoris cauſa, ſicut ſit, cum de dolo excipitur poſſeſſoris: neque enim datur talis replicatio petitori, ‘ aut ſi rei quoque in ea re dolo actum ſit,’ *l.* 154. *ff. d. r. j.* Paria enim delicta mutua penſatione diſſolvuntur, *l.* 39. *ff. ſoluto matrim.*

From theſe principles it follows, that one is not entitled to recover goods, which he has ſold to a perſon who is in reality inſolvent, but whom he knows not to be ſo, either from the purchaſer himſelf or from his aſſigns, upon getting notice of the inſolvency. For the ſale transfers the property; the goods ſold become the buyer's, and are abſorbed in *his eſtate;* they muſt therefore at that inſtant, at which it is transferred, become, like every other part of his eſtate, liable to be attached by all his creditors. The ſeller ceaſes to be proprietor of them; he truſts the buyer, becomes his creditor, and muſt employ the ſame means for recovering payment of the price which other perſonal creditors muſt employ for recovering payment of the debts due to them. 'Tis true one, who knows himſelf to be inſolvent, ought not to purchaſe goods on credit from another who is ignorant of his inſolvency. But a ſale cannot on that account be held to be void; and the buyer cannot preciſely be ſaid to have defrauded the ſeller: for he has *ex hypotheſi* agreed to pay a price for the goods, and it is the buſineſs of the ſeller to know the circumſtances of him to whom he ſells. He is ſuppoſed to have enquired into theſe; he has actually truſted the purchaſer; and muſt by conſequence be held either to be ſatisfied about his circumſtances, or to have been willing to truſt him with this adventure in order to aſſiſt him to retrieve his affairs. He cannot therefore be ſaid to have been *over-reached* by the buyer: for he might have refuſed to ſell on credit; and every one, who enters into a contract, is preſumed to know the condition of him with whom he deals, *l.* 19. *ff. d. r. j.* The riſk he runs, the loſs he ſuſtains muſt be aſcribed to himſelf; ſince it was his buſineſs to have been better acquainted with the circumſtances of the perſon to whom he choſed to ſell his goods. Inſolvency and fraud are very different things; an inſolvent perſon may make a purchaſe, knowing his inſolvency, and may yet have no thoughts of defrauding the ſeller; he may be a very honeſt man, and may be fully perſuaded that he will pay the utmoſt farthing; *ſæpe enim de facultatibus ſuis amplius, quam in his eſt, ſperant homines,* § 3. *J. quib. ex cauſ. man.* and one, who has voluntarily ſold to an inſolvent perſon upon credit, cannot be ſaid to have been *circumvented* by him any more than thoſe who were his creditors before he made the purchaſe. For he did not become inſolvent by it; he was ſo before; every one of them muſt therefore be entitled to be reſtored againſt the dealings which they had with him in former times. Thus infinite confuſion would be introduced into human affairs; men could never be rendered ſecure about their property; and after the longeſt poſſeſſion one might be deprived of things which he had believed to be his own, becauſe they might have been ſold to an inſolvent perſon, and the ſeller might pretend at any time before 40 years from the ſale that they were his, and that the property of them was never transferred. For if he is once allowed to ſay ſo, 'tis impoſſible to aſſign a good reaſon why he ſhould not be allowed to do it at any time within theſe forty years; the property having not been originally transferred, muſt remain with him always till he loſes it by preſcription; and he muſt be entitled to recover it, or rather poſſeſſion of it, as well from the moſt remote aſſigns

aſſigns of the original purchaſer as from the purchaſer himſelf. Beſides, the ſeller having actually truſted him, *fidem ſecutus emptoris* without being induced by extraordinary artifices to do ſo, ought not to be on a better footing than his other perſonal creditors; that, which is his misfortune, muſt *ex neceſſitate* be their advantage; they have truſted him too, and muſt ſuffer as well as he; and the little benefit, which has been thrown in their way by this purchaſe, ought not to be taken from them.

But one who is inſolvent, it has been ſaid, ought not to purchaſe upon credit from another who is ignorant of the ſituation of his affairs; and it is in ſome reſpects hard, that one ſhould be deprived of his property, in order to increaſe the fund of payment to the creditors of another. Therefore lawyers have preſumed that one, who buys goods from another on truſt, meant to defraud the ſeller, and that the property of them is not transferred, in caſe the buyer becomes inſolvent *immediately* after making his purchaſe, or the goods are delivered, *ſi mox foro ceſſerit.* The conſequence is, that they give the ſeller in that caſe a right to *vindicate* them, to recover poſſeſſion of his own, and do not hold him to be no more than a creditor of the purchaſer. But every thing, eſpecially time, ought in law to be fixed and determinate; judges ought, in all caſes, to have a *preciſe* rule to obſerve; as little as poſſible ought to be left to be determined arbitrarily by them; and lawyers have defined the time meant by the word *mox* to the third day after that on which either the purchaſe or delivery is made. For it is the delivery which transfers the *property;* therefore the ſeller is not bound to deliver the goods, in caſe the purchaſer becomes inſolvent *before* they are delivered to him. This rule, I was going to have uſed the Latin word *definition*, has been adopted by the Court of Seſſion, *D.* I. 335. 336. 16th *June* and 8th *Dec.* 1736, *Sir John Inglis;* and there are not wanting good reaſons for ſaying, that it ought to be conſtantly obſerved. For either this or ſome other ſhort time ought to be preciſely defined to be the invariable rule in every caſe: and it is difficult to abſtain from expreſſing ſome concern, that all ſeems again, *Fo.* 24th *Dec.* 1680, *Magnus Prince.*—*St. ibid.*—*Da.* 130.—*B.* 27. to have been thrown looſe, 1757, *Patullo.*—20th *Jan.* 1758, *Mackay v. Forſyth.*

§ 761. One is entitled to be reſtored againſt *every* deed, by which he has been defrauded. Therefore it matters not of what ſort it be, whether it be a judicial or an extrajudicial, an unilateral or a bilateral one; whether *dolus dedit cauſam*, or *incidit negotio.* I am obliged to uſe the expreſſions of the civil law; for it is difficult to tranſlate them into Engliſh. *Dolus dat cauſam negotio*, when it is the firſt cauſe of it, when one is induced by fraud to do a thing, which he had not a mind to do. Fraud is ſaid *incidere negotio*, when one, who had originally mind to do it, is defrauded in doing it. Thus when one is by fraudulent means induced to ſell a thing, of which he had not an intention to diſpoſe, fraud is ſaid to give cauſe, *dare cauſam*, to the bargain: when one, who had an original intention of buying, is cheated in making the bargain, for inſtance in the qualities or the value of the commodity, fraud is ſaid *incidere negotio.*

§ 762. One may ſue for reſtitution *ex capite fraudis* 1) againſt thoſe, who defrauded him; for they are bound, by their own delinquency, to reſtore to him that of which they defrauded him, that is, to make up the loſs which they have cauſed him to ſuſtain. Of courſe the law does not diſtinguiſh whether they have or have not made advantage by it; whether they do or do not continue to poſſeſs any advantage, which they may have made by it; whether they defrauded him directly themſelves, did it indirectly by means of others whom they interpoſed to do it, or were acceſſary to the doing of it. For all theſe may be ſaid to have defrauded him; therefore, action lies againſt them all. Their obligation is founded on a delinquency; therefore it lies againſt every one of them *in ſolidum.* He who has been defrauded is entitled to no more than full and ſimple reſtitution; therefore, as ſoon as he has got it, he has no more to aſk, and all thoſe from whom he has not recovered it ceaſe to be liable to him. 2) It lies againſt

againſt their heirs; and that *in ſolidum*. For they are liable in the ſame manner with their predeceſſors, ſince the obligation is to reſtore to one that, of which they defrauded him. The law of Scotland makes heirs liable to the ſame patrimonial obligations, which lay on their predeceſſors; and does not mind whether they deſcend from a lawful or from an unlawful action, from a convention or a delinquency *; whether any thing or nothing has deſcended to them by means of it. 3) One may be reſtored againſt ſuch ſingular ſucceſſors as ſucceed on lucrative titles; ſuch are legatees and donees: for the law preſumes that they were privy to the fraud, that they were acceſſary to it, and that it was originally intended to be, ſince it has actually been turned to their benefit. Beſides, it is more reaſonable that one, who has by fraud been made to ſuffer a patrimonial loſs, ſhould get reſtored to him that of which he has been defrauded, than that one, who has acquired it on a lucrative title, ſhould be allowed to retain it. *Jure naturæ æquum eſt, neminem cum alterius detrimento et injuria fieri locupletiorem, l.* 206. *ff. d. r. j.*—*St.* 18th *Dec.* 1667, *Auchinleck*. But 4) it cannot be ſued againſt ſuch ſingular ſucceſſors, as ſucceed on onerous titles, *ex cauſa oneroſa*. For fraud is perſonal to thoſe who committed or were acceſſary to the commiſſion of it, *l.* 15. § 3. *ff. de dolo malo, l.* 2. § 1. *ff. de doli mali et met. except.* but one, who ſucceeds on an onerous title, and gives an equivalent for that which he gets, cannot be ſaid to have defrauded either his own immediate author, him from whom himſelf acquired immediately, or the authors of his author, thoſe from whom his author acquired, *l.* 4. § 27. 29. 31. *ff. de doli mali et met. except.*

§ 763. Every thing which has been ſaid (§ 751. *ſqq.*) concerning the manner, the time, and the effects of reſtitution *ex capite vis et metus*, is equally true, *mutatis mutandis*, of the manner, the time, and the effects of reſtitution *ex capite fraudis*. In order therefore to ſave repetition, I have ſubjoined in the notes on that title, expreſſions which may be inſerted in the text inſtead of thoſe uſed in it concerning reſtitution *ex capite vis et metus*.

It is not however improper to remark that the law of Scotland does not, like that of the Romans, mind, whether fraud gives cauſe, *dat cauſam*, or is only incident, *incidit negotio*. It gives in all caſes one, who has been defrauded, the option of getting either that, by which he has been defrauded, annulled by ſuing for a reduction of it; or the loſs, which he has ſuſtained, made up to him by ſuing an ordinary action for that purpoſe. For it diſfavours fraud and fraudulent men, and allows them not to avail themſelves of it in any ſort.

PART II.

§ 764. The doctrine, which has been hitherto explained, concerning that fraud by which one is defrauded in dealings which he has with others, and to which he is a party, is ſimple and eaſy. The more difficult and the more complex caſe remains to be treated, that, to wit, in which one is ſuppoſed to be defrauded not in dealings which he has with others, and to which he is a party, but by thoſe which others have among themſelves, and to which he is not a party. In unfolding this doctrine it will be neceſſary to proceed ſlowly, and to diſcloſe ſtep by ſtep, in an analytical way, the principles on which it is founded, in order to avoid that chaos, in which it has been involved by ſome who have written on this part of the law of Scotland.

I. One cannot loſe his property † without ſome act done by himſelf. *Id, quod noſtrum eſt, ſine facto noſtro ad alium transferri non poteſt, l.* 11. *ff. d. r. j.* (§ 625.).

* It was otherwiſe by the civil law. It made heirs liable *ex delictis defunctorum* only *in quantum ad eos pervenit*.

† By property I mean any corporeal or incorporeal thing, which belongs to one, and is veſted in his perſon.

Therefore the property of one man cannot be affected or taken from him by any thing which others may do among themſelves, without his conſent. Let them do what they pleaſe, it remains entire to him: and if he loſes the natural poſſeſſion of it, or if damage is done to it, he has legal remedies for recovering the former, and for getting reparation of the latter. *Non alienat, qui duntaxat omittit poſſeſſionem, l.* 119. *ff. d. r. j.* 'Tis plain therefore that one ſtands not in need of the extraordinary remedy of reſtitution, in order to protect himſelf and his property againſt thoſe things which others may do concerning it. Indeed one cannot be defrauded of his *property* by actions, which others do among themſelves; becauſe their actions cannot affect it in a legal way. No doubt, in a natural one they may, by ſtealing from him, by robbing him, by ejecting him out of it, by intruding into it, by doing damage to it, *&c.* But actions, which do not affect it in a natural way, can have no effect upon it at all; becauſe they cannot deprive him of his *rights*, theſe being incorporeal. Thoſe things therefore which others do among themſelves alone, againſt which one has a right to be reſtored *ex capite fraudis*, muſt relate to the property not of him who ſues for reſtitution, but of ſome other.

II. One cannot be defrauded by actions which others do concerning *their* property, unleſs he has a legal right to get either all or part of it transferred to him. For if he has no ſuch right, they may do with their property what they pleaſe, and he has no title either to complain or to ſay it is ill done; becauſe he is not, indeed he cannot be wronged in this caſe. But one, who has a legal *right* to get the property of another transferred to him, is called a *creditor* of him, whoſe property he has a right to get transferred to him. Therefore one cannot be entitled to be reſtored againſt dealings which others have among themſelves, and to which he is not a party, unleſs he is a creditor of him whoſe property is affected by thoſe dealings.

III. But one, who has not been *defrauded*, is not entitled to be reſtored *ex capite fraudis* (§ 759. 760.): and one cannot ſay he has been defrauded, unleſs he is made ſuſtain a patrimonial loſs. A creditor is entitled to get payment of the debt due to him, and no more; he cannot therefore be ſaid to have ſuſtained a patrimonial loſs, unleſs ſomething is done by which it is made impoſſible to him to effectuate his right, or to get payment of the debt due to him. By conſequence a creditor is entitled to be reſtored *ex capite fraudis* againſt thoſe things alone, by which it is made impoſſible to him to get the right which he has made effectual to him, or to recover payment of that which is due to him.

IV. Every creditor, being entitled to get a determinate part of the eſtate of his debtor made over to him, may, as has been remarked (§ 599. *ſqq.*), be conſidered, in ſome ſort, as proprietor of part of it. Therefore the eſtate of every *inſolvent* debtor is all of it, in ſome ſort, the property of his creditors. But one has power to diſpoſe of his own property alone, and cannot diſpoſe of that of others. An inſolvent debtor therefore has no right to diſpoſe of his eſtate; and alienations made of it by him muſt be void. Of courſe his creditors muſt be entitled to get them ſet aſide as made *a non habente poteſtatem.*

But it is not of a determinate ſpecies that his creditors can be ſaid to have the property; he has alone the *jus in re*, and is the alone proprietor of all the *particulars* of which his eſtate conſiſts; and they have no more than *jus ad rem.* But this is no more than a right to the *value* of all theſe particulars. As long therefore as this value is not diminiſhed, but continues the ſame, the creditors cannot ſay they are defrauded. By conſequence they are not entitled to get ſet aſide *onerous* alienations made by their debtor; for the value of the eſtate is not diminiſhed, the particulars of which it conſiſts are only changed by theſe: they are entitled to be reſtored againſt *gratuitous* alienations alone.

V. But one is entitled to be reſtored *ex capite fraudis* againſt thoſe alone who have *defrauded* him; that is, who did what they were doing, when they knew the conſequence

conſequence of it would be to do injuſtice to him, and to make him ſuſtain a patrimonial loſs. For this is implied in the very nature of the thing.

Out of theſe principles, deduced thus in an analytical way, it will be eaſy to form a general one, reſolvable into axioms, from which, by deſcending in a contrary order, we may deduce, in the ſynthetical manner, the ſeveral concluſions neceſſary for explaining as well as for underſtanding this doctrine. For from them it follows, that 'creditors are entitled to be reſtored againſt every deed, 'by which they are defrauded:' a principle which may be reſolved into the following axioms. I. Thoſe, who are entitled to be reſtored, muſt be 1) *creditors*, and 2) *defrauded*. II. The deeds, againſt which they are entitled to be reſtored, are *all thoſe by which they are defrauded*. III. Therefore they are entitled to be reſtored againſt *thoſe alone, who have defrauded them*. IV. They are entitled to be *reſtored*. From theſe axioms it will be eaſy to ſhew 1) the perſons who are entitled to be reſtored *ex capite fraudis*, or to impeach deeds done by their debtors to be fraudulent; 2) the deeds which theſe perſons may impeach to be fraudulent, and againſt which they are entitled to be reſtored; 3) the perſons againſt whom they may be reſtored, and are entitled to impeach them to be fraudulent; 4) the manner of obtaining reſtitution againſt them.

§ 765. The perſons, who are entitled to be reſtored *ex capite fraudis* in theſe circumſtances, muſt 1) be *creditors* of him, whoſe property is affected by that which is done (§ 764. *ax.* 1.). By creditors in this, as in moſt other places, are meant 'thoſe, who have others bound to them by valid and effectual obli-'gations.' But all obligations are perſonal; for they lie on the perſons obliged alone. Therefore the creditors, who are entitled to be reſtored *ex capite fraudis*, are properly *perſonal* ones. Such, as have real rights *in* the property of others, fall not preciſely under this denomination; the reality of the rights, which theſe have, makes them rather be conſidered as joint proprietors with thoſe, in whoſe property they have them. For a real right remains entire, notwithſtanding deeds done either by him whoſe property is affected by it, or by any other; and is not affected by them. He, who has it, cannot be deprived of it, without a deed done by himſelf; the deeds, the tranſactions, the dealings of others cannot deprive him of it. For it is a real charge upon the thing affected by it, and adheres to it, no matter through how many hands it paſſes, or into how many it comes. A real right therefore can hardly be hurt by any other than him who has it; and he can ſeldom have intereſt in ſuing for a reduction on account of it. (§ 764. *ax.* 1.).

But it is poſſible deeds may be made in order to hurt it; even a proprietor has a title to render his property more ſecure by getting ſet aſide every deed on which one may found pretenſions to it. Therefore even a real creditor may have occaſion to ſue for reduction *ex capite fraudis;* and he has a title to do it in all caſes in which his right is infringed, or he is defrauded. But his action is not properly a reduction *ex capite fraudis;* it is rather one which is a neceſſary conſequence of his property. Beſides, one who has a real right, may be alſo a perſonal creditor, and the real right may be granted in ſecurity of that which is due to him by the perſonal obligation. But the prudence, vigilance, and caution which he ſhews for his own intereſt, in order to inſure himſelf of payment, ought not to be prejudicial to him, or to deprive him of any right which he has by being a perſonal creditor.

But thoſe obligations muſt 2) be valid and effectual ones; he, who has the other bound, muſt have legal means for making them effectual, and muſt be entitled to get his debtor compelled to fulfil them. One who has not theſe means, but depends for the completion of them upon the caprice of the debtor, cannot be called a creditor; for he has not a perfect right; he has no more than an imperfect, a dependent, and an uncertain one.

Every perſonal creditor has a right to be reſtored againſt deeds, by which he is defrauded; therefore 3) it is no matter, whether the debt due to him be 1) a pure,

pure, or 2) a conditional one, whether it be due 3) from a day, or 4) to a day ; 5) *ſub cauſa*, or 6) *ſub modo*. For theſe differences do not make a debt not a debt; they are no more than accidental qualities, which alter not its eſſence. It muſt however be remarked, that one cannot ſue for reduction *ex capite fraudis*, unleſs payment of his debt is preſently demandable; becauſe one, who cannot ſue the original debtor, ought much leſs to be allowed to ſue for reduction of deeds granted by him in favour of third parties. This is ſurely true with regard to conditional debts, becauſe the conditions may happen not to exiſt, and of courſe no debts become due: for *dies nec cedit nec venit*, till they exiſt. But it is otherwiſe in caſe the debt is due either to a day or from a day ; becauſe the day *ſtatim cedit* as ſoon as the debt is conſtituted, and one has ſurely a title to get ſet aſide deeds made for diſappointing him of payment.

But he muſt 4) have been a creditor, *before* the deed, by which he is defrauded, was done. For one, who has no intereſt in the eſtate of another, has no right to reſtrain him from diſpoſing of it as he pleaſes; and one has no intereſt in reſtraining him, who is not a creditor. If he is not a creditor, no part of the eſtate of the other can, in any ſort, be ſaid to be his; his title therefore to reſtrain his debtor commences only at the time at which he becomes a creditor. Beſides, people contract with others on the faith of the eſtate which they have at the time of making the contract, and muſt be preſumed to be contented with the ſecurity which it affords them at that time. Therefore they muſt be preſumed to approve of every deed done by him, with whom they contract, before that time, and to renounce any right which they pretend to have to get it ſet aſide. Every creditor therefore is entitled to be reſtored againſt ſuch deeds alone granted by his debtor, as are poſterior to the debt due to himſelf, *Fo.* 25th *July* 1702, *Man.*

One is reckoned a prior creditor, if the obligation, by which he has his debtor bound, be anterior to the deed by which he is defrauded ; no matter tho the written document which he hath of it bears a poſterior date: for regard is had not to the time at which the written document is dated, but to that at which the debt is contracted. Thus a merchant, who ſells goods, becomes a creditor of the buyer at the time of the ſale ; therefore he is entitled to be held a creditor, prior to any deed granted by the purchaſer, tho the writ, which he has got from his debtor to conſtitute the debt, be poſterior to it, *St.* 21ſt *Jan.* 1669, *Creditors of Pollock.*—27th *July* 1669, *Street.*—28th *Nov.* 1679, *Cathcart*, provided the time of the ſale was prior.

It is needleſs to enquire 5) whether it may be ſued by the heirs of the original creditor. For it is plain that it may be ſued by them, in caſe the debt has not been paid to him, and has devolved to them ; for they are in that caſe creditors: and that they are not entitled to ſue for it, in caſe the debt has been paid to their predeceſſor, or is not tranſmitted to them ; becauſe they are then not creditors.

For the ſame reaſon it is plain that it is needleſs to ſay, 6) whether it may be ſued by the aſſigns of the original creditor: for an aſſignment makes thoſe, to whom the debt is made over, become creditors ; therefore they muſt be entitled to ſue it.

As little is it of much importance to remark 7) that it matters not whether one be an onerous or a gratuitous creditor : for every one, who is a creditor, is equally ſo, and has all the rights which creditors have. Thus one, to whom a bond has been made by gift or left by will, is a creditor, and has thereby a title to be reſtored againſt deeds by which he is defrauded, as much as one to whom it has been made for money borrowed from him.

§ 766. But in order to entitle one to be reſtored *ex capite fraudis*, it is not enough that he be a creditor ; he muſt 2) be *defrauded* (§ 764. *ax.* 1.). But a creditor cannot be ſaid to be defrauded, unleſs his debtor 1) has an *animus* of defrauding him, and 2) does ſomething which makes him ſuſtain a patrimonial loſs;

loſs; for both the *animus* and the effect are eſſential to the idea of fraud (§ 756.).

I. The debtor muſt have the *animus* of defrauding his creditor; that is, he muſt be conſcious, that the conſequence of the deed, which he is doing, will be to make his creditor ſuffer a patrimonial loſs. But the thoughts of the heart are known to the Searcher of hearts alone; and the law is neceſſitated to preſume concerning the intentions of men, from their actions. Now a creditor does not ſuffer a patrimonial loſs, who gets payment of the debt due to him; and he ſuſtains one, when he does not get it. Therefore the law preſumes a debtor to have an *animus* of defrauding his creditor, who either does a thing by which he is rendered inſolvent; or being inſolvent does a thing, by which the intereſt of his creditor is hurt. For the law preſumes every one to know the ſtate of his own affairs, the value of his eſtate, and the amount of his debts. Therefore it preſumes one who does a thing, by which he becomes inſolvent, to have known it would have this effect. But one who knew it would have this effect, it is plain, muſt have known he was doing injuſtice to his creditors, he was wronging, was defrauding them: for he ought to have paid his juſt debts before he did it. *A fortiori* one, who being inſolvent, does a deed by which the intereſt of his creditors is hurt, muſt be held to have the *animus fraudandi*: for being unable to pay them, he ought at leaſt to abſtain from doing any thing by which either it is rendered more difficult for them to recover payment, or they are hindered from recovering as much as they could otherwiſe have done. Therefore every even gratuitous deed done by one, who neither is inſolvent nor is rendered ſo by it, is good; becauſe his creditors cannot ſay they are defrauded by it; he retains as much as is ſufficient for clearing the debts due to them; and has therefore the abſolute diſpoſal of his own eſtate.

II. But a creditor cannot ſay that he is defrauded, unleſs he actually ſuſtains a patrimonial loſs; it muſt be impoſſible for him to recover full payment of the debt due to him, in caſe the deed done by his debtor is allowed to ſubſiſt and to take effect: for he cannot be defrauded otherwiſe. 'Tis true he who did the deed, might have an intention of defrauding his creditor by it. But if this intention is not made effectual, if the debtor has, notwithſtanding, as much as will diſcharge his debts, if his creditor gets payment, he cannot be ſaid to be defrauded at all; for he has no right to aſk more; or to enquire in this caſe into the intention of his debtor, ſince he has not ſuffered any loſs.

§ 767. A creditor is entitled to be reſtored againſt *every* deed, by which he is *defrauded* (§ 764. *ax.* 2.). But it has been ſaid (§ 766.) he cannot be defrauded, unleſs ſomething is done which, in caſe it is allowed to become effectual, will either render it impoſſible for him to recover payment of the debt due to him, or make him ſuſtain a patrimonial loſs by infringing his rights in ſome other manner; an effect which cannot be produced by any deed done by an inſolvent debtor, which does not diminiſh the funds he has for paying his debts, or infringe the rights which his creditors have in competition with one another. But theſe cannot be diminiſhed, unleſs he does ſomething by which his eſtate either is immediately or may afterwards be diminiſhed: for his eſtate is nothing elſe than another phraſe for expreſſing theſe funds. Creditors therefore are entitled to be reſtored againſt *every deed, by which the eſtate of their inſolvent debtor either is or may be diminiſhed.*

Diminuere, to diminiſh, is *to make leſs*. Therefore an eſtate is diminiſhed, when it is made leſs than it was; or when ſomething, which was a part of it, is made to ceaſe to be ſo. But a thing is made to ceaſe to be a part of one's eſtate by being *alienated*, that is, *by being made to ceaſe to be his property*. A thing may be alienated, for it may ceaſe to be one's property, in two ways: either it may ceaſe to be the property of one, without becoming at the ſame time the property of another; or it may become the property of another at the ſame time that it ceaſes to be the property of him, who aliens it. A thing ceaſes to be the property of one without becoming the property of another, when it is relinquiſhed: for dereliction is a ſpecies of alienation; he, who relinquiſhes

his property, makes it ceaſe to be his, § 47. *J. de rer. div.* It ceaſes to be the property of one *and* becomes that of another, when it is made over to another and is acquired by him. 'Tis this which is properly called alienation (§ 459.); becauſe that, which belonged to one, becomes by it *alienum*, the property of another.

But money, ſays SOLOMON, anſwereth all things; and creditors have occaſion to rate every eſtate by its pecuniary value alone, by that ſum which it is able to yield for clearing the debts due to them. Therefore the eſtate of their debtor can be ſaid by them to be diminiſhed in thoſe caſes alone, in which it is rendered leſs valuable, or is made to yield a leſs ſum to them. By conſequence creditors are not entitled to be reſtored againſt every alienation made by their debtor; he may make a thing ceaſe to be a part of his eſtate without diminiſhing its value, for he may get an equivalent for it. Therefore 'tis againſt thoſe alienations alone which he makes without getting equivalents for the things alienated, that creditors are entitled to be reſtored *ex capite fraudis*: for they can be defrauded by theſe alone. They are not in all caſes entitled to be reſtored againſt thoſe which he makes for valuable conſiderations. Thoſe which are made for valuable conſiderations, that is, conſiderations equivalent to the things for which they are given, are in the law of Scotland ſaid to be made for *onerous cauſes* or to be *onerous*; and thoſe made without them are ſaid to be made for *gratuitous cauſes* or to be *gratuitous*. We ſhall have occaſion hereafter to ſpecify ſome caſes, in which creditors are entitled to be reſtored even againſt *onerous* ones: therefore I ſaid they are not in *all* caſes entitled to be reſtored againſt them.

'Tis hardly neceſſary to remark further, that the deeds againſt which creditors are entitled to be reſtored muſt be done by their debtor: for this is implied in the whole argument. Therefore they muſt be *voluntary* ones (§ 611.); creditors are not entitled to be reſtored againſt thoſe which are *neceſſary*, that is, ſuch as he is either compelled or compellable by legal means to do. For he cannot be ſaid to defraud his creditors by theſe; he has no intention of defrauding them; he who does them acts *ex neceſſitate legis*; and has therefore little or no part in them.

They muſt alſo be ſuch as either are granted by him after he is inſolvent, or render him ſo (§ 764. 766.): and they muſt be poſterior to the debts due to the creditors. But it matters not, whether they be judicial or extrajudicial, unilateral or bilateral, contracts or obligations, onerous or gratuitous, completed by writ or without it, relate to heritage or to moveables; provided they are done *in fraudem creditorum*. For all which the law requires in order to make them voidable is, that they be deeds by which creditors *are defrauded*; and we ſhall ſee that creditors may, in ſome caſes, be defrauded by onerous deeds.

But creditors are entitled to be reſtored againſt thoſe deeds alone, by which the eſtate of their debtor is *diminiſhed*, or is made *leſs* than it was; for they are held to be defrauded by thoſe alienations alone, by which ſomething that *belonged* to him is made to *ceaſe* to be a part of his eſtate. They have no title to compel their debtor to augment it by acquiring. Therefore if he either does not or refuſes to acquire the property of any thing, which he might acquire on a lucrative title, they are not entitled to be reſtored againſt the neglect; for they cannot ſay, that the eſtate of their debtor is thereby diminiſhed. *Non fraudantur creditores, cum quid non adquiritur a debitore; ſed cum de bonis quid diminuitur, l.* 134. *ff. d. r. j.* *. Suppoſe, for inſtance, the debtor does not ſeiſe the property of a thing which never belonged to any body, and which he has it in his power to acquire; ſuppoſe he refuſes to accept of a preſent which is offered him; ſuppoſe he is negligent of his intereſt, does not employ his ſtock in a profitable way, does not lay his money out on intereſt, does not graſp at advantageous bargains, or neglects to do any other thing by which he might make lucrative

* See JAC. GOTHOFREDI *comment. ad d. l.* 134. *d. r. j.* and GOEDEUS *ad l.* 28. *ff. de verb.* § 12.

lucrative acquiſitions, and add to his eſtate; his creditor has no right to make the acquiſition for him, to attach the thing which he might have acquired, and to be thereby reſtored againſt his negligence: for he cannot ſay that his debtor has alienated any part of his eſtate, or has diminiſhed it; he has only rejected a method, by which he might have increaſed it. Beſides, no creditor has a legal right to force his debtor to make acquiſitions. 'Tis true a debtor, who is ſo baſe as to neglect to do it, and thereby to make his creditor ſuffer, may well be ſaid to be an ill man. But the law leaves him to be puniſhed by the ſtings of a guilty conſcience, and by the contempt that uſes to attend ſuch diſhoneſt actions, preſuming that moſt men are diſpoſed to pay their juſt debts, if they are able to do it, and to make as many lucrative acquiſitions as they have it in their power to make, *l.* 6. *p.* § 1. 2. 4. *ff. quæ in fraudem creditorum, l.* 28. *ff. d. v. ſignif. l.* 134. *ff. d. r. j.*

But a right to an eſtate or to a particular thing may devolve to one; and no more may be neceſſary in order to veſt it in his perſon than to make in a formal manner complete titles to it. In theſe caſes creditors may *attach* the things, which their debtor may acquire; and the law has pointed out the way in which they may do it. But they are not entitled to compel him to acquire or to make titles to them; that is a very different matter; all which they can compel him to do is to renounce his right to them; but they are not entitled to be reſtored againſt his renunciation, to get it ſet aſide, or to make him liable in the ſame manner in which he would have been in caſe he had acquired in the moſt formal manner.

§ 768. But in order to entitle creditors to get an alienation made by their debtor ſet aſide, to be reſtored againſt it, and to recover the thing alienated by him, it is not enough that it has been alienated by the debtor, when he was conſcious he was thereby defrauding them, and that the creditors were actually defrauded by the alienation (§ 766.). Every thing, which has been alienated by the debtor, muſt be re-claimed from ſome other perſon than him; becauſe by the alienation it ceaſes to be his property, and becomes the property of another. Reſtitution therefore *ex capite fraudis* muſt in all caſes affect the intereſt of ſome third party.

Either a corporeal thing, which he has purchaſed, is taken from him; or he is deprived of a right, which he has acquired; or a deed made in his favour is ſet aſide. But the law allows not the fraud of one to be hurtful to another; it confines both the effects and the conſequences of it to thoſe alone, who are partakers of it. Therefore it does not allow one to be, in all caſes, deprived of a thing which he has acquired either mediately or immediately from an inſolvent debtor, and by the alienating of which the creditors of the latter are defrauded; and it is neceſſitated to diſcover equitable principles, on which it may found the right of ſuing for reſtitution. It means not to put an end to commerce among mankind; and therefore diſtinguiſhes between alienations made for cauſes which are not anterior to them, and ſuch as are made to creditors in ſatisfaction or ſecurity of debts antecedently due to them. Let us conſider each of theſe caſes in their turn; and explain the ſtatutes which the Scotch legiſlature hath made concerning them. Theſe are two; the firſt was made in the one thouſand ſix hundred and twenty-one during the reign of JAMES the Sixth of Scotland, the other in the ſixteen hundred and ninety-ſix during that of King WILLIAM.

§ 769. 'Tis ſurely much more reaſonable that lawful creditors ſhould get payment of debts due to them, than that the eſtate of their debtor ſhould be enjoyed by one who has no better than a lucrative title to run away with it. Therefore reſtitution *ex capite fraudis* may in all caſes be ſued againſt ſuch as acquire on lucrative titles, *v. g. pro derelicto* (§ 767.), *pro donato, pro legato, &c.* whether they do or do not know, that the debtor either is or will become inſolvent, and his creditors be defrauded by the alienation, 1621, *c.* 18.—*St.* 3d *Feb.* 1672, *Home.* They are *in damno vitando,* he is *in lucro captando;* they are

ſeeking

ſeeking to avoid loſs, he is graſping at unjuſt gain: therefore their caſe is more favourable than his, and they ought to be preferred to him. But a *bonæ fidei* poſſeſſor is not accountable for fruits reaped by him *bona fide;* and one who has acquired on a lucrative title may himſelf diſpoſe of that which he has acquired. One therefore who is *in bona fide*, and knows not that the creditors are defrauded by the alienation, is liable for no more than he poſſeſſeth, or than he is *locupletior factus*. But one who is *particeps fraudis*, and knows that the creditors of the debtor would be defrauded by the alienation, acquires *mala fide*, and muſt therefore be liable in all caſes *in ſolidum* of that which he hath acquired, and of the fruits reaped by him *mala fide; quia dolus pro poſſeſſione eſt, l.* 6. § 11. *ff. quæ in fraud. cred. l.* 5. *C. de revoc. iis quæ.*

Alienations made for *onerous* cauſes diminiſh not the eſtate of the debtor: for they alter not its value; they only alter the denomination of the particulars of which it conſiſts (§ 767.). Beſides, it would be abſurd for the law to preſerve the rights of creditors by putting an end to commerce among mankind. Therefore creditors are not entitled to be reſtored againſt onerous purchaſers, or alienations made in their favour. Onerous purchaſers 'are ſuch as purchaſe *intending* to get *value* for that which they give, and *believing* that that which they purchaſe is worth that which they give for it.' And one is held to make an onerous *alienation*, 'who both *intends* to get value for that which he alienates, and *thinks* he gets it.' 'Tis not therefore neceſſary that the thing purchaſed be in *reality* worth that which the purchaſer gives for it, or that others have the ſame opinion which he has concerning its value, or that he be able to get from them the ſame value which he has given for it. Regard is not in this matter had to the *real* values of things; 'tis the intention, the thoughts, the *animus of parties*, on which alone it depends; and all which is neceſſary in order to make one be held to be an onerous purchaſer is, that he himſelf *think* he has got value for that which he gives. A mathematical equality is therefore not requiſite; and that which is called *metaphyſical* is more conſidered in this caſe than *logical* truth. For it is not neceſſary converſly, that each of the parties *think* that, which he *gives*, equivalent to that which he gets. The law ſays it is in all caſes lawful for thoſe who are making onerous bargains to circumvent one another; *in pretio emptionis et venditionis naturaliter licere contrahentibus ſe invicem circumvenire, l.* 16. § 4. *ff. de min.* that is, it is lawful for the ſeller to ſell as dear and to get as high a price as he can; for the buyer to buy as cheap and to give as low a price as he can: and a bargain, an alienation, a purchaſe, in which both parties have reſpectively this intention, is an onerous one. Therefore the creditors of the inſolvent perſon, who makes the alienation, are not entitled to get it annulled; provided he intended to get full value for the thing alienated by him.

But bankrupts fall on many contrivances for defrauding their creditors; and thoſe, who have a regard for them, are apt to be moved by compaſſion to aſſiſt them in carrying theſe into execution. *Plus valet quod agitur quam quod ſimulate concipitur*. Therefore the law believes not every alienation, which a bankrupt pretends is onerous, to be ſo; it attends to the circumſtances of perſons, of times, and of things; and hath found it neceſſary to diſtinguiſh alienations made in favour of ſuch as it ſuſpects to be *confidents* of the bankrupt, and thoſe made in favour of others.

§ 770. Confidents are thoſe in whom one confides. The confidents therefore of a bankrupt are thoſe whom he truſts, and who, he confides, will act for his behoof. They are called in the law, 1621, *c.* 18. *conjunct or confident* perſons; and may be defined to be 'thoſe in whom an inſolvent perſon confides, and whom he therefore employs to act for his behoof.'

People have uſually an affection for thoſe who are related to them by the ties of blood; they are anxious about their welfare; and they ſometimes ſcruple not, out of compaſſion for the misfortunes of their friends, to make ſtretches in order to relieve them out of their diſtreſs. But other accidents give riſe to ſtrong attachments,

tachments, and diſpoſe men to favour thoſe to whom they are attached. Some men therefore the law ſuſpects to be confidents of an inſolvent perſon, becauſe of the propinquity of the relation, in which they ſtand to one another; others it ſuſpects on other accounts. The former are called properly *conjunct* perſons; the latter are in a ſtrict ſenſe called the *confidents* of the bankrupt.

All thoſe uſe in vulgar ſpeech to be called *conjunct* perſons, 'who are related 'to one another:' becauſe a natural tie binds them together. But diſtant relations are ſometimes unknown to one another; the regard, which men have for theſe, is uſually ſmall, and is annihilated by that which they have for nearer ones; and the law cannot go on *in infinitum*, ſuſpecting every one, who can be proved to have the moſt diſtant connexion, to be a confident of the bankrupt. 'Tis neceſſary therefore to fix a limit ſomewhere; and the law of Scotland holds *ſuch alone* to be, in the ſenſe of this title and of the ſtatute 1621, *conjunct* perſons, *as are prohibited by law* 1681, *c.* 13. *and are not allowed to judge in the cauſes of one another.* Theſe are 1) father, 2) mother, 3) ſon, 4) daughter, 5) brother, and 6) ſiſter, either by affinity or by conſanguinity, *Fo.* 18th *June* 1712, *Scot*, 7) uncle, 8) aunt, 9) nephew, and 10) niece*. For a father is not allowed to judge in the cauſe of his own child; a ſon is not allowed to judge in the cauſe of his father or mother; a brother is not allowed to judge in the cauſe of his brother or ſiſter; a father-in-law is not allowed to judge in the cauſe either of his ſon-in-law or of his daughter-in-law, *Fo.* 16th *Jan.* 1695, *Mercer*; a ſon-in-law is not allowed to judge in the cauſe either of his father-in-law or of his mother-in-law: a brother-in-law is not allowed to judge in the cauſe of his brother-in-law, or of his ſiſter-in-law, *Fo.* 18th *June* 1712, *Scot*; an uncle is not allowed to judge in the cauſe of his nephew or niece; a nephew is not allowed to judge in the cauſe of his uncle or aunt. But this prohibition and incapacity extends not to any other degrees either of conſanguinity or of affinity, 1594, *c.* 212.—1681, *c.* 13. So that an uncle-in-law or an aunt-in-law, and a nephew-in-law or a niece-in-law, are not reckoned conjunct perſons in the ſenſe of 1621, *c.* 18.—*F.* 8th *Feb.* 1712, *Lord Elibank*; nor couſins-german, *Fo.* 6th *Dec.* 1679, *Sinclair*.—*F. MS.* 8th *June* 1714, *M'Douall*; nor any degree different from thoſe, which have been mentioned. But aſcendents and deſcendents, or parents and children, are they prohibited and incapacitated *in infinitum?* They are not mentioned expreſsly; they ſeem however to be compriſed in the words 'father and 'ſon.' For a child is in ſome ſort as much a part of the body of his parent, as fruit is of the tree which bears it; a father therefore and grandfather, a ſon and a grandſon are the ſame perſons; and every deſcendent is the ſame perſon with all his aſcendents. 'Tis true grandchildren ſeldom happen to be promoted ſo early in life as to have opportunities of judging in the cauſes of their grandfathers. But grandfathers have ſometimes occaſion to judge in thoſe of their grandchildren: they regard their poſterity with the greateſt affection, and may well be ſuſpected of being partial in their favour. An uncle is incapacitated from judging in the cauſe of his nephew; and ought not a grandfather to be incapacitated from judging in that of his grandchild? A nephew is incapacitated from judging in the cauſe of his uncle; and ought not a grandſon to be incapacitated from judging in that of his grandfather?

In this manner all thoſe, who are held to be conjunct perſons, are aſcertained eaſily and with preciſion. It is more difficult to diſcover thoſe, whom we call confident ones. For ſuch, as intend to defraud their creditors, fall on all the contrivances which invention can ſuggeſt, in order to conceal and to accompliſh their deſigns. The law is therefore obliged to have penetrating eyes, and to take hold of circumſtances, from which it may preſume a deſign of defrauding creditors.

 Theſe

* Before the 1681, the prohibition was limited to father, mother, brother, ſiſter, ſon and daughter, 1594, *c.* 212.

Theſe circumſtances are ‘ any which make it probable, that one is truſted by a-‘ nother, and is acting for his behoof.’ It is therefore impoſſible either to enumerate, or to lay down any general rule, which may compriſe all of them; and it muſt be left to the penetration of the judge to form his conjecture from thoſe which diſtinguiſh every caſe. But the writers on the law have ſpecified ſome of them; and the moſt remarkable * are theſe following.

I. He, in whoſe favour an alienation is made, may allow him who made it to retain, notwithſtanding, the natural poſſeſſion of the thing alienated. It is plain, that in this caſe the alienation is not actually made effectual; for he who made it is allowed, after, as he ſays, he has ceaſed to be proprietor, to enjoy all the benefits of his property. But the law is ſuſpicious of every thing which is dark, if it ſees, that one of the parties concerned in it has an evident intereſt in concealing the truth. An alienation made in this manner by an inſolvent perſon carries obvious marks of fraud in its boſom; he, who has pretended to make it, may retain his property and thereby defraud his creditors. Therefore the law preſumes in theſe circumſtances, that the deed was ante-dated, and holds him who pretends to have acquired the property of the goods poſſeſſed by the bankrupt, to be a confident employed by him to defraud his creditors.

II. For the ſame reaſons the law preſumes every latent deed made by an inſolvent perſon to be fraudulent, and him in whoſe favour it is made to be privy to the fraud of the bankrupt. A latent deed is ‘ one which it was not known was ‘ made? A deed of this kind, if it makes its appearance of a ſudden, at a time when people were not expecting it, and when he who made it has an evident intereſt in pretending to have made it, is, it is plain, liable to be ſuſpected of being a fraudulent contrivance, created in a moment to ſerve a turn.

From hence it is plain, that theſe preſumptions muſt chiefly have place in moveables; becauſe one may make them over by a written conveyance in favour of another, and be allowed, notwithſtanding, to retain the poſſeſſion of them. But if one is, after this manner, allowed to retain the natural poſſeſſion of moveables which he pretends to have made over to another, the law is ſuſpicious of the alienation, holds it to be a ſimulated one, preſumes it to be a fraudulent contrivance deviſed in order to do injuſtice to creditors, and ſuſpects him, in whoſe favour it is made, to be a confident of the debtor who made it, and to be his accomplice in the execution of his wicked deſigns, *arg.* 1592, *c.* 147. For it is the *natural* poſſeſſion alone, which the law regards in the caſe of moveables. Inſtruments of poſſeſſion and other ſchemes may be as eaſily deviſed as the principal one, and are ſo far from diminiſhing, that they rather increaſe the ſuſpicion of ſimulation and of fraud.

Theſe preſumptions may alſo have place with regard to immoveables. A tenant may pretend to have aſſigned his leaſe, and the ſtock which he has on his farm; and may continue, notwithſtanding, to hold the natural poſſeſſion as well as uſe of both. For ſeiſin is not neceſſary to complete the right of the aſſign. But they cannot well have place in thoſe caſes, in which ſeiſin is neceſſary to complete the right of him in whoſe favour the alienation is made, and it is actually taken. For formal ſeiſins muſt be regiſtered, and are thereby made public. But it *is poſſible* they may *ſometimes* have place in theſe caſes alſo. For one may pretend to veſt the property of an immoveable in another by the moſt complete and moſt formal titles; and may yet retain the real property as well as the actual poſſeſſion to himſelf. He may either rely on the honour of his confident, and may run the riſk of his life, without getting a written acknowledgment of truſt; or he may ſecure himſelf by delivering no written titles to him, or rather by getting them re-delivered to himſelf immediately after ſeiſin is taken. For in this caſe he can at any time bring an action of reduction and improbation of the rights of his truſtee, in order to get all his titles ſet aſide and declared to be falſe and forged; and the truſtee being unable to produce any others than his ſeiſin,

* *Vid.* Perez. *ad l.* 7. *t.* 75. § 10. *C.*

ſeiſin, which alone is nothing, certification muſt be granted againſt all the reſt for being not produced, and all his titles be thereby avoided.

III. A third circumſtance, which may have influence in making one be ſuſpected of being the confident of another, is propinquity of blood. Some relations, it has been ſaid, are ſo near that they *alone* are held to afford ſufficient ground for forming this ſuſpicion: but theſe I mean not in this caſe. I mean thoſe remoter ones, which law allows not *alone and by themſelves* to create any preſumption of mutual confidence, but which *joined* to *other* circumſtances, may have great influence on the mind of a judge, *St.* 22d *June* 1680, *Trotter*. The force therefore of every relation muſt depend on its propinquity, on the intercourſe which the parties are known to have had, and on the regard which they can be proved by preſumptive evidence to have had for one another.

IV. People uſually put much confidence in thoſe whom they employ in the management of their affairs; theſe are greatly concerned about the intereſt of their maſters, and conceive ſtrong attachments to them. Hence one, who is employed in the management of the affairs of another, as his commiſſioner, his ſteward, his factor, his attorney, his agent, or, as we ſpeak in Scotland, his *writer* or *doer*, will from thence be preſumed to be a confident of him, whoſe affairs he is employed to manage.

But it may be inferred from many other circumſtances, that one is the confident of an inſolvent debtor: the creditors therefore of every inſolvent perſon are entitled, and ought to be allowed to bring proof of all facts and circumſtances which may ſerve to ſhew that there is reaſon to believe one, in whoſe favour a deed hurtful to their intereſt is made, to be a confident of their debtor. For this purpoſe the law 1621, *c.* 18. allows them to prove this either by the oath or by the writ of the confident perſon himſelf. But facts may yield the cleareſt real evidence, and may afford the ſtrongeſt conviction; theſe therefore may be proved by witneſſes: for all facts may be proved in that manner, which the law has not forbidden to be ſo. 'Tis true it hath declared by 1696, *c.* 25. truſt to be proveable by the oath or writ of the truſtee alone. But this ſtatute relates not to the preſent caſe; and means to exclude people from proving truſt by witneſſes in thoſe caſes alone, in which having it in their power to have got a written acknowledgment of it, they have neglected to exact one. This negligence it puniſhes by depriving the negligent perſon of the faculty of proving the truſt otherwiſe than by referring it to the oath of him, to whom he made the conveyance. But it means not to wreſt the law in order to hinder fraud from being detected. On the contrary it diſfavours it, and does every thing it can do to facilitate the detection of it; and for theſe reaſons the ſtatute 1696, *c.* 25. is not underſtood to extend to truſts of this kind. A creditor, who is defrauded, has it not in his power to exact a declaration of truſt from him who is the confident of his debtor, and in whoſe favour an alienation is made; for *ex hypotheſi* he is not a party to the tranſaction, which they have among themſelves. Beſides, if they intend to defraud him, and the debtor thinks he has reaſon to confide in the other, it is for *his* intereſt to neglect to exact a declaration of truſt, in order to give to their tranſaction the appearance of a fair and an onerous bargain, and to make it more difficult to diſcover their fraudulent deſign. But it would be hard to make an honeſt and an onerous creditor therefore to ſuffer, becauſe his debtor has, out of a fraudulent deſign, forborne to exact from his confident a writ acknowledging the truſt, eſpecially when the creditor has it not in his power to exact one.

§ 771. The law, it has been ſaid (§ 769.), entertains ſuſpicions of perſons whom it takes to be confidents of an inſolvent debtor, and therefore diſtinguiſhes alienations made in favour of them from thoſe made to others. In order to give validity to thoſe made in favour of others, it requires no more than that they be *truly* onerous; eſtimating their oneroſity not by the *real* value of the thing alienated,

nated, but by the *animus*, the *intention*, the *thoughts* of parties *alone*. It deprives not therefore one, who has made a *cheap* purchaſe, of the thing purchaſed by him, becauſe he has happened to get a good bargain; the *animus*, which parties had of making an onerous bargain, ſecures his purchaſe to him.

But it ſeems to be otherwiſe with reſpect to alienations made to the confidents of the inſolvent debtor; theſe may be pretended to be onerous, and ſomething may be really given by the purchaſer, in order to render his purchaſe more ſecure: but this may not be near the value, and he may intend to re-convey to the bankrupt, after he has, perhaps, compounded with his creditors, or got acquittances from them; or the bankrupt may intend to ſecure his eſtate to the heir of his family. The law therefore, 1621, *c.* 18. requires alienations made in favour of confidents to be made for *true*, *juſt*, and *neceſſary* cauſes, and for *juſt* prices really paid.

By conſequence it is not ſufficient to give abſolute validity to alienations made in favour of them, that the prices be *true*, *ut pretium ſit* verum, or that parties have truly the *intention* of making onerous bargains; the prices muſt be *juſt*, that is, they muſt be adequate to the *real* value of the thing alienated. This depends not on the intention, the *animus* of parties, but on the price which might have been got; and it is eſtimated by the value which a thing, ſuch as that alienated, commonly gave in the market at the time of making the bargain. Of courſe a latitude muſt be obſerved in this matter, and it is *palpable* injuſtice in the price which can alone render the alienation voidable: for every inconſiderable difference cannot be minded; prices are not in all caſes preciſely defined in the market. But the purchaſer, having really given ſomething, ought at all rates to be ſecured of it; he muſt therefore either be preferable upon it to all the creditors of the inſolvent perſon, who had not acquired real rights upon it before his purchaſe, or muſt be reimburſed upon diveſting himſelf. For it would be hard to ſet aſide the alienation, to deprive him totally of the thing purchaſed by him, and to leave him to ſeek his redreſs by ſuing, like a perſonal creditor, the inſolvent perſon for reſtitution. The *truth* of the price, provided it has really been *true*, ought to ſecure him of his reimburſement, *Du.* 17th *Jan.* 1632, *Skeen.*

But it is not enough to render ſecure an onerous purchaſer, who is a confident of the inſolvent perſon, that he hath purchaſed for a cauſe which is both in truth and in juſtice onerous; the alienation muſt alſo be made for a neceſſary cauſe; that is, he, who makes it, muſt lie either under a legal or under a natural obligation to make it. He muſt be liable to be compelled by legal diligence to make it; and in this caſe the alienation is not voidable, provided it is not on other accounts. For it is lawful for one to fulfil an obligation *in forma ſpecifica;* and it would be abſurd for the law to avoid a deed, which it either hath itſelf charged one or may order him to do. As little can it blame one for doing his duty; therefore an alienation, which one lay under a *natural* obligation to make, cannot be voidable. But marriage is the alone natural obligation, which can be ſaid to be both an *onerous* and a *neceſſary* cauſe; and we ſhall ſee, that ſtipulations made in ante-nuptial contracts have the privilege of being held to be made for true juſt and onerous cauſes.

Alienations made without neceſſity are deeds merely capricious, and being made by an inſolvent perſon to his confident muſt be voidable. The reaſon is; the law preſumes his confident to know his circumſtances, and to purchaſe from him, that by altering the nature of his eſtate he may, with greater facility, either make off with it, or conceal it from his creditors, and hinder them from getting acceſs to it. But one, who is conſcious of the deſigns of the bankrupt, and has himſelf this view in purchaſing from him, is plainly not only privy to his fraud, but an accomplice of it; he aſſiſts him in carrying thoſe which the law calls his *godleſs deceits* into execution; an alienation therefore made to him in theſe circumſtances muſt be liable to be ſet aſide.

Another

Another manner, in which the law diſtinguiſheth alienations made by a bankrupt in favour of his confidents, relates to the proof which muſt be brought of the onerosity of the bargain. For it has been ſaid that it believes not every alienation, which a bankrupt pretends is onerous, to be ſo; and believing his confident to be in concert with him, lays him under the neceſſity of making proof of the onerous cauſe of his purchaſe. But moveables are ſaid not *habere ſequelam;* the poſſeſſor of theſe is *preſumed* to be the real owner of them; and the law is obliged to diſtinguiſh alienations made by writ from thoſe made without it. In all caſes therefore in which an alienation or conveyance is made by an inſolvent perſon by a written deed, in favour of one whom the law ſuſpects of being his confident, it relieves an honeſt creditor from the neceſſity of proving, that it was made for a cauſe which is not onerous; and preſuming it from the circumſtances and the connexion of parties to be fraudulent and gratuitous, lays him in whoſe favour it is granted under the neceſſity of proving in ſome convincing way, that it was granted for an onerous cauſe. This it does, whether the writ by which the conveyance is made does or does not bear in its boſom to be made for one. The reaſon is plain: the law ſuſpects fraud to be in the matter; and he, who affirms the deed to be onerous and whoſe evidence is to be taken, has a patrimonial intereſt in concealing the truth: therefore it allows not thoſe who have concerted the fraudulent ſcheme, to give evidence in favour of one another. Beſides, in all caſes in which an alienation is made in favour of a conjunct perſon, the affirmation of the conveyance is at beſt no more than the evidence of one near relation in favour of another: but in thoſe caſes, in which the ſtatute 1621, *c.* 18. reckons perſons conjunct to one another, their propinquity either incapacitates them altogether from giving evidence in favour of one another, or renders their veracity ſuſpected, *St.* 15th *Jan.* 1679, *Brown.*—*Fo.* 26th *Feb.* 1685, *Erſkine.*—*F.* 19th *June* 1713, *creditors of Orbieſton.*—*B. MS.* 30th *Nov.* 1716, *Moncrief.* Beſides, the alienation is *ex hypotheſi* (§ 766.) made by an inſolvent perſon; but the evidence of a bankrupt cannot hurt his creditors, *St.* 10th *Feb.* 1680, *Morton.*—*K.* 62. For theſe reaſons, the affirmation made in the conveyance granted by the bankrupt, proves not its onerous cauſe: and the law lays him in whoſe favour it is granted, under the neceſſity of inſtructing, ſome way or other, that it was granted for one; becauſe it preſumes, that it was granted out of a fraudulent deſign, and without an onerous cauſe. This point has been eſtabliſhed by a ſuite of deciſions, *Du.* 12th *Feb.* 1622, *Denniſton.*—28th *Jan.* 1625, *Livingſton.*—24th *Nov.* 1626, *Glen.*—29th *Jan.* 1629, *Auld.*—22d *Jan.* 1630, *Hope-Pringle.*—17th *Jan.* 1632, *Skene.*—9th *March* 1639, *Riddoch.*—22d *June* 1642, *Niſbet.*—*St.* 12th *Feb.* 1670, *Napier.*—15th *July* 1670, *Hamilton.*—29th *Nov.* 1671, *Whitehead.*—14th *Dec.* 1671, *Whitehead.*—15th *Dec.* 1671, *Duff.*—9th *Jan.* 1672, *Robertſon.*—12th *Jan.* 1676, *Stansfield.*—*Fo.* 5th *Dec.* 1707, *Macleerie.*—22d *Feb.* 1711, *Rule.*—*F.* 4th *July* 1711, *Gray.*—*K.* 105. The evidence, by which this muſt be proved, muſt be ſuch as is ſufficient to convince the judge, that there is no fraud in the caſe, and that the alienation was truly made for a juſt, onerous, and neceſſary cauſe. Therefore it muſt vary according to the condition of parties, the circumſtances of every caſe, and the preſumptions of fraud ariſing from them; and muſt be proportionable to theſe. If the preſumptions of fraud are violent, ſtrong evidence will be neceſſary to redargue and to over-ballance them: if they are ſmall, evidence proportionable to them is all, that will be neceſſary, *Ho. de creditoribus,* 27th *Feb.* 1622, *Deniſton.*—*St.* 14th *Dec.* 1671, *Whitehead.*—15th *Dec.* 1671, *Duff.*—9th *Jan.* 1672, *Robertſon.*—*Fo.* 22d *Feb.* 1711, *Rule.*—*F.* 4th *July* 1711, *Gray.*—*K.* 105.

But it is otherwiſe in thoſe caſes in which the alienation is made in favour of one, who is not a confident of the inſolvent perſon, and is therefore not liable to be ſuſpected of being in concert with him: the law pays in theſe regard to the affirmation of the deed itſelf. It either may or may not bear expreſsly to be granted for an onerous cauſe. If it is expreſsly declared in the written convey-

ance, that it is granted for an onerous cauſe, he in whoſe favour it is made is not obliged to prove any thing; becauſe it would be hard to lay a purchaſer whom the law believes to be an honeſt man, and does not ſuſpect of any fraudulent deſigns, under the neceſſity of proving his innocence: therefore he, who affirms the deed was granted for a cauſe not onerous, muſt in this caſe prove his allegation either by the writ or by the oath of him, in whoſe favour it is granted: for it is not allowable to prove it by witneſſes, *St.* 28th *June* 1665, *Monteith*.—22d *June* 1680, *Trotter*.

But if it is either not at all or ambiguouſly expreſſed in the deed itſelf, whether it is granted for an onerous cauſe, it is incumbent on him, in whoſe favour the alienation is made, to ſhew by proper evidence that it was granted for one, *St.* 22d *June* 1680, *Sinclair*; for the want or the ambiguity of the declaration makes the deed be preſumed to be gratuitous and fraudulent, and puts the *onus probandi* on him who affirms it to be onerous.

But an alienation may be made without writ, by the delivery of *corpora mobilia*, *animo transferendi dominium*; and it is in this caſe incumbent on him, who impeaches it to be fraudulent, to prove every thing; for the property of moveables is preſumed by law to belong to him, who poſſeſſes them. Therefore this preſumption, which the law makes in favour of the poſſeſſor, muſt be redargued and be overcome by poſitive proof. Conſequently he who ſays, that the property does not, or at leaſt ought not to belong to the poſſeſſor of them, muſt prove that they were purchaſed by him from the bankrupt. But as ſoon as he proves this, matters return to the ſame ſtate on which the law puts them when the alienation is made by writ; for the purchaſer either is or is not a ſuſpected perſon. If he is ſuſpected, he muſt prove that he acquired them for an onerous cauſe: if he is not ſuſpected, he is not bound to prove any thing; he, who alledges it, muſt prove fraud either by proving the alienation to be gratuitous, or otherwiſe.

§ 772. But onerous purchaſers are not, in all caſes, ſecure; they are ſecure in thoſe caſes alone, in which they acquire *bona fide*, and are not privy to the fraudulent intentions of him from whom they acquire (§ 769.). Such, as are conſcious of them, are partakers of his fraud; and the things, which they have acquired, are revocable from them, *l.* 6. § 8. *l.* 7. 8. 10. *p. ff. quæ in fraud. cred. l.* 5. *C. C. de revoc. iis quæ in fraud.*

§ 773. It would have been improper to interrupt the thread of the argument; and it is better to take this opportunity of obſerving that *reaſonable* proviſions made for wives are not liable to be ſet aſide by creditors: for they are held to be onerous, marriage being an onerous contract. They may be made by contract either before or after marriage. In caſe they are made by an ante-nuptial contract, they are not liable either to be ſet aſide or to be reſtricted, though they ſhould be exorbitant and unreaſonable; provided the woman in whoſe favour they were made did not know, that he, who made them, was not able to make them good to her. For ſhe is *in bona fide* to inſiſt for them, and to accept of them; they muſt therefore be valid, whether they are made to her by her huſband or by any other; becauſe it is to be preſumed, that ſhe would not have agreed to the marriage, unleſs they had been made for her, *Da.* 137.—*B.* 72.—*D.* I. 73. 18th *Nov.* 1729, *Creditors of Sir David Thoirs*. But ſhe may have known, that he was not able to make them good to her, and at the ſame time to pay his debts; in that caſe they muſt be reſtricted either to reaſonable proviſions, or at leaſt to ſuch as he could have made good to her, after paying all the debts due by him at the time, at which the contract was made; becauſe his creditors may be ſaid to be defrauded by them. In caſe they are made by a poſt-nuptial deed, they are valid and irrevocable, provided a right is eſtabliſhed in the wife by the delivery of an effectual deed, becauſe they are onerous; for a wife acquires to her huſband every moveable, which ſhe acquires either by her labour or otherwiſe; ſhe manages his œconomical concerns, and by her care of theſe may add to his

his eſtate; ſhe is therefore worthy of her hire, *Du.* 19th *June* 1635, *Walker*—*D.* 1. 70, 71, 11th *Jan.* 1738, *Robertſon.*—17th *Feb.* 1738, *Sir Rod. Mackenzie.*

But the law allows no man to defraud his creditors by voluntary deeds: therefore exorbitant poſt-nuptial proviſions are voidable, not indeed totally, but in ſo far as they are unreaſonable, *St.* 19th *Jan.* 1676, *Stansfield*; becauſe a bankrupt has no power to make unreaſonable proviſions either for his own wife or for the wife of another. Reaſonable proviſions are 'ſuch as are ſuitable to the viſible con-'dition of parties;' that is, to the circumſtances in which a man appears, or is generally reputed to be, and to the condition of his wife; for regard ought to be had to them both.

For the ſame reaſons deeds, which a man gets either from his bride or from any other *nomine dotis*, are not revocable; provided he did not know of the bankruptcy of him, who gave them: for theſe alſo are onerous, *F. MS.* 22d *Jan.* 1714, *Lockhart.* Indeed an exorbitant portion accepted after marriage from one who is not able to pay it, may be reſtricted to one ſuitable to the circumſtances of him, who gave it, *St.* 23d *Nov.* 1680, *Wood.*

Proviſions made either by a huſband or by another for him, for the iſſue of a marriage, ſeem to be in the ſame caſe with proviſions made for a wife; for people are uſually more anxious about the happineſs of their children than about their own; therefore they are, indeed they muſt be held to be articles of the onerous contract, provided they are made by an ante-nuptial covenant. In that caſe they are conditions, which induced the bride to agree to the marriage, and without which, it muſt be preſumed, ſhe would not have agreed to it. Therefore they are not voidable, if they were ſtipulated *bona fide.* For if ſhe knew that the huſband or he who became bound was not able to make them good, they are voidable in ſo far as they are exorbitant, *B.* 114. *.

But if they are made by a poſt-nuptial deed, they are voidable *in totum;* becauſe they cannot be ſaid to be articles of the onerous contract. They are like proviſions granted to children in other caſes, are conſidered as gratuitous deeds, and are therefore liable to be ſet aſide at the ſuit of thoſe who were creditors of the father before he granted them; provided he was at that time inſolvent. And it alters not the caſe, whether they are made in the ſame deed with that in which poſt-nuptial proviſions are made for the wife, or in one different from it: for they have no connexion with one another.

§ 774. Thoſe deeds therefore which have been deſcribed, and by which creditors are defrauded, are liable to be ſet aſide. For they are not void; they are only voidable; and it is a matter of prudence which the creditors muſt determine according to circumſtances, whether they will chuſe to get them avoided.

But it muſt be remarked, that an onerous purchaſer, whoſe purchaſe is ſet aſide, is not entitled to get reſtored to him the onerous conſideration given by him for that which is revoked from him. For he did not give it to the creditors; he gave it to the bankrupt out of a fraudulent deſign; he muſt therefore bear the conſequences of his own fraud; and they muſt have the ſame acceſs to the eſtate of their debtor which they would have had if the alienation had not been made. However the law allows not one to be iniquitouſly enriched at the expence of another; the onerous conſideration may be ſtill extant among the eſtate of the debtor; and the funds, which he has for paying his debts, may be increaſed by it, or be greater than they would have been, if the alienation had not been made. But the creditors have no juſt title to that increment; they are entitled to no more than they would have had, if the alienation had not been made; it muſt therefore be reſtored to the onerous purchaſer. But it may not be extant; the creditors may have no greater funds for paying their debts than they would have had, if the alienation had not been made; and the onerous purchaſer has in this caſe no other ſecurity for being reimburſed than the hope of

* The Court of Seſſion found otherwiſe in a caſe reported, *F.* 22d *June* 1711, *Aikenheads.*

of any thing which may remain, after the debts due to thoſe, who were creditors before the alienation, are fully diſcharged; for his fraud ought not to hurt them; therefore he muſt be contented with being poſtponed to them. If he were not poſtponed to them, but either preferred or brought in *pari paſſu* with them, his fraud would hurt them; for they would draw leſs, than they would have drawn, in caſe the alienation had never been made, *l.* 7. 8. *ff. quæ in fraud.*

§ 775. Hitherto we have conſidered thoſe alienations which are made not for precedent cauſes, but for ſuch as had not an exiſtence before the making the agreements concerning them, for prices inſtantly paid, for equivalents which he in whoſe favour they are made bound himſelf to pay, or for other cauſes moving the maker of them to alienate. But beſides theſe, alienations may alſo be made either directly or indirectly to creditors in ſatisfaction or in ſecurity of debts antecedently due to them (§ 768.). Theſe make an important part of this doctrine, and fall now to be treated.

I ſhall begin this matter with making one general obſervation, which is, that creditors are *in all caſes* entitled, and are held to be *in optima fide* to accept of *payment* of debts due to them, whether the debtor is inſolvent or not, whether his bankruptcy is notorious or not, whether they knew or were ignorant of it, whether they have done diligence or not, and whether the diligence done by them is prior or poſterior to that done by others. For the title *pro ſoluto* is an onerous one; and a creditor, who receives payment of a juſt debt, cannot be ſaid to be *in dolo. Nihil dolo creditor facit, qui ſuum recipit, l.* 129. *p. ff. d. r. j. ſibi enim vigilavit, l.* 6. § 7. *ff. quæ in fraud. cred.* Therefore other creditors are in no caſe entitled to be reſtored againſt the payment of juſt debts, or to revoke the money with which they have been paid from that creditor who received it, *Du. ult. Jan.* 1ſt *Feb.* 1627, *Scougal.—B.* 92.—*D.* I. 83. 25th *Jan.* 1733, *Buchanan.—Fa.* II. 186. The truth of this propoſition we ſhall have occaſion to prove more fully in the ſequel of this title, when applying it to the various caſes, which muſt be treated in it.

But it is not ſo with other deeds or alienations made *in ſolutum*, ſatisfaction, or ſecurity of debts. For human affairs are liable to many accidents; men may by misfortunes become unable to pay all their debts; and theſe may exceed the funds, which they have for clearing them. One in theſe circumſtances, it is plain, cannot pay value equal to the full debt due to every one of his creditors; the loſs therefore ſhould be divided proportionably among them all; and every one of them ſhould bear a part of it proportionable to the amount of the debt due to him: a rule founded on the moſt equitable principles. For the loſs is not owing to the fault of any of them; it is owing either to the careleſſneſs, the indolence, the prodigality, the fraud of their debtor, or to accidents. But it is reaſonable that a loſs, which is not owing to the fault of any one of them more than of the reſt, ſhould be borne by them all proportionably. The ſame principle, on which the deciſions of the Rhodian law are founded, may be applied to this caſe: for the two caſes are extremely ſimilar. The loſs ſuſtained by thoſe, whoſe goods are thrown overboard during a ſtorm, is ſuſtained for the common ſafety; thoſe who ſuſtain it are, therefore, entitled to have a contribution made for them, that the loſs may thereby be made not to fall on them alone, but may be borne proportionably by all thoſe who are benefited by it (§ 690.). In the ſame manner the loſs is, in this caſe, general; it falls not immediately on the property of any one of the creditors; and it is not owing to the fault of any individual among them. By conſequence no reaſon can be aſſigned for ſingling out one among them all, and for making it be borne by him alone. 'Tis reaſonable therefore that it be borne equally by them all; that is, every one of them ought to bear a ſhare of it proportionable to the debt due to him. Indeed there can be nothing more unreaſonable than that one creditor ſhould get full payment of the debt due to him, at the ſame time that another gets payment of no part of that due to him. The eſtate of every inſolvent perſon may be conſidered as the

property

property of his creditors; for it is the fund out of which they are neceſſitated to effectuate payment of the debts due to them. But if it is their property, it muſt be the common property of them all: for no reaſon can be aſſigned, on which it can be ſaid to belong to one more than to any other of them. It muſt therefore belong *pro indiviſo* to them all. Conſequently they are joint proprietors of it, and muſt of courſe be entitled to bring the action *communi dividundo*, in order to get it divided among them. But the part, which ought on making the diviſion to be aſſigned to each of them, muſt be proportionable to the extent of the debt due to him: for it muſt be proportionable to the ſhare, which he has in the common eſtate. But this ſhare is repreſented and muſt be eſtimated by his debt. Therefore the ſhare, which he is entitled to draw, muſt be alſo proportionable to it. Beſides, being joint proprietors, the loſs, which has befallen their property, ought to be borne by them all jointly: for it may be conſidered as accidental, ſince it is not owing to the fault of the proprietors, or to any thing done by them. But accidental loſſes muſt be borne by thoſe, on whoſe property they fall. Of courſe, this loſs muſt be borne by *all* the proprietors. But it cannot be borne by them all, unleſs it is divided among them according to the amount of the debt due to each of them; for the extent of that debt is the extent of the ſhare, which every one has in the common property.

For theſe reaſons, the law of Scotland favours that equality which makes every creditor of an inſolvent perſon draw out of the common fund a ſhare proportionable to the debt due to him, and endeavours to preſerve it among them as much as it can. On the other hand it diſfavours preferences, and endeavours to hinder any one creditor from drawing more than is proportionable to his debt.

Therefore it incapacitates inſolvent debtors from ſhewing partiality to any of their creditors, from giving any of them a greater ſhare of their eſtates than falls to the debt due to him, and from doing any thing by which the right, which either natural equity gives them, or they have by their diligence acquired, may be defeated. For one, who gives a ſingle perſon more, diſpoſes of the property of the other creditors, ſince by contracting more debt than he is able to pay, he has in ſome ſort loſt the property of his eſtate.

This matter is important in the law; and in order to underſtand it fully, and to treat it diſtinctly, it will be neceſſary to make ſeveral diſtinctions. For either none, or ſome, or all of the creditors may be ſuppoſed to have done diligence.

§ 776. In caſe none of them have done diligence, it is plain, that none of them can have acquired preferences to the reſt: for theſe are acquired by diligence *. *Nam jura vigilantibus favent.* Therefore each of them has a natural right to come in *pari paſſu* with all the reſt (§ 775.); for they have all of them an equal right to get payment of the debts due to them. But every individual has alſo a right to get payment of the debt due to himſelf; a right which is as ſtrong as that, which all the reſt have to come in *pari paſſu* with him. For his right is not a merely natural, but a mixed one; it may be rendered effectual by legal means. But their right is one merely natural; for they have not, in all caſes, a remedy for making it effectual to them. Therefore the right, which they have to come *in pari paſſu* with him, does not incapacitate him from exerciſing the right which he has, and from endeavouring to get payment of the debt due to him. Indeed the law encourages him to endeavour to get it; for it diſcourages careleſsneſs and inactivity. A creditor therefore, who gets payment of debt due to him, is ſecure: the other creditors have no right to revoke the payment, and to call him to account to them for that which has been paid, in order to bring them *in pari paſſu* with him, even tho he knew that the common

* No doubt the law grants preferences to creditors of certain kinds, tho they have done no diligence. But theſe are as effectual as thoſe acquired by diligence: therefore the conſequences of them will fall to be explained afterwards. And ſuch, as have real rights and preferences in conſequence of them, do not fall under this title; for their real rights ſecure them, and make them, in ſome ſort, proprietors (§ 765.).

debtor was insolvent, and was not able to pay any thing to them. *Jus civile vigilantibus scriptum est, l.* 6. § 7. *l.* 24. *ff. quæ in fraud.*—*sibi vigilavit.* He did no more than he had a right to do. *Nullus videtur dolo facere, qui suo jure utitur, l.* 55. 151. *ff. d. r. j.*—*suum recepit;* he got his own restored to him. *Nihil dolo creditor facit, qui suum recipit, l.* 129. *p. ff. d. r. j.* The other creditors, as well as he, might have endeavoured to get payment; and if they have neglected to use the means for getting it, they have themselves alone to blame. *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire, l.* 203. *ff. d. r. j.*

Payment is usually applied to money alone; it may also be used in a more extensive sense, for 'the specific performance of that which one is bound to do.' But one who is pressed by his creditors, may, in order to avoid their ultimate diligence, give them part of his effects *in solutum;* and a creditor who either knows or suspects the circumstances of his debtor to be bad, may be willing to accept of the goods offered him. In this case he hath not got payment of his debt, but hath got something *in solutum* for it; and the other creditors are not entitled to revoke this from him, *Du. ult. Jan.* 1st *Feb.* 1627, *Scougal.*—*St.* 20th *July* 1671, *Laird of Birkenbog.*—*Fo.* 25th *Nov.* 1696, *Creditors of Campbell.*—13th *July* 1698, *Moncrief.*

But the law of Scotland hath not determined with precision *every* thing relating to the rights of creditors; the statutes which define them are no more than two; these do not make it unlawful for creditors to accept of goods *in solutum* for debts due to them; therefore they are entitled to do it. But it allows not injustice to be done them; a thing given *in solutum* ought to be no more than equivalent to the debt for satisfying which it is given; it would be unjust both to the insolvent person himself and to his other creditors to allow that one, who has got more than an equivalent, to keep it; he must be held to have taken advantage of the distressful circumstances of his debtor, and ought to be deprived of some part of it. Besides, the law requires in all cases, in order to give validity to onerous alienations made by insolvent persons, that the prices or valuable considerations mutually given be not only *true* but *just* (§ 771.). By consequence in all cases, in which that given *in solutum* exceeds the debt satisfied by it, the alienation is *gratuitous* and revocable *pro tanto.* In all cases therefore, 1) in which some of the creditors of an insolvent person say that one of them has got more than was equivalent to the debt due to him, he is bound either to pay them *as much as* they say the value of the thing given *in solutum* exceeds the amount of the debt due to him, or to divest himself of *all* which has been given him upon receiving payment of every farthing due to him at the time at which he makes the divestiture. By giving him the option in this manner the matter is made extricable, and justice is done to both parties; for the expence of bringing proof of the real value of it is saved, and he has no title to complain upon getting full payment of every farthing which is due to him and for which he has received an equivalent, *Du.* 17th *Jan.* 1632, *Skene.*

A creditor is allowed to accept of *value* from his insolvent debtor *in solutum.* But that which is given him may exhaust all the funds which his debtor has for satisfying others; and these may thereby lose all. The law gives not its sanction either to principles or to deeds which are palpably unjust; and is well entitled to give redress in all cases, in which gross injustice is done to creditors. Therefore 2) an alienation *omnium bonorum* made *in solutum* is in *all* cases voidable, because manifest partiality is thereby shewn to some and wrong done to others of the creditors of the insolvent person; and those of them who are defrauded of all by it, are well entitled to get it set aside, and to be brought in *pari passu* with those preferred to them, *N.* 98.—*St.* 18th *Jan.* 1678, *Kinloch.*—*D.* I. 67. 25th *Feb.* 1737, *Cramond.* For the law approves not of a selfishness which is rapacious; thinks a creditor *ought not to accept* of a deed by which he knows others will be much wronged; holds his *acceptance* of it to offend against the most obvious principles

of

of juſtice, *ladere verecundiam;* and deprives it therefore of its effects. But others than thoſe alienations which are either in terms or in reality *omnium bonorum*, it ſets not aſide; becauſe theſe are not fraudulent, and in caſe they are of more than value, the wrong is, as we have ſeen, corrected after another manner, *D.* I. 67. *Dec.* 1728, *Ducheſs of Buccleugh.*

Near relations have many opportunities to be early apprized of the ſituation of the affairs of one another; they are in ſome caſes ſuſpected of being accomplices with the inſolvent perſon in his ſchemes for defrauding his creditors; alienations made to them are preſumed to be made to his uſe; and he ought not to be allowed to prefer them to all his other creditors. Therefore 3) deeds made to conjunct perſons, though truly *in ſolutum* and for no more than value, are in all caſes voidable, like alienations *omnium bonorum*, by other creditors, *Fo.* 28th *Jan.* 1696, *Scrimzeor.*

§ 777. But the law, it has been ſaid, favours (§ 775.) that natural right, which all creditors have to draw out of the eſtate of their debtor ſhares proportionable to the debts reſpectively due to them; therefore it puts it out of the power both of him to give and of them to accept of any thing even *in ſolutum*, *after* they are *held* to *know* that he is not able to give as much proportionably to every one. For both the debtor who gives, and the creditor who accepts of more *in ſolutum* than he *knows* other creditors can get, may be ſaid to defraud them; he deprives them of that, which they have a natural right to get (§ 775.). Therefore they muſt be entitled to be reſtored againſt the fraud, by which they are cheated.

One is *held* to know that his debtor is inſolvent, as ſoon as he is become a *notorious bankrupt*. One becomes a notorious bankrupt, as ſoon as it becomes notorious that he is bankrupt. A notorious bankrupt therefore may be defined to be 'one who, it is notorious, is bankrupt.'

Every thing ought, as much as poſſible, to be defined by law; and the Scotch legiſlature hath, in order to prevent ambiguity and diſpute by ſpecial ſtatute, 1696, *c.* 5. fixed the characteriſtics, by which it may be pronounced with certainty, who are and who are not notorious bankrupts. The circumſtances from which it characterizes them, are three; which it requires to be concomitant or to concur with one another. For in order to make it be held to be notorious that one is bankrupt, the law 1696, *c.* 5. makes it neceſſary 1) that he be under diligence by horning and caption; 2) that he either be impriſoned in conſequence of this diligence, or retire to a privileged place, or fly, or abſcond, or defend himſelf by force, in order to avoid the effect and to fruſtrate the execution of it; and 3) that he be inſolvent.

I. It is neceſſary that he be under diligence by horning and caption, *Fo.* 15th *Feb.* 1698, *Gray.* Letters of horning muſt have been iſſued, and ſerved upon him; he muſt have been charged in conſequence of theſe to pay his debt or to fulfil his obligation. For a public regiſter of letters of horning, iſſued under the ſignet in name of the King, is kept: from whence thoſe are made known, againſt whom they are iſſued. But inferior courts are numerous; and regiſters are not regularly kept of diligences iſſued by them. Therefore a charge given on the precept of an inferior judge is not ſufficient, even along with all the other circumſtances, to make one liable to be characterized a notorious bankrupt.

But it is not ſufficient that he hath been charged by horning; he muſt have not given obedience to the charge; for his diſobedience, he muſt be denounced rebel (§ 161.); and the letters of horning, the denunciation, and the executions of them both muſt be duly regiſtered. Theſe are ſteps neceſſary, in order to make it lawful to iſſue letters of caption againſt him; for they muſt be iſſued in name of the King and under his ſignet, in order to get the rebel impriſoned. A precept of warding, proceeding on the act of an inferior judge, is not ſufficient: the reaſon is, becauſe the ſolemnities attending the iſſuing, execution, and regiſtration

tion of letters of horning and of caption, make the tottering and ſuſpicious circumſtances of him, againſt whom they are iſſued, more generally known than diligence proceeding on the decrees of inferior courts. Beſides, the law is expreſs and preciſe; it uſes the word *caption*, which has one determinate meaning, and no other, *Fa.* 13th *Nov.* 1744, *Snodgraſs*.

Theſe letters muſt be iſſued at the ſuit of a creditor, in order to effectuate payment of a debt due to him. For it is his refuſal to obey a charge given him to pay money, which alone ſhews his bankruptcy, becauſe it implies his inability to pay. Therefore diligence, iſſued in order to force one *factum præſtare*, has not any corroborative influence in making one liable to be held to be a notorious bankrupt: becauſe one who is very rich may refuſe *factum præſtare*; and an obligation, which conſiſts *in faciendo*, does not diminiſh the eſtate of the perſon bound.

But the act of parliament is preciſe; all which it requires to make one be held a notorious bankrupt is, that he be *under diligence by horning and caption*. Therefore it is not neceſſary either that more than one horning and caption be iſſued againſt him; for a debtor againſt whom one is iſſued may be ſaid to be under diligence by horning and caption as well as one againſt whom many are iſſued, *Da.* 5th *Feb.* 1705, *creditors of Cleland*: or that they proceed upon ſpecial letters; for one, againſt whom general letters have iſſued, is as much under diligence by *horning and caption*, as one againſt whom ſpecial letters are iſſued, *Da.* 36. It is however preciſely neceſſary, that there be at leaſt one horning and one caption. But diligences, which are void, cannot produce any legal effects; therefore one againſt whom either a horning or a caption, which is void either becauſe it has been irregularly iſſued, or informally executed, or on any other account, cannot be held to be a notorious bankrupt. For he cannot be ſaid to be under diligence by *horning and caption*; a horning or a caption, which is void, being incapable of being ſaid to be a *horning or a caption*. Theſe are formal writs. Hence one upon whom, during his reſidence in foreign parts, letters have been ſerved not upon ſixty days, as the law requires, but upon fifteen, cannot be held to be a notorious bankrupt, in caſe a caption is iſſued againſt him upon that horning. For the caption is void; he, at whoſe ſuit it is iſſued, dares not cauſe it to be executed; and he, againſt whom it is iſſued, is not liable to be impriſoned upon it. Therefore he cannot be ſaid to be under diligence by horning *and caption*; and it is impoſſible to help being ſurpriſed at the judgment reported, *D.* I. 82. to have been given, 24th *Feb.* 1737, *Lord Kilkerran*. 'Tis true the intentions of the legiſlature may by this means be in ſome caſes defeated. But it is the buſineſs of judges to apply the preciſe text of every *ſtatute*, which is in full force, to the *ſpecies facti* of every caſe; they are not anſwerable for the imperfections of the law; and the legiſlature has alone power to amend it. At the ſame time it muſt be confeſſed that inconſiderable informalities ought to be diſregarded.

II. But it is not enough that letters of horning and of caption have been iſſued againſt him: it is alſo neceſſary, that he either be impriſoned in conſequence of them, or render the caption ineffectual and hinder himſelf from being impriſoned either by retiring to a ſanctuary, or by flying, or by abſconding, or by defending himſelf by force. For ſome one of theſe alternatives, it is neceſſary, muſt concur; but any one of them will do.

One is ſaid to be impriſoned, 'who is confined in a public priſon.' But one may be held to be a notorious bankrupt without being impriſoned; he may do ſomething which makes it impoſſible to carry the diligence into execution, and to impriſon him; and it would be abſurd to hold him not to be bankrupt, becauſe he had found means to eſcape the diligence of the law. Hence one, who is under diligence by horning and caption, is held to be a notorious bankrupt, 2) in caſe he retires to a ſanctuary. One retires to a ſanctuary, who, in order to ſecure his perſon againſt caption, takes the benefit of a ſanctuary; or who retires within the precincts either of the

the Abbay of Holyroodhouſe, or of ſome other privileged place, which affords a legal ſanctuary to inſolvent debtors, and protects their perſons againſt diligence. For the law of Scotland is not forgetful of the diſtreſſes of mankind; it pities thoſe, whom misfortunes have reduced to poverty; and ſhews it feels for them by allowing them certain places, within which, if they retire, they are not liable to perſonal diligence*. The privilege of being ſecured againſt perſonal diligence is a great one: and thoſe who have taken the benefit of it ought to be both known and ſafe. Therefore the ſanctuary is ſubject to its proper magiſtrates, who have juriſdiction over thoſe who live in it; and thoſe unfortunate perſons, who have taken the benefit of it, ought to be booked in the regiſters kept by them. But the ſtatute ſpeaks of *retiring* alone; therefore it is not neceſſary in order to make one, who has retired, held to be a notorious bankrupt, that he be regiſtered in the books kept by the officers of the ſanctuary; 'tis ſufficient that he hath actually gone into it and remain in it, in order to protect his perſon from diligence. For one, who lives in it with this view, may be ſaid to have retired, *Fa.* II. 241.

But the limits of every ſanctuary are narrow; confinement is diſagreeable; and one may either be neceſſitated or chuſe to fly, in order to eſcape the diligence iſſued againſt him. Therefore it is not neceſſary, in order to make a debtor who is under diligence by horning and caption be held to be a notorious bankrupt, that he either be impriſoned, or retire to a ſanctuary; the law ſays it is enough, 3) that he *fly*. One flies who goes to a place which is out of the reach of the officers of the law, either within or without the kingdom, a privileged or an unprivileged place.

But one may be at a diſtance from a ſanctuary, and it may be impoſſible for him to arrive at it in ſafety; 'tis natural for him to repoſe great confidence in his friends, and to expect moſt relief from their affection; he may not have reſolution to leave their neighbourhood or company; and he may hope to live ſecure near his own home. Beſides, poverty makes men aſhamed, and few are diſpoſed to make their neceſſities known. Hence the law holds one, who is under diligence by horning and caption, to be a notorious bankrupt, 4) in caſe he *abſconds*. One is ſaid to abſcond, when in order to hinder himſelf from being apprehended by the officers of the law, who he ſuſpects either are ſearching or will ſearch for him, he hides himſelf in any place, where he hopes to remain concealed. I ſay *any* place; for it is no matter whether he do it in a houſe or in the fields; and if he hides himſelf in a houſe, whether he do it in his own or in any other; for one may hide himſelf in his own houſe as well as in any other place, *C. F.* 139.

But all theſe methods of being ſafe may prove ineffectual; one may be apprehended at an unguarded moment; and love of perſonal liberty may induce him in this ſituation to tranſgreſs the law by defending himſelf forcibly againſt the officers employed to take him. One therefore is held by law to be a notorious bankrupt, 5) in caſe he *defends his perſon by force*. One is ſaid to defend himſelf by force, when he reſiſts the execution of the law, and by forcible means hinders himſelf from being carried to priſon.

Theſe are the only alternatives which ſeem to be expreſsly particularized in the ſtatute. But one who either flies from the officers of the law, or defends himſelf againſt them, is, if the other requiſites concur, declared by the expreſs words of the ſtatute to be a notorious bankrupt; and a debtor, who is actually apprehended and is in the cuſtody of a meſſenger, is in ſome ſort ſaid to be *impriſoned*. Therefore he muſt, the other requiſites concurring, be held to be a notorious bankrupt, *C. F.* 139. *In eo, quod plus ſit, ſemper ineſt et minus. l.* 110. *p. d. r. j.*

III. The laſt circumſtance required to make one be held to be a notorious bankrupt is *inſolvency*. A notorious bankrupt muſt actually be inſolvent; that

* Of ſanctuaries we ſhall have occaſion to treat hereafter.

is, he muſt be unable to pay his debts; they muſt amount to more than the funds, which he has for paying them. For one, who is not inſolvent, who is able to pay his debts, can never be ſaid to be bankrupt. He muſt be inſolvent at the time, at which he either is impriſoned, or retires, or flies, or abſconds, or defends himſelf. For that is the only inſtant, at which it can be ſaid, that all the three characteriſtics concur, and may be affixed to him; or that he is inſolvent, *and* is under diligence by horning and caption, *and* either is impriſoned, or has retired, fled, abſconded, or defended himſelf. If he becomes inſolvent only after that point of time, all the three requiſites do not concur. 'Tis true he is inſolvent, but it is not notorious that he is ſo; for two circumſtances, from which the notoriouſneſs of his inſolvency is preſumed, are wanting, *F.* 4th *Jan.* 1712, *real and perſonal creditors of Monimuſk.* But no one of them does without the other two; nay no two of them are ſufficient without the third; they muſt all three concur, 10th *Feb.* 1743, *Creditors of Lady Rachine.*

§ 778. In this manner the law aſcertains the preciſe time, at which one is held to become a notorious bankrupt. But it is not ſo preciſe as to admit of no latitude, or to confine the effects of bankruptcy to an individual point of time. The circumſtances of bankrupts uſually begin to be ſuſpected, and are known to be tottering, long before diligence is done againſt them. Therefore the law, 1696, *c.* 5. looks backward ſixty days from the time at which one becomes a notorious bankrupt, and deprives of their validity every deed done within that time, as well as thoſe done at it or after it; by which the bankrupt defrauds ſome and prefers others of his creditors: becauſe it preſumes *præſumptione juris et de jure*, that the bankrupt who did it, as well as the creditor in whoſe favour it was done, knew that the other creditors would not be paid an equal proportion, and would of courſe be defrauded. Therefore it makes every voluntary deed, made by a bankrupt in favour of his creditors, either in ſatisfaction or in ſecurity of debts due to them, either on the day at which he becomes a notorious bankrupt, or after it during the continuance of his bankruptcy, or within the ſixty days preceding it, to be void and null, and to be liable to be ſet aſide at the ſuit of thoſe creditors who are defrauded by it.

I ſay 1) *every deed:* for the words of the ſtatute are general.

But it muſt 2) be made by the bankrupt: for the ſtatute ſpeaks of ſuch deeds alone, as are made by him. Thoſe therefore made by a perſon different from him, fall not under the words of it, and are not voidable upon it.

The deed, in order to make it voidable upon this ſtatute, muſt 3) be voluntary; that is, it muſt be one which the bankrupt was not preciſely bound, and was not actually compelled by legal diligence to make: for both theſe requiſites muſt concur to make the deed be held to be neceſſary in this caſe; one, which the bankrupt is not *actually* compelled by ultimate diligence to do, cannot be called ſo.

It muſt 4) be made either directly or indirectly *in* favour of a creditor: for

It muſt be made 5) either *in ſatisfaction* or *in ſecurity* of a debt due before the granting of it. A deed granted not for a precedent debt, but for a cauſe which had not exiſtence till the agreement was made about granting it, falls not under the ſtatute 1696, *c.* 5. Onerous as well as gratuitous alienations made by notorious bankrupts, of their effects for other cauſes than debts antecedently due to creditors, *may be* voidable either at common law or on the ſtatute 1621, *c.* 18. (§ 769. *ſqq.*), but they cannot be ſet aſide upon this ſtatute 1696. *D.* I. 83. 1ſt *Jan.* 1717, *Burgh.*

The ſtatute ſays, 'All and whatſoever voluntary *diſpoſitions*, *aſſignations*, *or* 'other deeds which ſhall be found to be *made and granted*;' words which ſeem to be capable of being underſtood of written deeds alone. But the inaccuracy of our Scotch legiſlators; their ignorance of language; the impropriety, not to ſay abſurdity of their expreſſions; above all, the reaſon of the thing, have made

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the Court of Seſſion interpret them of every deed by which creditors are iniquitouſly and partially preferred to one another; not of written ones alone, but of alienations made by delivery of moveable *corpora*, and of all others made *in ſolutum* without writ. *Da.* 132.—*D.* I. 83. 19th *July* 1728, *Smith.*

But *ſolutio* and *in ſolutum datio* are different things. *Solutio* is *performance of that which one is ſpecifically bound to do*; in ſolutum dare, is *to ſatisfy a creditor by doing or giving ſomething different from that which one is bound to do*; and the words of the ſtatute 1696, *for ſatisfaction*, ſeem to be capable of being underſtood in the latter ſenſe alone. For they ſuppoſe the bankrupt to be unable to pay or to fulfil ſpecifically his obligation; and uſe not the words *payment*, *paying*, or *fulfilling it*, but *for ſatisfaction*, which ſeems to anſwer preciſely to *in ſolutum datio*. Therefore actual payment is not a deed, which falls under the letter of 1696, *c.* 5. and is not voidable upon it, *D.* I. 83. 25th *Jan.* 1733, *Buchanan.*—*Fa.* II. 186. One who can recover it, is entitled to do ſo; and others are not entitled to come *in pari paſſu* with him, unleſs the law gives them expreſsly a right to do ſo. Beſides, it would do harm to the commercial intereſts of mankind, were every one, who had recovered payment of his money from a bankrupt, accountable for it to his other creditors.

Property implies a power of diſpoſing of it; and one, who holds the former, retains the latter as long as he is not deprived of it by law. But the ſtatute 1696 relates 6) to ſuch deeds alone, as are made by a bankrupt in favour of ſome of his creditors *in preference to others*. Therefore it relates not to ſuch as do not give ſome of them a partial *preference* to *the reſt*. By conſequence a deed, by which a bankrupt makes over *all* his eſtate either to all his creditors or to a truſtee for their uſe, proportionably according to the debts reſpectively due to them, and to the preferences which they have at the time of granting it, is not voidable by them *upon this ſtatute*. For he does not thereby *prefer ſome* of them to *others*; and it does not incapacitate him from making a deed of this ſort, becauſe he does not defraud any of his creditors by it. By conſequence every one of them acquires a right by means of it, of which the others by refuſing to accept of the deed cannot deprive him; and the property of as much of the eſtate, as is proportionable to the debt due to him, is actually and fully veſted in his perſon. The reſt therefore cannot deprive him of this by getting the deed ſet aſide. For no injuſtice is done them; and he is not *preferred* to them, *K.* 61.—*D.* I. 85. 15th *July* 1726, *Creditors of Eyemouth.*—*Arg. Fa.* I. 2.—179. But a bankrupt cannot hurt the rights which his creditors have among themſelves; of theſe he cannot deprive them. Of courſe the rights, which they have any of them acquired to be *preferred* to one another, cannot be taken from them; theſe muſt be left entire to them: the bankrupt cannot encroach upon them; and a deed by which one of them is deprived of a right he had acquired to be preferred to the reſt, is voidable by him. Hence every conveyance made by a bankrupt of his eſtate in favour of *all* his creditors muſt leave all thoſe rights, which each of them has already, at the time of making it, acquired in the eſtate of their debtor, entire to them: otherwiſe it is voidable at the ſuit of thoſe hurt by it; becauſe they can ſay it is a deed, by which *the bankrupt prefers ſome* of his creditors to *them*.

The deed done by him muſt be ſimple and abſolute; it muſt totally diveſt him who makes it; muſt veſt the things conveyed abſolutely in the perſons of thoſe in whoſe favour it is made; and muſt not in any ſort encroach upon the rights which they have acquired at the time of granting it. But the ſtatute gives not a bankrupt a right to force his creditors to accept of a conveyance made in their favour; they may refuſe to take the benefit of it; they may chuſe to have recourſe to legal diligence for recovering payment; and one acquires not the property of a thing, who refuſes to accept of it (§ 673.). Therefore thoſe, who will not accept of the deed made in their favour, may uſe legal means in order to attach the eſtate of their debtor; but being not

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entitled to deprive thoſe, who have choſen to take the benefit of it, of the rights which it veſts in them, their diligence can have effect upon that part alone of the eſtate of their debtor, which would have fallen to their ſhare in caſe they as well as the others had accepted of it. For they might as well as the others have accepted of it; thoſe therefore, who have accepted of it, cannot be ſaid to be *preferred* to them. Of courſe thoſe who accept muſt draw of the eſtate made over to *all the creditors* as much, as they would have drawn, in caſe all of them had accepted; that which doth not fall to their ſhare muſt be left to thoſe who refuſe to accept; and theſe muſt diſpute with one another about it upon their diligences, for they have *inter ſe* the ſame rights which they would have had in caſe the deed had never been made. But a conveyance relates to thoſe things alone which are made over by it: therefore thoſe who accept of it may attach other things, which either are not included in it, or are acquired by the debtor afterwards, as well as thoſe who repudiate it, *St.* 24th *July* 1669, *Crawford.*—*Fo.* 9th *Jan.* 1696, *Dryſedale.*—*D.* I. 86. *Jan.* 1729, *James Cheyne.*—85. 12th *July* 1734, *Snee.*—28th *Jan.* 1735, *Mansfield.*—3d *Feb.* 1736, *Earl of Aberdeen.* Theſe concluſions ſeem to be neceſſary conſequences of the moſt undiſputed principles of law, are agreeable to the letters of theſe ſtatutes 1621 and 1696, and, in ſome ſort, reconcile the various judgments which have been given upon this matter.

A judge is no more than the mouth which pronounces the words dictated by the law; and he ought not to diſtinguiſh caſes which it does not diſtinguiſh. The ſtatute 1696 annulls all deeds by which one creditor is preferred by the bankrupt to another; therefore it enquires not whether he who is *preferred* knows of the granting the deed made in his own favour, or uſed means in order to obtain it; it preſumes in all caſes, which fall under the circumſtances required by this ſtatute, the bankruptcy to be *notorious*, *Arg. Fa.* II. 8.

Laſtly, it muſt be granted within the time limited by law, *i. e.* either on the day on which the debtor becomes a notorious bankrupt, or after it during the bankruptcy, or within ſixty days immediately preceding it. For one granted before theſe ſixty days falls not under the words of the ſtatute, and is not voidable; becauſe the law preſumes *præſumptione juris et de jure* the creditor, in whoſe favour it is made, to be ignorant of the tottering condition of his debtor, to be no more than vigilant for his own intereſt, to be *in bona fide*, and to accept with a good conſcience of that which is given him either *in ſolutum* or in ſecurity of the debt due to him.

Hence appears an imperfection in the ſtatute; for a bankrupt may grant a deed in favour of his creditor, and may immediately fly into England. But letters of horning muſt in all caſes be ſerved upon thoſe, who are out of Scotland, on ſixty days; and theſe muſt be fully paſſed, the debtor muſt be *denounced rebel* for diſobeying them, and the letters as well as executions of them be regiſtred before a caption can be iſſued againſt him. Thus the deed granted by him falls not within the period limited by the ſtatute 1696; it may, 'tis true, be in ſome caſes voidable, either at common law or on the ſtatute 1621; but it cannot be ſet aſide upon this one. I own this may appear to be a rigorous interpretation of the law: but the ſtatute is preciſe; it is better to own that the law is imperfect than to allow judges to make ſo great a ſtretch in favour of equity as to find, that 70, 80, 90, or 100 days are no more than ſixty; and the judgment cited above, *D.* I. 82. 24th *Feb.* 1737, *Lord Kilkerran*, ſeems not to be agreeable to principles.

§ 779. The law hinders the bankrupt from doing deeds, by which ſome of his creditors are *preferred* to others. But it is neceſſary to the completion of ſome deeds that ſeiſin follow upon them; this gives a real right and a preference to him in whoſe name it is taken; and thoſe, on which it may be taken, may be kept latent. Hence ſeiſin taken on deeds, granted either by a notorious bankrupt or by one who becomes ſo, within the period limited by 1696, muſt be void againſt his creditors;

ditors; for proceeding on a deed made by the bankrupt, it is itſelf in ſome ſort a deed made by him, and eſtabliſhes a preference in favour of him who gets it. He therefore, in whoſefavour it is taken, acquires no *real* right by virtue of it; for the creditors of the bankrupt are entitled to get the deed declared to be, notwithſtanding the ſeiſin, no better than one merely perſonal. Hence we find it declared in this ſtatute, 'that *all diſpoſitions*, heritable bonds, or *other* heritable rights, 'whereupon infeftment may follow, granted by the foreſaid bankrupts, ſhall only 'be reckoned, as to this caſe of bankrupt, to be of the *date of the ſeiſin* law-'fully taken thereon, but prejudice to the validity of the ſaid heritable rights 'as to all other effects as formerly.' The meaning of the legiſlature is, that the *deed itſelf*, in caſe it falls not within the period to which the ſtatute limits its operation, is not voidable by the creditors of the bankrupt who grants it; but that the *ſeiſin*, in caſe *it* be taken within it, is void againſt them, is liable to be ſet aſide by them, and gives no *real* right in competition with them to him in whoſe favour it is taken: in caſe neither the date of the deed itſelf nor that of the ſeiſin falls within it, neither of them is voidable, and both ſubſiſt; in caſe both of them fall within it, the deed itſelf, provided it be one which falls under the former part of the ſtatute, is, as well as the ſeiſin taken on it, void againſt his creditors, and is liable to be ſet aſide by them.

The law ſays expreſsly *the date of the ſeiſin*, that is, the time at which ſeiſin is actually taken by getting delivery of the ſymbols of poſſeſſion formally made; and judges, who ought to apply it and are culpable for preſuming to take it upon them to make it, have no power to define any other point of time. Therefore regard cannot be had to the time, at which it is *regiſtred*; and the heritable right muſt be good, provided the date of the actual taking of ſeiſin falls not within the period limited by 1696, *c.* 5. though that of its regiſtration ſhould fall within it, *Da.* 137.—*B.* 73.—*Fa.* II. 91. becauſe the right is completed as ſoon as ſeiſin is taken upon it; he, who has taken it, has done all which he can do to complete it; and is allowed by law ſixty days for cauſing it to be regiſtred.

Beſides, it muſt be remarked that this clauſe of the ſtatute is general, and relates not to thoſe deeds alone which are granted to *creditors* in ſatisfaction or in ſecurity of *debts antecedently* due to them; it relates to *all* deeds on which ſeiſin may follow, to *nova debita* as well as to others, to ſuch as are granted without cauſes antecedent to the making of them or the agreements concerning it. Both caſes therefore are compriſed in the ſtatute: for its words are preciſe and general; and it would give occaſion to much iniquity if it were otherwiſe. A creditor, who obtains a deed in ſecurity for money paid or debt contracted at the time of granting it, has himſelf alone to blame for delaying to take ſeiſin; he furniſhes his debtor with money, which he may throw away inſtead of applying it towards the ſatisfaction of his creditors; he brings thereby a burden on the eſtate of the bankrupt; and in caſe his heritable ſecurity is held to be good to him, he acquires a preference by virtue of his ſeiſin. He hurt the other creditors of the bankrupt by delaying to take it, and thereby concealing his heritable ſecurity as well as the exiſtence of his debt from them. He muſt therefore be held to have been ſatisfied with the perſonal ſecurity of his debtor; and his heritable ſecurity cannot avail him, in caſe the date of the ſeiſin taken for obtaining it falls within the period defined by 1696, *c.* 5. The words of the *ſenatus conſultum Macedonianum* are applicable to this caſe; he, who lends to a bankrupt, *inter cæteras ſceleris cauſas, quas illi natura adminiſtrat, æs alienum adhibet; et ſæpe materiam peccandi malis moribus præſtat, l.* 1. *p. ff. de ſenat. Maced.*—*Da.* 168. 178.—*D.* I. 86. 19th *June* 1731, *Creditors of Merchiſton.*—25th *Nov.* 1735, *Truſtees of Mathiſon's Creditors.* *

* This point ſeems to have been determined otherwiſe in two caſes. *K.* 69.—*Fa.* II. 189.

§780. The ſtatute limits its retroſpect to 60 days immediately preceding that on which the debtor becomes a notorious bankrupt. But it is not ſo preciſe in defining the time, during which it continues its effects after the bankruptcy. One would at firſt ſight think, that deeds made by him, after he ceaſes to be a notorious bankrupt, are not voidable on this ſtatute; and that he returns at that time to the enjoyment of all thoſe powers, which he had before the ſixtieth day preceding that on which his bankruptcy became notorious. One ceaſes to be a notorious bankrupt at that inſtant, at which he ceaſes to fall under the definition which has been explained, or at which all the characteriſtics given of one ceaſe to be applicable to him. For all of them, it has been ſaid (§777.), muſt concur at one and the ſame time; therefore the want of any one of the three makes him ceaſe to be capable of being characterized a notorious bankrupt. But the words of the ſtatute *either at, or after his becoming bankrupt*, ſeem plainly to import, that its operation continues after the debtor has ceaſed to be, in the preciſe terms of the ſtatute, a notorious bankrupt. For they diſtinguiſh two caſes; the words *either at* relate to ſuch deeds as are made *during the continuance of the notoriety of the bankruptcy;* and thoſe *or after his becoming bankrupt* to ſuch as are made after the time at which he *ceaſed to be a notorious bankrupt.* All deeds therefore granted by him after he ceaſed to be ſuch, are voidable on this ſtatute, unleſs he either 1) ceaſes to be inſolvent, for one who is able to pay all his debts, has the abſolute diſpoſal of his affairs; or 2) obtains a diſcharge of the debt due by him as well as of the horning and caption, the diligence under which he was; for his circumſtances ceaſe thereby to be ſuſpicious, and it becomes impoſſible for either the ſecond or the third characteriſtic of notorious bankruptcy to be, as a logician would expreſs it, predicable of him, becauſe one, againſt whom no caption is iſſued, cannot either be impriſoned, or endeavour by flying, retiring, abſconding, or defending himſelf to fruſtrate the execution of it, 10th *Feb.* 1743, *creditors of Lady Rachine.* But creditors are often moved by compaſſion; and finding not much account in doing perſonal diligence againſt their debtors, frequently conſent to their being releaſed from priſon, or give them aſſurances that they ſhall not, on coming out of their lurking-holes, be be thrown into gaol. Hence it is not ſufficient to give validity to deeds done by an inſolvent debtor, that he is either releaſed from his confinement or allowed to go openly and freely about his affairs, *Fa.* II. 167. provided he has once actually fallen under the preciſe deſcription of a notorious bankrupt by the concurrence of all the three requiſites which characterize one. For as long as the caption is not diſcharged, he is liable every inſtant to be impriſoned; and the humanity of his creditors ought not to confer new powers upon him.

§781. In order to render its ordinances effectual, the ſtatute makes it competent to any of the creditors of the bankrupt to bring, before the Lords of Seſſion, an action in order to get their debtor declared to be bankrupt, the time aſcertained at which he became notoriouſly ſo, and every deed granted by him during his incapacity ſet aſide. It is not therefore allowed to avail in any ſort him in whoſe favour it is made; he is not entitled to found upon it a title to be brought in *pari paſſu* with the creditor at whoſe ſuit it is ſet aſide, *Da.* 51.—*D.* I. 84. 19th *July* 1728, *Smith;* it is not a title upon which he can pretend to retain the fruits yielded by the eſtate of the bankrupt, and which are *in medio*, *F.* 8th *Feb.* 1706, *Hamilton.* 'Tis true his *bona fides*, in caſe he was in it, may relieve him from being accountable for thoſe which he has reaped during the continuance of it. But in other reſpects it cannot avail him; all the eſtate of the bankrupt muſt be laid open to the diligence of his creditors; and this one being a creditor may attach it as well as either he who hath impeached the deed or any other, and may thereby acquire a preference to them all. For his acceptance of the deed, it being voidable, cannot hinder him from doing diligence againſt the eſtate of his debtor.

§782.

§ 782. But the law, tho it disfavours preferences, means not either to encourage men in their inactivity and careleſſneſs, or to diſcourage their activity and vigilance about their affairs. Therefore it affords them certain legal means, which it allows them to employ for effectuating payment of the debts due to them. Thoſe means it calls *diligences*; and thoſe who uſe them, are ſaid *to do diligence*. But it is lawful for every creditor to do diligence, in order to effectuate payment of his debt: for it is lawful for every creditor, nay every creditor has a right to get payment of the debt due to him. Therefore a creditor, who obtains in an open manner, by means of his diligence, payment of it, or acquires the property of any part of the eſtate of his debtor, or, which is the ſame thing, acquires a right to be preferred to others, cannot be deprived of that which he has got, tho the other creditors ſhould not be able to get payment of the debts due to them, *l.* 6. § 7. *ff. quæ in fraud. ſibi enim vigilavit; ſuum recepit*; he did no more than he had a right to do; he was watchful for his own intereſt; he did diligence in order to recover payment of a juſt debt; and having recovered it, he cannot be ſaid to have got more than his own. Beſides, creditors are entitled to revoke fraudulent alienations alone made by their debtor. But this cannot be ſaid to be an alienation made by the debtor; it is an alienation made by the law; for the property of the eſtate of the debtor is transferred by law, and is acquired by that creditor who is doing diligence, by virtue of it. The others had it in their power to have done diligence; and if they have neglected to do it, *ſibi imputent*; they muſt bear the conſequences of their own inactivity; and are not entitled to the benefit of his diligence, which is proper to himſelf.

Therefore nothing, which a creditor has acquired by lawful diligence, can be revoked from him. 'Tis true, others may be entitled, in conſequence of diligence done by them, to come in *pari paſſu* with him, that is, to draw out of a common fund, which they have all attached, a ſhare proportionable to the debts due to each of them; and he muſt in this caſe, if he has got payment of the whole common fund, be accountable to the reſt for their reſpective ſhares. He is not entitled to retain it all, even tho it ſhould not be enough for clearing the debt due to himſelf; becauſe the right which the reſt have to draw proportionably with him, hinders him from ſaying it is all his own; they have attached it as well as he; therefore part of it may be held to belong to them; and that part he muſt reſtore to them. 'Tis the ſurplus alone which he has a right to retain, and to call *ſuum*; becauſe 'tis it alone which he has by his diligence appropriated to himſelf. *Qui vero poſt bona poſſeſſa debitum ſuum recepit, hunc in portionem vocandum, exæquandumque cæteris creditoribns: neque enim debuit præripere cæteris poſt bona poſſeſſa, cum jam par conditio omnium creditorum facta eſſet, l.* 6. § 7. *ff. quæ in fraud.*

It may not be improper to illuſtrate this general doctrine by an example. Suppoſe two adjudications to be entitled to come in *pari paſſu*, and one of the adjudgers to have recovered upon his adjudication all the money adjudged; he is in this caſe liable to the other adjudger for as much of it, as is proportionable to the ſum for which his decree is made. For both adjudications are held to be, as it were, one; each of the adjudgers has the benefit of that of the other; the fund adjudged becomes, in ſome ſort, common to both; and each of them acquires a right *pro indiviſo* to a determinate ſhare of it. He therefore, who has recovered nothing, is entitled to cauſe him, who has levied all, to reſtore to him his part of it.

Suppoſe one of the adjudgers, beſides adjudging, to have alſo arreſted, and by virtue of his arreſtment to have recovered ſomething. This, which he recovers on his arreſtment, is perſonal to himſelf, becauſe the arreſtment is ſo; the other adjudger cannot pretend to any benefit by it. Therefore the adjudger, who hath alſo arreſted, is entitled, always till he has recovered payment of every farthing for which his adjudication is given, to draw out of the common fund as much as he would have done in caſe he had not arreſted; and the other adjudger

judger cannot bring that, which has been recovered by arreſtment, into computation, or inſiſt that it be counted a part of the ſum for which he is to be ranked on his adjudication. Every farthing, which he recovers otherwiſe than by virtue of his adjudication, is proper to himſelf; and he is entitled to draw by virtue of it the ſame ſum which he would have been entitled to draw, in caſe he had not recovered a farthing otherwiſe. He is not therefore accountable to the other adjudger for one farthing of that which he has recovered otherwiſe; becauſe they are entitled to come in *pari paſſu* together not on the arreſtment, but by virtue of their adjudications, *D.* II. 355. 16th *Feb.* 1734, *Earls of Loudon and Glaſgow, v. Lord Roſs.*—21ſt *July* 1758, *Lochwood v. the creditors of Auchinbreck.*

§ 783. The law allows not the creditors of a notorious bankrupt to make private bargains with him for their own particular advantage; for theſe are always ſuſpicious. But it does not hinder them from *doing legal diligence*, in order either to get payment of the debts due to them, or to get an equivalent for them, or to ſecure themſelves of getting it by acquiring a right of being preferred or of being paid preferably to others. For diligences are the proper means, which the creditors of a notorious bankrupt ought to employ in order to recover their money; becauſe they are fair open and public ones. Therefore a creditor cannot be deprived of a *preference which he has acquired by his diligence*, by any deed done either by his debtor or by any other. For one cannot be deprived of any *right*, which he has, by a deed done by another; he can loſe it in conſequence of his own deed alone, *l.* 11. *ff. d. r. j.*

A fortiori he cannot be deprived of it, for he is not allowed to be defrauded by any deed done by his debtor. 'Tis true an inſolvent debtor may do a deed, which is not voidable; and the right of preference may produce in fact effects different from thoſe which it would have had, in caſe that deed had not been done, or, which is the ſame thing, had been voidable. For the real effects of it depend on the nature and the extent of the eſtate of the debtor; but the right itſelf, which is totally different from its effects, is independent of them, and remains entire to the creditor who has it, amidſt all the changes which the eſtate of his debtor undergoes.

Indeed a right, which one creditor has acquired by legal diligence to be preferred to another, is independent not only of the deeds of the debtor, but of thoſe of every other mortal. He cannot loſe it, provided he does not either make it over in favour of another, or forfeit it by his negligence in proſecuting it.

§ 784. But one, whoſe bankruptcy is not notorious, may have favourite creditors, whom he may wiſh at all adventures to have paid: and by making voluntary deeds to them, may endeavour to fruſtrate the lawful diligence of others. Hence the law 1621, *c.* 18. incapacitates *every inſolvent debtor* from making voluntarily either by himſelf, or by others interpoſed by him for this purpoſe, *any payment or right*, in favour of one *creditor* to the prejudice of *another* who hath done *diligence* for *attaching* the eſtate or effects of his debtor *more timely* than he, in whoſe favour the deed is done: and it gives him, who is thereby defrauded, a right not only to ſue the debtor, or the perſon whom he hath interpoſed to help him in carrying his ſcheme into execution, but alſo the creditor who has been preferred by the partiality of his debtor, in order to recover that which hath been paid him in defraud of the creditor who had done diligence before him.

The words of the ſtatute 1621 are as preciſe and as ſtrong as words can well be ſuppoſed to be; it is not contented with ſaying *payment*, but ſays *any payment*; and one would from thence think that the right, which creditors have in this caſe, is more ample than that given them by 1696, *c.* 5. and that the act of parliament 1621 extends to *actual payment* made in caſh as well as to every other deed done by the inſolvent perſon. But it is otherwiſe: for the law allows one to accept of payment even from a notorious bankrupt (§ 778.); *a fortiori* it muſt in *all* caſes be lawful to take it from one who is no more than inſolvent, and whoſe inſolvency is not held

held to be notorious. Beſides, a creditor who founds his right upon this ſtatute 1621, is in all caſes ſuppoſed to have done diligence by which the effects of his debtor are capable of being attached; and one is not allowed to plead it, who cannot ſay that the diligence which he hath done affects thoſe particular things which he wants to recover. But *caſh poſſeſſed by one* ſeems not, in the ſtricteſt propriety, to be poindable; the formalities attending the ſerving of letters of poinding ſhew that ſuch things alone, as are capable of being appraiſed by money, can be poinded; and the law, taking it for granted that a debtor who is poſſeſſed of money will give it to diſcharge his debt, hath not therefore invented an *ordinary* diligence by which it may be taken out of his pocket againſt his will, but hath ſupplied his creditor with one called a *caption*, by which he may get him *impriſoned* and may compel him *ſqualore carceris* to give voluntarily that which he has. But caption is not a diligence by which either his caſh or his goods are attached; it affects his body alone. A creditor therefore can *never* ſay, that he hath done diligence by which the caſh poſſeſſed by his debtor is attached. Of courſe he cannot upon this ſtatute 1621, impeach actual payment of money made by him; and the words uſed by it muſt be underſtood of ſuch payments alone, as are obtained from others by virtue of deeds made either by the inſolvent perſon or by others interpoſed by him, *Fa.* II. 186.—*Da.* 142.—*B.* 92.—*St.* 11th *Nov.* 1675, *Veitch.*

But every other ſort of deed alienation or right granted by him is impeachable upon this ſtatute; provided

It be made 2) either by the debtor, or by one interpoſed by him and privy to the deſign which he has in making it. For the law does not mind, whether one does a thing by himſelf or by means of another, *H.* 154. 133. provided the perſon employed by him be privy to his fraud, *H.* 133.—*Home*, *Feb.* 1682, *Neilſon.*

A perſon, who is *in facultatibus* ſufficient for clearing all his debts, has abſolute power over his own eſtate; therefore in order to make a deed fall under this ſtatute, it muſt be made 3) by a debtor who either is inſolvent already, or is rendered ſo by it, *Fo.* 12th *Feb.* 1686, *Cockburn.*

In the year 1621 the characteriſtics, by which notorious bankrupts are diſtinguiſhed, were not aſcertained; therefore it is not neceſſary in order to bring a deed under this ſtatute that it be granted by a *notorious* bankrupt; all which the law requires to make it impeachable is actual inſolvency, *Fo.* 19th *Nov.* 1697, *Miln.*

But a debtor, who is compelled by legal diligence to act, cannot be ſaid to defraud either the law or any of his creditors: therefore 4) the ſtatute 1621 incapacitates the debtor from making *voluntary* deeds alone; it extends not to *neceſſary* ones. Thoſe are neceſſary, which he is charged in a legal manner by the ſerving of letters of horning upon him to make; for it is not illegal for one to obey an order given him in the formal manner appointed by law: and thoſe are voluntary which he is not by legal diligence charged to do; for an inſolvent debtor ought not to make a deed, by which one of his creditors will be preferred to the reſt; unleſs he is compelled to do it, *St.* 18th *July* 1677, *Murray.*—25th *Jan.* 1681, *Bathgate.* But one may be charged to do the ſame preciſe deed in favour of different perſons: he ought not in this caſe to prefer thoſe whoſe diligence is lateſt, but ought either to obey the charge firſt given him, or wait till ſome one of theſe perſons does more diligence than the reſt. Deeds granted otherwiſe muſt be held to be voluntary, *St.* 20th *Nov.* 1677, *Biſhop of Glaſgow.*—*Fo.* 14th *Jan.* 1703, *Deans.* Beſides, one who does a deed different from that which he is preciſely charged to do, does it voluntarily; for he does not by making it obey a lawful charge given him; he does ſomething different from that. Therefore a deed, different in any reſpect from that one which the debtor is charged to grant, is not a neceſſary but a voluntary one; he neither was nor could have been compelled to make it. Of courſe it muſt be voidable on this ſtatute. Thus one, who being charged to pay a hundred pounds, inſtead of paying the money grants an aſſignment of a bond, makes over a part of his eſtate,

ſtate, or does any other thing *in ſolutum*, muſt be held to have done a voluntary deed; becauſe the deed done by him is not that which he was charged to do: it muſt therefore be voidable, *H.* 156. In the ſame manner one, who being charged to make a conveyance, gives a ſum of money inſtead of it and gets a diſcharge of his obligation, gives the money voluntarily; the delivery of it cannot be ſaid to be *payment*, for a debt was not due to him who received it. By conſequence it muſt be revocable.

But we are here treating of the methods by which the law endeavours to prevent debtors from ſhewing partiality to their favourite creditors; and this part of the ſtatute, which was made in 1621 for this purpoſe and which we are conſidering, relates to deeds made in favour of creditors alone. Therefore a deed, in order to be voidable in this caſe, muſt 5) be granted either directly or indirectly in favour of a creditor of him by whom it is granted. For one may ſhew his partiality to his creditor as well by deeds made indirectly to ſerve him as by thoſe made directly in his favour.

Hence it muſt 6) be made to him either in ſatisfaction or in ſecurity of debt due to him: or it is by doing deeds in order to ſatisfy the debt due to him, that his debtor can alone prefer him to another creditor; and every thing, which has been ſaid (§ 778.) upon this point of the ſtatute 1696, is applicable to *this part* of the one made in 1621. For deeds made not for debts antecedently due, but for cauſes which exiſted not till the agreement concerning the making of them, for inſtance the ſale of an eſtate, or the borrowing of money, fall not either under the ſtatute 1696, or under this part of the ſtatute 1621, *Da.* 142.—*St.* 28th *June* 1665, *Monteith.* 8th *Feb.* 1681, *Neilſon.*

The ſtatute was made in order to hinder an inſolvent debtor from fruſtrating the diligence of thoſe of his creditors, who he finds are uſing legal means for recovering payment of the debts due to them, by diſpoſing of his effects to others who have not been ſo vigilant, but whom he wants to prefer. Therefore, in order to entitle a creditor to impeach upon this ſtatute a deed done by his debtor, it is neceſſary 7) that he have himſelf begun to do diligence for recovering payment, or for compelling his debtor to fulfil his obligation. For it is not neceſſary that his diligence be complete, and that he hath veſted by means of it the property either of part or of all of the eſtate of his debtor fully in his perſon. One who has by legal diligence acquired the full property of a thing can as little be deprived of it by a deed done by his debtor, who is *ex hypotheſi* diveſted of it, as he could be in caſe he had purchaſed it for a valuable conſideration. 'Tis therefore one whoſe diligence is not fully *complete*, who ſtands alone in need of the aid of this ſtatute.

By conſequence a creditor, who hath cauſed an arreſtment, a horning, an inhibition, or a ſummons of adjudication to be *executed*, is entitled to the benefit of this ſtatute; for he hath begun to take proper ſteps for attaching the eſtate of his debtor, and his *diligence may*, as is required, *be defrauded* by deeds made to diſappoint him, or to prevent the effects of it. But it has been ſaid that the diligence needs not be abſolutely complete; the ſtatute ſays *ſerved inhibition*; for an inhibition, which is *executed* (§ 608. 611.) upon the *debtor* alone, has its effect before it is either ſerved upon the lieges or regiſtered, *H.* 639. In the ſame manner the execution of letters of horning upon the debtor is alone ſufficient to entitle his creditor to found upon this ſtatute, without regiſtration, *Fo.* 19th *Nov.* 1697, *Mill of Caridden.*—24th *Feb.* 1709, *the bank of Scotland.*—*F.* 23d *Feb.* 1709, *Hamilton.* The reaſon is, that the creditor can ſay in terms of the law, he hath done diligence to affect the eſtate of his debtor; and the diligence, which he hath begun to uſe, notifies his intention as well as diligence the moſt complete; an intention which it ought not to be in the power of the bankrupt to fruſtrate; he ought to leave his eſtate to be affected by his creditors according to their reſpective diligences; and ought not to be allowed either to prevent by any partial voluntary deed the effects of their vigilance, or to prefer one of them to another.

For

For this reaſon the diligence done by the creditor who impeaches the deed, muſt 8) be *more timely* than that done by that one who is preferred to him; that is, it muſt be prior to it. For this is all which the ſtatute requires; it requires not that he, who hath firſt done diligence, have acquired a preference by means of it. The law does not give preferences to one who hath taken *any ſtep* of diligence before another; it gives them to ſuch as have prevented others by taking *certain ſteps alone;* and one, who has taken none of theſe, muſt be poſtponed to another who has, tho he has perhaps done diligence of ſome kind before him. But it is the priority of the diligences which is alone regarded in this caſe; thoſe, and thoſe alone, who can ſay that they have done diligence *before* the others, are entitled to plead the benefit of this act; and one, whoſe diligence is poſterior, cannot found upon it a right to impeach a deed made in favour of one whoſe diligence was prior, *St.* 18th *July* 1677, *Murray.*—20th *Nov.* 1677, *Biſhop of Glaſgow.*—*Fo.* 14th *Jan.* 1703, *Deans.*—*H.* 156. For the law reſerves to itſelf the power of ſingling out thoſe among creditors, whom it thinks entitled, on account of their diligence, to be preferred to others; and it allows not an inſolvent debtor to prefer one of them to another. By conſequence one, who hath done diligence in the terms required by the ſtatute, muſt in all caſes be entitled to impeach deeds made in favour of ſuch as have done none; and the benefit of this ſtatute is perſonal to him whoſe diligence is prior. Others cannot found upon his right, or impeach deeds done in favour of thoſe whoſe diligence is poſterior to his; for they cannot ſay that *their own diligence* is prior to that of theſe others, *N.* 17.

But the creditor, who pleads upon this ſtatute, muſt ſay that his *diligence* has been *defrauded.* Therefore it muſt 9) be ſuch as affects that thing which he wants to reclaim from him, to whom the debtor has ſhewn his partiality, and in whoſe favour he has made the deed; becauſe he can, in this caſe alone, ſay that his debtor has withdrawn his effects from his diligence. Thus arreſtment is a diligence, by which moveables and debts and ſome other things can alone be attached; therefore one who has uſed it can impeach ſuch deeds as relate to things arreſtable alone; he cannot impeach upon this part of the ſtatute ſuch as relate to land or other things which are not arreſtable; for he cannot ſay that *his diligence* is *defrauded,* or that the effects of *it* are fruſtrated by alienations of theſe. In the ſame manner an arreſtor cannot impeach deeds concerning things arreſtable poſſeſſed by one, upon whom he has not ſerved an arreſtment; becauſe the *diligence which he has done* affects not theſe, and cannot be defrauded by deeds concerning them.

Letters of horning relate not properly either to moveables or to heritables; but in antient times eſcheats, both ſimple and liferent, were the conſequences of diſobedience of charges given by virtue of them; and grants of theſe might have been obtained by the creditor from thoſe to whom they had fallen. Therefore the execution of letters of horning was held formerly to give the creditor, at whoſe ſuit they were iſſued, a good title to impeach upon this ſtatute deeds relating either to heritage or to moveables, made poſterior to it; becauſe the inſolvent perſon prevented thereby his eſtate from eſcheating, and his creditor could ſay that his diligence was defrauded by them, *St.* 25th *Jan.* 1681, *Bathgate.*—18th *July* 1677, *Murray.*—*Fo.* 19th *Nov.* 1697, *Mill.* But eſcheats fall not at preſent on denuntiations made for diſobedience of charges to pay money or to fulfil obligations; and letters of horning are properly diligences directed againſt the *perſons* of debtors. Their effects therefore muſt be more limited at preſent than they were before the act *for aboliſhing tenure by ward.* But charges are given upon them to compel perſons bound to fulfil obligations which conſiſt *in faciendo;* and upon theſe captions may be iſſued. Beſides, they are ſometimes ſteps taken to pave the way to poinding the eſtate of the debtor. Therefore a creditor may yet avail himſelf of them, in caſe he hath uſed them either to compel his debtor *factum præſtare,* or as a ſtep previous to poinding; and may impeach deeds granted

ed by him *after* the execution of them. But in the firſt caſe they muſt relate to that part of his eſtate about which he is charged to do ſomething, and be granted in favour of a creditor whoſe diligence is poſterior; and in the ſecond they muſt relate to his poindable effects, *St.* 18th *July* 1677, *Murray*. For the creditor can in both caſes ſay in the preciſe terms of the ſtatute that his *diligence* is *defrauded*, thoſe things, to attach which he uſed it, being withdrawn from him.

Inhibition relates to real eſtates alone (§ 608.); therefore an inhibitor can impeach ſuch deeds alone as either concern theſe directly, or are attempted to be made effectual upon them. For his diligence cannot be defrauded by others. In order to entitle the creditor to plead it againſt another creditor, all which is neceſſary is, that it be ſerved upon the perſon inhibited; it needs not be either ſerved upon the lieges or regiſtered. Of courſe the mere ſerving it upon him gives his creditor a right to plead it againſt all deeds relating to *every* thing to which it extends, without regard to its local ſituation.

In the ſame manner the ſervice of a ſummons of adjudication protects ſuch things alone, as are adjudgeable; and deeds relating to ſuch as are not ſo, are not impeachable on this ſtatute. For theſe cannot be ſaid to be withdrawn from *that* diligence, which the creditor has begun to uſe; therefore he cannot ſay *it* is defrauded by alienations of them.

One, who hath done diligence, may neglect to proſecute it, and may by his delay ſhew that he hath relinquiſhed it. But it would be hard to hinder another forever from taking care of his own intereſt, becauſe the firſt one had done diligence before him. The law therefore bars a creditor, who hath done diligence, to impeach a deed made in favour of another whoſe diligence is poſterior, in all caſes in which he, whoſe diligence is prior, is *in mora* and is preſumed from thence to have relinquiſhed it, *F.* 28th *March* 1707, *Gordon.*—9th *July* 1709, *Drummond.*

The law therefore gives him, whoſe diligence is defrauded, a right 1) to ſue for reduction of the deed by which it is defrauded, and to get it ſet aſide; 2) to recover that, which has been endeavoured to be withdrawn from him, either from the creditor who has been preferred by the deed which the inſolvent perſon has made in his favour, or from thoſe who being privy to his fraudulent deſign have been interpoſed by him to aſſiſt him in concealing and accompliſhing it.

But a creditor, who hath been vigilant for his own intereſt, and hath got no more by the partiality of his debtor than an equivalent to the debt due to him, is not very culpable, and cannot himſelf be accuſed of much fraud; *ſuum recepit.* Therefore the law means not, as has been ſaid, to give every creditor, who hath taken *any* ſtep of diligence *before* another, a right to be preferred or to be paid before him; it thinks it does enough for him if it incapacitates the debtor from diſappointing his diligence, and ſets aſide every deed which produces this effect. The utmoſt therefore, which the creditor who hath done the firſt diligence can demand, is to have the ſame acceſs to the eſtate of his debtor which he would have had in caſe the partial deed had never been made. The diligence which he hath done may give him a *preference* to the other; and he muſt in *this* caſe be entitled to cauſe him whoſe diligence is poſterior reſtore that which he hath got, or, as the ſtatute expreſſeth it, he muſt be *preferred* to him. For the ſtatute intends to hinder the preference which he hath acquired either from being taken from him, or from being rendered ineffectual by the partiality of his debtor. But he may not have acquired a preference by his diligence, and both creditors may lie under the neceſſity of taking other ſteps in order to acquire it: in this caſe either both of them muſt be immediately brought in *pari paſſu* together, and muſt be relieved of the trouble and expence of farther diligence; or the eſtate of the debtor muſt, by ſetting aſide the deed made by him, be laid open to the diligence of them both, and they muſt be left to attach it in the ſame manner in which they might have done before the deed was granted. Thus priority determines in ſome caſes the preference of arreſtors: one therefore who having

having obtained it, and being entitled to get ſet aſide a deed by which his prior diligence is attempted to be fruſtrated, and a poſterior arreſtor preferred to him, has a right to demand the creditor, who has but ought not to have been preferred to him, to make the goods arreſted forthcoming to him, in the ſame manner as the arreſtee would have been obliged to do, in caſe the deed had never been made, and he had brought an action of forthcoming againſt him. But one acquires not by giving a charge of horning before another a preference to him; all therefore, which *he* can demand in this caſe, is to have the ſame room to attach either by arreſtment and forthcoming, by poinding, or by other diligence the eſtate of his debtor which he would have had in caſe the deed had not been made. Of courſe both of them muſt have the ſame acceſs to it, or they may be brought in *pari paſſu*, *D.* I. 80. *March* 1682, *Cunninghame.*

§ 785. Creditors are not entitled to be reſtored againſt thoſe, who acquire *bona fide* and for onerous cauſes from the inſolvent debtor himſelf (§ 769.), or to revoke from them that which they have purchaſed; *a fortiori* they are not entitled to be reſtored againſt ſuch as acquire from others *bona fide* and for onerous cauſes things which belonged to the bankrupt, even though thoſe from whom they acquired have been interpoſed by him, in order to aſſiſt him in concealing his fraudulent ſchemes and in carrying them into execution. For one, who purchaſes *bona fide* from a perſon different from the bankrupt, ought not to be in a worſe condition than one who purchaſes from the bankrupt himſelf, 1621, *c.* 18.

But it has been ſaid (§ 769.) that gratuitous alienations are in all caſes void againſt the creditors of an inſolvent perſon. They muſt therefore be voidable *in infinitum;* regard is not had to the number of perſons who have been interpoſed by the bankrupt and have acquired by gift things which belonged to him. Every one of them, the laſt as well as the firſt, is bound to reſtore that which he poſſeſſeth and is found veſted in him; the titles, which he has to it, are liable to be ſet aſide; and it may be revoked by the creditors; provided all the intermediate purchaſers have been either confidents of the bankrupt or gratuitous purchaſers. For

The law ſtops as ſoon as it arrives at one onerous *bonæ fidei* purchaſer; his purchaſe is in all caſes ſecure to him; and muſt therefore be ſecure to all who acquire from him, even though theſe ſhould know that the firſt and original author of them all was bankrupt, and that he from whom their author purchaſed *bona fide* for an onerous cauſe was a truſtee or confident of the bankrupt. For the benefit and the effects of his *bona fides* are in all caſes tranſmitted to thoſe who acquire from him; and the thing purchaſed by him being irrevocable from him, it muſt be ſo from them alſo.

'Tis plain therefore that it is not ſufficient to render a purchaſer ſecure, that he hath purchaſed for an onerous cauſe; he muſt alſo have purchaſed *bona fide.* By conſequence a perſon who purchaſes from one, whom he *knows* either to be the truſtee of an inſolvent perſon or to have acquired gratuitouſly from him, and is not himſelf ignorant of the inſolvency, is, as much as a ſuſpected perſon, bound to prove the cauſe of his purchaſe to be truly onerous; his ſimple aſſertion or that of the deed made in his favour is not alone believed; he knowing the circumſtances of his original author and the connexion of the truſtee with him, is himſelf ſuſpected of being a truſtee for him; therefore *utitur jure auctoris* and is bound, like him, to prove his purchaſe to have been made for a cauſe truly onerous. One is held to know his author to be a truſtee of the inſolvent perſon, in caſe the titles, being written, made in his favour bear expreſsly that ſuch a connexion ſubſiſts either by blood or otherwiſe between him and the bankrupt, as would make him be held by the ſtatute 1621 to be his confident; and to have acquired gratuitouſly in caſe his titles bear ſo expreſsly. For every one is preſumed to look attentively into the titles of him from whom he purchaſes. But theſe may make no mention of the connexion, and an onerous purchaſer is not bound to inquire farther into the matter; therefore he is in this caſe ſecure. In caſe his author has not written titles,

his knowledge of the connexion ſubſiſting between them muſt be proved by the creditors from other circumſtances and in another manner: as muſt alſo in all caſes his conſciouſneſs of the inſolvency of the original author of them all. For his knowledge of *both* muſt be proved in order to lay him under the neceſſity of bringing proof that he purchaſed for an onerous cauſe; his ignorance of *either* of them relieves him from the neceſſity of doing it, and renders his purchaſe ſecure to him, *Du.* 11th *July* 1637, *Robertſon.*—*St.* 6th *Feb.* 1672, *Hay.*—*Fo.* 24th *Jan.* 1680, *Crawford.*—28th *Nov.* 1693, *Spence.*—*F.* 15th *June* 1710, *Leſlie.* From hence it is eaſy to determine the purchaſer, at whom the law ſtops: it ſtops as ſoon as it arrives at one who is held not to have known from the titles of his authors, that they were all in a continued ſeries, one after another, liable of being ſuſpected to be his confidents, or acquired gratuitouſly.

But it would be hard to allow a purchaſer to lie for a long time under this neceſſity; his witneſſes may die and his proofs may fail him; and creditors uſually impeach deeds, by which they are defrauded, ſoon after they are granted. Therefore one, who has been allowed for a conſiderable time to retain the peaceable poſſeſſion of the thing purchaſed by him, and whoſe right has not during all this time been impeached, ought not to be put to the hardſhip of proving any thing concerning it; his purchaſe ought to be ſecure to him, *Fo.* 23d *Dec.* 1692, *Spence.*—*F.* 2d *Feb.* 1711, *Guthry.*

The creditors of the bankrupt therefore cannot attach that thing, which once belonged to their inſolvent debtor, and is now veſted in the perſon either of an onerous purchaſer or of one claiming under him. But they cannot be hurt by the deeds of their debtor; and muſt have acceſs to the price or mutual valuable conſideration agreed to be given for it. For it is ſurrogated into the place of that which formerly belonged to him, and muſt, like that whoſe place it ſupplies, be attachable by them.

The onerous purchaſer may be ſuppoſed either to have or not to have fulfilled his part of the bargain by paying the price, which he had agreed to give; for I ſhall uſe this word, as money is the uſual valuable conſideration with which purchaſes are made; and by performing the obligations incumbent upon him.

In caſe he has done ſo, no demand can be made upon him either by the bankrupt himſelf, or by his creditors, or by him from whom he acquired. Action therefore lies not to any of theſe againſt him; and the creditors muſt ſue thoſe, who they find are poſſeſſed of the eſtate of their debtor. In caſe it has been made over to the bankrupt himſelf, and is veſted in his perſon, it muſt, like every other *ſimilar* part of his eſtate, be attachable by his creditors: for they are entitled to ſue him, and to do diligence both againſt his perſon and his eſtate for recovering payment of the debts due to them. But he may have interpoſed confidents in order to aſſiſt him in executing his ſchemes for defrauding the law and his creditors; theſe may hold the poſſeſſion of it; and it may be neceſſary to ſue them in order to get at it. It muſt therefore in all caſes be lawful for his creditors to ſue thoſe who are his confidents, and who hold in truſt to his uſe the poſſeſſion of things belonging to him, and to bring every action which it is neceſſary to bring againſt them in order to recover his eſtate out of their hands, and to obtain ſatisfaction of the obligations by which he is bound to them. Every one of them therefore muſt make that which they poſſeſs forthcoming to his creditors; their titles to it may be ſet aſide; and they may be decreed to diveſt themſelves of it. But they may have ceaſed *bona fide* to poſſeſs it; therefore the law provides, that allowance ſhall be given them of every thing, which they have really applied towards the ſatisfaction of his lawful creditors and of the debts due by him. For the debtor himſelf is allowed to ſatisfy his creditors, provided he is not a notorious bankrupt, and defrauds not the prior diligence done by any of them: but they are no more than a name for him, and may do every thing which it is lawful for him to do. By conſe-

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quence they cannot, in caſe he is a notorious bankrupt, contravene the act of parliament 1696; and every deed, which being done by him would have been impeachable on that ſtatute, muſt be ſo alſo in caſe it is done by them; the law itſelf hath ſaid ſo; and that part of the ſtatute 1621, which relates to this matter, ſuppoſes that the debtor is no more than inſolvent, and that the deed done *in ſalutum* defrauds not the diligence of any creditor. For the ſtatute 1621 incapacitates the truſtees of the bankrupt as well as the bankrupt himſelf from defrauding the lawful diligence of creditors, and from contravening in any ſort that act of parliament. Every deed therefore, which being done by him would be impeachable upon it, is ſo alſo when done by them. Beſides, they may have diveſted themſelves in favour of the inſolvent perſon himſelf, and muſt be ſafe *pro tanto;* provided he has not become a notorious bankrupt, or they have not been interpelled in a lawful manner by his creditors to diveſt in his favour.

But the onerous *bonæ fidei* purchaſer may not have paid the price; and the creditors of the bankrupt muſt have power to attach it in his poſſeſſion by all the diligences, which are ſuitable to the nature of it.

§ 786. Creditors therefore are entitled to be reſtored againſt the deeds by which they have been defrauded; that is, they are entitled to have acceſs to the eſtate of their debtor in the ſame manner, in which they would have had acceſs to it, if the fraudulent deed had not been done. It muſt be laid open to be attached by them. 'Tis for this reaſon that the Roman law makes uſe of the word *revoke;* it ſays they are entitled to *revoke things* alienated *in fraudem* of them, and ſays not that *they* are entitled to be *reſtored.* For the thing alienated was never their property, and cannot be reſtored to them. Beſides, they are not bound to give any thing to him againſt whom they are reſtored, for they get nothing from him: ſo the reſtitution would not be reciprocal. Their right therefore conſiſts in being entitled to be put in the ſame condition in which they would have been, in caſe they had not been defrauded.

§ 787. By conſequence they are entitled to bring every action, which it is neceſſary for them to bring in order to get this right made effectual to them. They may therefore be reſtored by way either of action or of exception. They may be reſtored by way of action in all caſes, in which they are not in poſſeſſion and have any decree to recover againſt another: for ſuch, as are in poſſeſſion and have not occaſion to recover any decree concerning the thing poſſeſſed by them, have no more to aſk; and in caſe they are themſelves ſued, they may defend themſelves by pleading fraud by way of exception.

The ſtatute 1621 allows creditors to plead fraud by way of exception againſt every deed, by which it is contravened and they are defrauded. But this propoſition muſt be explained agreeably to the nature of that deed, which is to be impeached, and to the principles eſtabliſhed in law. By conſequence creditors are in all caſes entitled to be reſtored by way of exception againſt every deed founded on in competitions; that is, they are not neceſſitated to bring an action, to cauſe a ſummons to be iſſued, and to *repeat* it in them: for competitions imply actions of all kinds. But they may be ſued on written deeds, which are *ex facie* valid in every reſpect; theſe they are not entitled to *deny* merely to be good; they muſt purchaſe a ſummons of reduction in order to get them ſet aſide. And it is in this ſenſe that the doctrine delivered by ſeveral lawyers muſt be explained: for *perſonal* deeds cannot any more than ſuch, as are made real by the taking of ſeiſin upon them, be allowed to be impeached by way of exception on any other occaſion but that of competitions.

Entitled to be reſtored, they muſt of courſe be entitled to get every decree made in their favour, which is neceſſary for re-inſtating them fully in their right, and for making it good to them. Thus a deed, which muſt be ſet aſide, they are entitled to get declared to be void; money which muſt be paid they are entitled to get decreed to be paid them; goods which they are entitled to get reſtored, muſt be ordered to be reſtored to them; *&c.*

§ 788.

§ 788. The right, which creditors have to be reſtored againſt deeds by which they are defrauded, is a perſonal one; and its duration is not limited by ſtatute to a ſhorter than the uſual time: it muſt therefore laſt during the full courſe of the negative preſcription. 'Tis true onerous purchaſers, as has been obſerved, may in ſome caſes be rendered ſecure ſooner; or rather they are after a long time relieved from the obligation of proving that they purchaſed for an onerous cauſe.

§ 789. Fraudulent bankrupts and their accomplices are liable to be puniſhed by puniſhments proportionable to the circumſtances which diſtinguiſh their fraud. But they are in no caſe puniſhable by death, 1621, *c.* 18.—1696. *c.* 5.

The End of the FIRST VOLUME.

MVSEVM BRITAN NICVM